EMPLOYMENT TRIBUNALS

Claimant:	**Miss Linda Firth**
Respondent:	**The Department for Work and Pensions**
Heard:	**By CVP in Leeds** **On: 7 and 8 December 2020**
Before:	**Employment Judge T.R.Smith**

Representation

Claimant:	In person
Respondent:	Mr Holloway (Counsel)

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V-video. It was not practicable to hold a face-to-face hearing because of the Covid19 pandemic.

RESERVED JUDGMENT

1. The alleged discriminatory acts set out in the claim form 1805315/2019(V) were not presented within the time limit specified in section 123 of the Equality Act 2010 and it is not just and equitable to extend time. They are struck out.
2. The hearing listed for 08 to 12 February 2021 is vacated.

REASONS

The Evidence

1. The Tribunal had before it a bundle consisting of 869 pages.
2. A reference to a number in brackets is a reference to a document in the agreed bundle.
3. The Claimant gave evidence by reference to written statements dated 13 August 2020 and 25 September 2020 (48 to 106) and gave oral evidence.
4. The Respondent did not call any evidence.
5. The Tribunal considered all the evidence in the round, even if it is not specifically referred to every dispute or every document.

The Procedural Background.

6. The Claimant presented her claim form on 08 October 2019.
7. Prior to the presentation of the claim form the Claimant had engaged in a period of early conciliation from 30 August 2019 until 10 September 2019.
8. It was agreed that any complaint about something that happened prior to 01 May 2019 was out of time.

The Acts of Discrimination

9. The alleged acts of discrimination are set out, in detail, in a case management summary prepared by Employment Judge Maidment dated 13 May 2020.
10. The Claimant's protected characteristic is disability and she contended she had been subject to discrimination arising from disability, a failure to make reasonable adjustments, harassment related to disability and victimisation, all contrary to the provisions of the Equality Act 2010.
11. For the purposes of the hearing before the Tribunal the Claimant summarised the acts of discrimination that she wished to rely upon into what she referred to as 10 appendices (48). Mr Holloway adopted the same labelling in the course of cross examination. Those appendices do not correspond exactly with how the Claimant put her claim in her ET1 but the Tribunal approached this hearing on the basis that her appendices set out how she now wished to put her claim, and it was on that basis that she was challenged by Mr Holloway.
12. The Tribunal has referred to each appendices as a separate act to assist the parties in following its reasoning.
13. Act 1. On or about September 2016 being told that an email she had sent regarding difficulties at work had "done her no favours" and "had ruffled feathers" .

14. Act 2. Being awarded a midyear box 3 mark in January 2017 and consequently an end of year box mark, also of 3.

15. Act 3. Being placed on a three-month performance action and learning plan in January 2017.

16. Act 4 . Being placed on attendance management plan, again, in January 2017.

17. Act 5. Being overloaded with additional work from July 2017 onwards.

18. Act 6. Being awarded an "inconsistent" talent management mark without being provided with any reason in July 2017.

19. Act 7.Being awarded a midyear box 3 mark in October 2017 and in May 2018.

20. Act 8. Being held on sick leave and not being considered for transfer out of the Respondents commercial directorate until July 2018.

21. Act 9. Being refused special leave in March 2018.

22. Act 10. Being refused an injury leave benefit request.

The Issues

23. Was the Claimant's claim form presented within three months (plus the early conciliation extension) of the act or acts of discrimination on which the Claimant complained?

24. If not, was there conduct extending over a period?

25. If so, was the claim made to the Tribunal within three months (plus the early conciliation extension) of the end of that period.

26. If not, were the claims made within such further period that the Tribunal considered was just and equitable.

27. The Claimant accepted that Acts 1 to 9 were out of time if they were not a continuing act. The Respondent disputed that Act 10 was in time.

The Time Line and Findings of Fact

28. The Claimant transferred from her employment with Crown Commercial Services ("CCS") to the Department of Work and Pensions ("DWP") on 01 December 2016.

29. The Claimant initially worked within corporate services at the DWP but from 30 July 2018 transferred to the production and reporting team.

30. The Claimant made no allegation of any discriminatory conduct in the production and reporting team.

31. The Claimant resigned her employment on or about a date in November 2019. It was not suggested to the Tribunal that any separate claim arose from that resignation.

32. Originally, when the Claimant joined DWP, her line manager was Ms Debbie Lunn.

33. In July 2017 Ms Victoria Webster was appointed as the Claimant's line manager, although in practice Ms Lunn and Ms Webster worked together managing the Claimant until October 2017 when Ms Webster assumed full responsibility.

34. The Claimant's line management changed again in February 2018 when Mr Ian Woodstock assumed responsibility. He ceased to be the Claimant's line manager when she transferred departments at the end of July 2018 and responsibility was assumed by Ms Rachel Bruce.

35. It is appropriate to mention at this stage that Ms Karen Morgan was more senior to any of the Claimant's managers. Ms Morgan did not work in the same office as the Claimant. She will appear later in the judgement.

36. The Claimant was absent from work from 20 September 2017 till 30 July 2018 with work related stress and depression.

37. Following the relocation of the Claimant on 30 July 2018, the Claimant had only 3 to 4 days absence due to sickness before she resigned.

38. In respect of each of the alleged discriminatory acts the Claimant identified the managers set out below as the principal discriminators, although it is proper to record that she believed Ms Karen Morgan was the guiding force behind all the events including, and following, act one.

39. Act 1, the September email. Comments were made to the Claimant by both Mr Terry Gee and Mr John Kitching.

40. Act 2, the box marks. The decision was made by Ms Lunn, although in practice, given Ms Lunn knew little of the Claimant, the Claimant's case was that it was Mr Gee who actually had considerable input into the scoring, as she had worked with him at CCS prior to the transfer.

41. Act 3, performance action and learning plan. Ms Lunn implemented the relevant plan although relied upon information the Claimant contended was given to her by Mr Gee.

42. Act 4 the Claimant was placed on attendance management plan between 25 January 2017 and 30 July 2018 by Ms Lunn.

43. Act 5. Although Ms Lunn was the manager the team of four in which the Claimant worked, it had been reduced to three. The Claimant's case was Mr Gee was trying to obtain additional resources and in the interim the work was shared out. She was not able to identify exactly who was responsible for the alleged discrimination.

44. Act 6 the talent management score was relayed to her by Ms Webster but in fact made on the basis of the assessment of Ms Karen Morgan.

45. Act 7, the midyear box score. The decision was communicated to the Claimant by Ms Webster, although the Claimant contended it was based on information given to her by Ms Lunn.

46. Act 8. Ms Webster acted in a discriminatory manner by failing to consider a prompt transfer of the Claimant to another department.

47. Act 9. The rejection of special leave was a decision taken by Mr Woodstock in conjunction with HR advice.

48. Act 10. The rejection of injury leave benefit was taken by My CSP (this appears to be an independent department which adjudicates upon injury benefits within the civil service) although this was not the act of discrimination complained of, but rather a note that Mr Woodstock had submitted with her application for injury benefit dated 06 June 2018.

Submissions

Claimant

49. The Claimant, as was her right, decided not to make any submissions.

Respondent

50. Mr Holloway relied upon to skeleton arguments dated respectively 26 August 2020 and 18 October 2020.

51. The Tribunal means no disrespect to Mr Holloway by failing to repeat in detail the submissions he made.

52. In essence he contended that Act 10 was not in time. None of the acts were continuing acts but were disparate acts.

53. It was not just and equitable to extend time as the Claimant knew of time limits at the latest from 2018 when she engaged in an ACAS early conciliation.

54. He made reference to **Network Rail Infrastructure Limited -v- Mitchell 18/6/2013 EAT, Hendricks -v- Commissioner of Police for the Metropolis [2002] EWCA Civ 1686, South Western Ambulance Service NHS Trust -v- King 2020 IRLR 168, Lowri Beck Services Ltd -v- Brophy [2019] EW CA Civ 2490, Robertson -v- Bexley Community Centre [2003] IRLR 434 and Romero -v- Nottingham City Council 10/9/18**

Was Act 10 lodged within the statutory time limit?

55. Section 123 of the Equality Act 2010 (EQA10) sets out the statutory provisions in respect of time, which the Tribunal has reproduced below: –

"…Proceedings on a complaint … may not be brought after the end of –

the period of three months starting with the date of the act to which the complaint relates, or

such other period as the Employment Tribunal thinks just and equitable….

(3) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it

(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something-

(c) when P does an act inconsistent with doing it, or

(d) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

56. The Tribunal reminded itself it should be slow to strike out all or part of a claim at a preliminary hearing, particularly when it involves discrimination, given the Tribunal has not heard all the evidence and discrimination cases are notoriously fact sensitive. That said there is no rule that there cannot be a strike out in a discrimination claim on a time point prior to the full hearing.

57. The Tribunal reminded itself that the test at this stage was whether the Claimant has made out a prima face case, **Lyfar-v- Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548.**

58. The starting point is whether there is any act in time.

59. If there is not an act in time then the Claimant cannot rely upon the concept of a continuing act for other acts that are out of time.

60. In respect of an allegation of failure to make reasonable adjustments time runs from when the adjustment might reasonably have been expected to be made.

61. The Claimant conceded that the only act she alleged was lodged in time was Act 10, that is the injury leave request. The Tribunal therefore has made the following findings relevant to its determination.

62. As the Tribunal understood matters in certain circumstances, where an employee of the Respondent sustained an injury, they might be entitled to an injury benefit, depending upon how the injury arose and whether it fell within the terms of the injury benefit scheme.

63. The injury benefit scheme is administered by MyCSP. The Claimant's managers had no involvement in the decision-making process. In fact, looking at the documents placed before the Tribunal MyCSP reached its decision on the basis of medical evidence.

64. It is important to record exactly what the Claimant accepted in evidence was the discriminatory act in respect of her injury benefit request.

65. The Claimant made an application for injury leave on 26 April 2018 (594). The application was initially rejected because of difficulty obtaining evidence from the Claimant's GP (556). Mr Woodstock made representations on the Claimants behalf to reopen the application on or about 31 October 2018 {560). It was reopened.

66. The application was rejected by MyCSP on 22 May 2019 (590) because it considered the medical evidence was not sufficient to support the criteria for access to the benefit. However, it is important to stress this was <u>not</u>, on the Claimant's case, a discriminatory act. The discriminatory act she relied upon was the document prepared by Mr Woodstock and sent to the administrators of MyCSP dated 06 June <u>2018</u> (610 to 612). The Claimant first saw this document 04 June <u>2019.</u>

67. The Tribunal concluded that even if the report dated 06 June 2018 was a discriminatory act, for the purposes of limitation, time ran from when the decision was taken rather than when it was communicated to the Claimant, see **Virdi v Commissioner of Police of the Metropolis 2007 IRLR 24** and **Apelogun-Gabriels v London Borough of Hackney 2002 ICR713.**

68. The Tribunal concluded the Claimant faced significant difficulties in her contention that Act 10 was in time as even on her own case it was not clear what could be said to be discriminatory in the submission of 06 June 2018. The Claimant could not establish a prima face case of discrimination. At its highest, Mr Woodstock's document was the Respondents view of the difficulties the Claimant had encountered. The application form called for the Claimant's account as well as the Respondent's account so both accounts were before the decision-maker. As the Tribunal has noted the decision taken by My CSP was based on medical evidence. In any event there was nothing of significance in that document that was not known to the Claimant as regards the Respondent's approach to her various complaints prior to her having sight of it on 04 June 2019. The above factors are relevant to a consideration of whether to extend time, a matter the Tribunal has dealt with in more detail later in its judgement.

69. The Tribunal concluded that Act 10 was out of time. The alleged act of discrimination occurred on 06 June 2018, more than a year before the presentation of the claim form.

70. Before turning to whether it would be just and equitable to extend time, if the Tribunal is wrong and Act 10 was in time, the Tribunal then went on to consider whether there was a continuing act as this was relevant to whether all or some of Acts 1 to 9 should be considered by a subsequent Tribunal.

A continuing act?

71. The starting point is what is a continuing act? The mere assertion that there was a continuing act by the Claimant will not suffice. In **Barclays Bank PLC v Kapur 1991 ICR 208 HL** the Supreme Court distinguished between a continuing act and an act with continuing consequences. The Supreme Court held that where an employer operated a discriminatory regime, rule, practice or principle, then such a practice would amount to a discriminatory act extending over a period. This concept was further explained in **Hendricks v Commissioner of Police for the Metropolis 2003 IRLR 96 CA**. The Court of Appeal said that in determining whether there was an act extending over a period, as distinct from a succession of unconnected or isolated specific acts, the focus should be on the substance of the complaints that the employer was responsible for and whether it was an ongoing situation or a continuing state of affairs.

72. **Hendricks** addressed the point raised in previous authorities as to what was a practice, policy, rule or regime. There was no need for there to be a written practice, policy rule or regime. They were simply examples that pointed towards a continuing act.

73. Further authorities have established that the mere repetition of the request cannot convert a single managerial decision into a policy, practice or rule – **see**

Cast v Croydon College 1997 IRLR14 and a Tribunal might find it instructive to determine whether the acts complained of were linked and whether there was a continuing discriminatory state of affairs, (see **Lyfar** above) and whether the same person or persons were responsible for each of the acts, see **Aziz –v- FDA 2010 EWCA Civ 304.**

74. In seeking to determine whether there is a continuing act the Claimant must lead prima facie evidence that the acts complained of are discriminatory as non-discriminatory acts break the chain, see **South Western Ambulance Service NHS Foundation Trust -v- King 2020 IR 168.**

75. In this regard the Tribunal reminded itself that this was not a binary decision. It was possible that there could be some acts that were continuing acts but not others.

Act 1. On or about September 2016 being told that an email she had sent regarding difficulties at work had "done her no favours" and "had ruffled feathers" .

76. The comments made, and the Tribunal has assumed such comments were made for the purpose of these proceedings, where in response to an email the Claimant sent on 28 September 2016.

77. The Tribunal noted that the Claimant did not transfer to DWP until the December 2016. Thus, any act of discrimination was against CCS.

78. The Tribunal did go on to consider, given that some managers in CCS also transferred to DWP and one of those was Mr Gee, whether this impacted upon matters. Even looking at matters at its highest, the Claimant said that the admonishment she was given had been a part influence in her subsequent grading as it was given as an example to her at her performance review on 25 January 2017. On the Claimant's evidence there was no further express reference to this document . It is proper to record that the Claimant stated in evidence she thought the admonition may have remained a factor held against her, because at the meeting with Karen Morgan in September 2017, to explain her talent management marking, she was told she had to be careful drafting emails but there was no explicit reference to the email of 28 September 2016. The Claimant could not point to anything thereafter, other than a general feeling that her email of 28 September 2016 was held against her throughout her dealings with the Respondent to show even any continuing consequences let alone a continuing act.

79. This was a one-off act. Even giving the Claimant every benefit of the doubt if it was a one-off act with continuing consequences the only prima facie evidence of any such consequences ended at her performance review 25 January 2017.

Act 2. Being awarded a midyear box 3 mark in January 2017 and consequently an end of year box mark, also of 3.

80. Whilst the box marking may have impacted upon any subsequent progress and salary review the Tribunal concluded this was one of act with, at best, continuing

consequences and is akin to the position set out in **Sourgrin v Haringey Health Authority 1992 ICR650 CA.**

Act 3. Being placed on a three-month performance action and learning plan in January 2017.

81. The Tribunal concluded this was again a clear one of act, assuming it was discriminatory, the discriminatory act ending at the end of the plan.

Act 4 . Being placed on attendance management plan, again, in January 2017.

82. Again, assuming this was a discriminatory act the discrimination occurred when the Claimant was placed on the attendance management plan in January 2017. It was not a continuing act.

Act 5. Being overloaded with additional work from July 2017 onwards.

83. The Claimant must lead at least prima facie evidence of some form of discrimination. She has failed to do so. On her own case, because one member of the team left, the remaining three members including herself had extra work to do. The Respondent was seeking to obtain approval to recruit. On the Claimant's case she was not treated less favourably or treated in any form of a discriminatory manner to the other members of the team.

84. The Tribunal would accept that if there was a discriminatory act it did not crystallise until the Respondents had failed to recruit additional staff within a reasonable time but this was not a continuing act and the Claimant was still out of time because the Claimant accepted when she moved to her new role on 30 July 2018 she had no complaints.

Act 6. Being awarded an "inconsistent" talent management mark without providing any reason in July 2017.

85. Whilst the talent management mark may have impacted upon any subsequent progress the Tribunal concluded this was one of act with, at best, continuing consequences.

Act 7.Being awarded a midyear box 3 mark in October 2017 and in May 2018.

86. Whilst the box marking may have impacted upon any subsequent progress and salary review the Tribunal concluded this was one of act with, at best, continuing consequences.

Act 8. Being held on sick leave and not considering transferring the Claimant out of the commercial directorate until July 2018.

87. At its highest, on the Claimant's own evidence, any discriminatory act ceased when she was transferred out of the commercial directorate on 30 July 2018. This was not a continuing act.

Act 9. Being refused special leave in March 2018.

88. The Claimant's manager Mr Woodstock rejected the Claimant's application for special leave evidenced by an email dated 06 July 2018 (497/498) based on the Respondent's policy and advice he received from HR.

89. The Claimant did not make any further applications under the special leave policy.

90. She did however lodge a grievance against the decision dated 17 July 2018 (514 to 518). The Claimant made specific reference to discrimination arising from disability and referred case law in her grievance.

91. The grievance was rejected in writing on 06 August 2018 (524/525) and the Claimant was advised of her right of appeal.

92. The Claimant was dissatisfied and it was referred, on or about 15 August 2018, to an independent manager, Mr Ian Keppie to carry out an investigation.

93. Mr Keppie reached a decision on 23 October 2018 which was provided to the Claimant.

94. The Claimant appealed Mr Keppie's decision in approximately December 2018 with a decision being handed down in March 2019. Her appeal was not upheld.

95. It is important to note the Claimant's allegation of discrimination was the rejection of her claim not anything to do with the appeal process. Looking at matters at its most favourable a final decision was handed down in March 2019 and this was not a continuing act.

Conclusion re Continuing Act.

96. For the reasons set out above the Tribunal has not found any of the above acts were continuing acts.

97. That however is not the end of the analysis the Tribunal must undertake.

98. There may be circumstances where there are a number of disparate acts which taken together show a continuing act.

99. One factor the Tribunal needs to look at is whether there was a guiding force behind the matters of which the Claimant complaints.

100. As the Tribunal has already indicated, earlier in its judgement, decisions were taken by a variety of managers.

101. It is true the Claimant contended that Ms Karen Morgan effectively controlled everything because she was so annoyed by the Claimants email of 28 September 2016. It would perhaps be somewhat surprising that a senior manager would go to such lengths as the Claimant contended over an email.

102. Whilst it can be seen that on occasions Ms Morgan did have some involvement (for example in respect of Act 6) there was a lack of any prima facie evidence that she was controlling the process. Indeed, it is difficult to see how, for example she could have had any influence in respect of the injury leave submission.

103. Nor is this a case of where the Respondent has had some form of policy procedure or practice and the Claimant has made repeated requests which are being turned down which arguably amount to an act of discrimination on each and every rejection. Here there were a number of unconnected acts.

104. The Claimant contended that a common thread was her disability but, with respect, in any complaint of discrimination a person's protected characteristic will remain. It does not convert separate and distinct acts into a continuing act.

105. Finally, the Tribunal looked at the substance of the complaints. The Tribunal noted that the Claimant herself in her statement said in respect of the various acts that *"the subject matter of each incident may be different".* Whilst the was some overlap, for example in respect of the box marking the Tribunal concluded that the Acts were separate and distinct.

106. It follows that even if the Tribunal was wrong that Act 10 was out of time the Tribunal concluded there was no continuing act.

Would it be just and equitable to extend time?

107. A Tribunal has a very wide discretion in determining whether or not it is just and equitable to extend time. It is entitled to consider anything it considers relevant. However, time limits are exercised strictly in employment cases. When considering the discretion, there is no presumption that the Tribunal should exercise its discretion unless it can justify a failure to exercise that discretion. On the contrary, a Tribunal cannot hear a complaint unless the Claimant convinces the Tribunal that it is just and equitable to extend time. The discretion is the exception rather than the rule – see **Robertson –v- Bexley Community Centre 2003 IRLR 434 CA.**

108. During her period of absence due to ill-health (20 September 2017 to 30 July 2018) she was still able to engage with the Respondent in respect of attendance management.

109. Although the Tribunal would accept there was a period of incapacity there was no medical evidence before the Tribunal establish that during this period of time she was totally and completely unable to engage in issuing a Tribunal application.

110. At all material times the Claimant had access to a computer and the Internet. It is noticeable the Claimant was to lodge her claim for online. She therefore could have lodged a claim even whilst absent from work.

111. The Claimant had the benefit of trade union representation from either August or October 2017 (there appears some inconsistency in the evidence on this point although nothing of substance turns on it) and it is noticeable that the Claimant was accompanied to a number of meetings thereafter by her trade union representative. The trade union in turn had access to legal advice. There was no reason for the Claimant not to know of her rights and the Tribunal noted the reference to the Equality Act and case law made in her grievance dated 17 July 2018 (see para 90). By this date at the latest she believed she had grounds to make a claim.

112. In 2018 she was advised by Citizens Advice Bureau to seek legal advice.

113. The Claimant herself accepted that she was aware of Tribunal time limits from 2017.

114. The Claimant contended that she delayed issuing proceedings because she wanted to pursue matters via the Respondents internal procedures. The mere fact that a person wishes to utilise internal procedures is not a reason to automatically extending time. There are two particular difficulties the Claimant faces in regard to this argument. The first is that by March 2019 all the internal procedures had been exhausted but the Claimant did not present her claim form to the Tribunal until 08 October 2019.

115. More significantly, secondly, the Claimant knew of the danger of awaiting the outcome of internal proceedings because of specific advice she received from ACAS in 2018.

116. The Claimant had entered into a previous period of ACAS early conciliation; receipt on 03 October 2018 with the certificate being issued on 03 November 2018 (1a). The Claimant contended she obtained this certificate because she believed the way the Respondents had dealt with her special leave request (which was necessitated, she said, because of the previous alleged discriminatory acts which caused her need to use this process) was an act of discrimination. Pausing at this juncture the Claimant therefore clearly knew at the latest of the existence of Employment Tribunal's and the requirement to engage in early conciliation in a complaint such as her own.

117. On 25 October 2018 the Claimant received an email from ACAS (97) which stated *"early conciliation on your case will expire 02/11/18. Once the certificate is issued you have a maximum of up to one calendar month to submit your claim at an Employment Tribunal. It would be your decision as to whether you wait until the appeal outcome is concluded, if they state this will take time, way past the EC deadline date, then potentially you risk not being able to submit your claim in time"*

118. Thus, by 25 October 2018, at the very latest, the Claimant could not have been in any doubt as to Tribunal time limits and in addition was on notice that by failing to issue on the basis that she was pursuing internal proceedings put her at risk that her claim could be out of time.

119. In considering whether to exercise its discretion the Tribunal had regard to the checklist in Section 33 of the Limitation Act 1980 as modified by the EAT in **British Coal Corporation –v- Keeble 1997 IRLR 336.**

120. The first issue is the length and reason for the delay. On the Claimant's case if she was allowed to proceed her oldest allegation, at the time of trial, would have occurred approximately 4 ½ years previously. The Claimant has not produced cogent reasons for the delay. As the Tribunal has already noted the Claimant relied upon in essence two principal reasons. Firstly, her ill-health which ended on 30 July 2018 (more than a year before she presented her ET1) and secondly awaiting the outcome of the internal proceedings which ended in March 2019. The Claimant encountered no health challenges after 30 July 2018 such that she could not institute proceedings. She accepted from 30 July 2018 she was working in a supportive team. She could not give any cogent reason why she did not issue proceedings at that stage. As the Tribunal has

already noted the Claimant was on notice that pursuing matters by internal proceedings would not automatically mean the time was extended, given the advice, she had from ACAS.

121. Secondly there will be some impact on the cogency of the evidence simply by the fact of the passage of time. It is trite that the longer time passes after an event the greater the risk of memories becoming less clear. That can be particularly important in a discrimination case where the motivation for why a person did or didn't do something is of significant importance. To some extent this is partly addressed by the fact there does appear to be a considerable volume of documents which would help to refresh witnesses' memories.

122. Thirdly the Tribunal is not satisfied that there has been concealment by the Respondent. There was some mention by the Claimant that she'd initially been told that certain HR advice been recorded but later found out, when it was applied via a subject access request that what she wanted had been recorded. On what was before the Tribunal there were no significant documents that were retained by the Respondent that would have impacted upon the Claimant's reasonable decision-making process. She clearly knew the concerns that she had, at the very latest from the autumn of 2018, and considered that she had been treated in a discriminatory manner.

123. The Tribunal has however had to take into account that the Claimant did not see the statement of Mr Woodstock until 04 June 2019. Whilst the Claimant's case is that it was the contents of the document submitted on 06 June 2018 that was discriminatory, should time be extended because she was unaware of the contents of the same? The Tribunal is not so persuaded for the following reasons There is no suggestion for example the Claimant ever asked for Mr Woodstock's report in respect of injury benefit and that it was refused. She would have known there had to be a statement from her manager given the format of the application form. In addition, the Tribunal is not satisfied, and it is a fact of the Tribunal must take into account, the Claimant has any reasonable likelihood of succeeding in arguing that the letter itself was discriminatory. The mere fact the Claimant may not agree with the contents does not mean it was discriminatory. In any event it is clear that the decision that was taken to refuse the Claimant's application by MyCSP and was based on medical grounds. Finally, the Claimant did bring an appeal which made reference to this document and that appeal was dismissed in March 2019 and the Claimant makes no complaint that, that decision in itself was discriminatory.

124. Fourthly at the very latest, by August 2018, the Claimant was aware she had a potential claim because she applied for ACAS early conciliation certificate. She did not issue proceedings until October 2019. The Claimant did not act promptly. Even if the Tribunal was persuaded, which it was not, that the Claimant was entitled to await the outcome of her appeal on receipt of that decision she did not act promptly. It was relayed to her in March 2019 she still then waited almost 7 months before presenting a claim form to the Tribunal.

125. Fifthly from 2017 the Claimant had access to her trade union. She was clearly aware of the provisions of the Equality Act as she made reference to the same

and certain case law in her grievance she sent to the Respondent in 2018. The Claimant could have taken legal advice at an early stage if you so wished.

126. Sixthly the Tribunal has to consider the relative prejudice. There is clear prejudice to the Claimant in that if time is not extended, she will be left remedy less. There is also a public interest that allegations of discrimination are ventilated in the public arena. The prejudice to the Respondent, if time was extended is that it will face the costs of the trial which has been listed for five days and the associated costs. The costs are likely to be considerable given the number of witnesses that would need to be traced and statements taken. Such costs are likely to be irrecoverable.

127. Seventhly the Tribunal then considered the strength or otherwise of the Claimants claim. There may be a powerful public interest in extending time in a case of obvious discrimination. The Tribunal treads with caution here because it is not heard all the evidence. The Tribunal did note the Claimant had disclosed, and chosen to disclose, advice she received from her union's legal department which was unsupportive. On the basis of the documentation presented to the Tribunal it cannot be said that the Claimant has a clear and obvious discrimination claim that will succeed at Tribunal.

128. Eighthly the Tribunal took into account whether a fair trial was still possible. Given the level of documentation there is the possibility of a fair trial albeit the Respondent may be handicapped somewhat by the passage of time. However, this was not a case where the Respondent was suggesting witnesses had disappeared and could not be traced who were central to its defence.

129. The Tribunal then stood back and weighed up those factors that both told in favour of the Respondent and in favour of the Claimant. Whilst noting that a fair trial was still possible that is not a decisive factor. The Tribunal concluded that in the particular circumstances of this case it was not just and equitable to extend time and therefore the claim itself must be dismissed.

130. The Tribunal has therefore consequentially vacated the trial listing.

Employment Judge T. R. Smith

Date 8 December 2020