Case Number: 2200516/2020

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT (sitting alone)**

BETWEEN:

Ms H Hassan

Claimant

AND

British Broadcasting Corporation

Respondent

ON: **10 December 2020**
IN CHAMBERS: **11 December 2020**
Appearances:
For the Claimant: **In person**
For the Respondent: **Mr N Roberts, counsel**

RESERVED JUDGMENT ON PRELIMINARY HEARING

The Judgment of the Tribunal is that:

1. The claims for unfair dismissal and breach of contract are struck out as having no reasonable prospect of success.
2. It is just and equitable to extend time for the claims for the discrimination and victimisation. These claims proceed to a full merits hearing.

REASONS

(1) A preliminary hearing by telephone took place on 9 June 2020 before Employment Judge Welch which identified six issues for consideration at this preliminary hearing. The following required determination at an open preliminary hearing:

a) Whether the claimant was dismissed or whether she resigned by virtue of voluntary redundancy?
b) Whether the tribunal has jurisdiction to consider the claims due to them having been presented out of time?
c) Whether any of the claims should be struck out on the basis that they have no reasonable prospect of success?

(2) The first issue as to whether the claimant resigned or was dismissed was conceded by the claimant during the last hearing on 22 October 2020 that she was dismissed. She also accepted this in her Skeleton Argument for this hearing in paragraph 16. This issue therefore fell away.

(3) The other matters were the claimant's application to amend and whether to order a deposit under Rule 39. The deposit application was considered together with the strike out application under Rule 37 as the considerations are similar. The other issue was disability status, which was conceded by the respondent in August 2020. This was no longer a matter for the tribunal's determination.

Witnesses and documents

(4) There was an electronic and a paper bundle of 212 pages. There was a Skeleton Argument from the claimant of 16 pages. This was prepared to a very high legal standard and the claimant had prepared this herself. The respondent relied upon its written submission from the October 2020 hearing, of 10 pages. The claimant also relied upon a written submission she prepared for the hearing in October 2020. All submissions were fully considered together with the case law relied upon, whether or not expressly referred to below.

(5) Evidence was heard from the claimant on the time limit point.

<u>The structure of the claim</u>

(6) In the claim as presented and before the consideration of the amendment application, there were three categories of claim: (i) the disability discrimination claim for reasonable adjustments and victimisation. This centred on the refusal to allow the claimant to move to a different team. This was put as a failure to make a reasonable adjustment and an act of victimisation due to the claimant's grievance of January 2017.

(7) The unfair dismissal claim related to the claimant taking voluntary redundancy.

(8) The breach of contract claim was in two parts: firstly not paying the claimant's wages for September to December 2019 and the secondly not paying notice pay.

(9) The respondent argued that the claims were either outside the tribunal's jurisdiction as being out of time or had no reasonable prospects of success. For the discrimination claim the respondent relied upon a decision made on 13 September 2019 as to the claimant not being permitted to move to another team. The respondent says that on the time

limit it is prima facie out of time and it is not just and equitable to extend time.

(10) The claimant relied upon a continuing act and said that the failure to allow her to move to another team was a failure to make a reasonable adjustment which continued until the date of dismissal on 9 December 2019. She said the continuing act went further because of a disciplinary outcome letter she received on 30 December 2019 which upheld that decision not to allow her to move (page 199). In any event it was accepted by the respondent that if there was a continuing act to 9 December 2019, it was in time.

(11) On the unfair dismissal claim, the respondent said that at the point of dismissal all communications between the claimant and respondent were in writing because the claimant was not attending work and did not want to meet or have discussions with her managers. The respondent said as such, it was possible to demonstrate on the papers that there was no reasonable prospect of success.

(12) For the breach of contract claim – on unpaid wages, it was agreed that the claimant was asked to return to work and declined to do so. The claimant said she had reasons for declining and the respondent said as a matter of law it was entitled to withhold wages. On notice pay, the respondent said that the termination date of 9 December 2019 was agreed.

(13) There was also an application to amend the claim. It was necessary to decide the other matters to see how the claim looked after those matters had been determined. It was agreed at the outset that the amendment application would follow the determination of the above matters.

(14) At the end of day 1 deliberation time was needed on the above issues. It was agreed with the parties that rather than deal with a detailed amendment application on Friday afternoon 11 December, most likely not starting before 2:30pm, the tribunal would seek availability dates and list a separate case management hearing for half a day to deal with this, if applicable.

<u>Agreed matters</u>

(15) The ET1 was presented on 10 February 2020. The dates of Early Conciliation were from 6 January 2020 to 6 February 2020. It is agreed that this meant that anything prior to either 6 or 7 October 2020 (the exact date was not agreed) was on the face of it out of time.

(16) It was also agreed that the unfair dismissal and the breach of contract claims were within time.

(17) It was agreed that the notice period in the claimant's contract of employment was a period of 2 months.

Relevant factual position

(18) The claimant worked as a broadcast journalist for the BBC World Service. Her substantive role was in the Arabic Radio team.

(19) The background to the case is that the claimant raised a grievance in January 2017 about what she called "gender related issues". It included an allegation that she had been addressed inappropriately by team members. Her grievance was heard on 20 March 2017 under the Grievance Policy. This grievance is relied upon as the protected act for the victimisation claim.

(20) In a first restructure round, the claimant's role was put at risk of redundancy. She was notified of this in a letter of 15 February 2018, bundle page 142.

(21) There was a further grievance raised on 6 August 2018. The claimant wished to be moved to a different team. It is not in dispute that on a temporary basis, pending the outcome of this grievance, the claimant was placed in the social media team.

(22) The August 2018 grievance was unsuccessful. The claimant appealed the grievance decision and received an outcome on 16 July 2019; it was not upheld. She said she continued to "*suffer from the same mistreatment*" and said she expected to be referred to Occupational Health which did not happen. The claimant describes her request to move to another team as a request for a reasonable adjustment.

(23) On 5 August 2019, a year after lodging the latest grievance, the claimant emailed her manager Ms Wanda Petrusewicz (page 170). She said her move to the social media team was coming to an end at the end of the week and she wanted to know what was going to happen next. Ms Petrusewicz replied that the claimant would stay in the social media team until her leave in October 2019 and they would discuss it. The claimant wanted a "*final word*" on the matter.

(24) Ms Petrusewicz offered a meeting (page 169). The claimant replied that they did not need to meet to talk it through. Ms Petrusewicz emailed on 9 August saying that she was happy to discuss the claimant's return to the radio team after her leave in October. Mediation was offered (pages 168/169) which the claimant said was "*adding insult to injury*" (email page 155).

(25) The claimant clearly said in an email on 9 August 2019 (page 168): "*I refuse to go back to radio".* She asked for a "*final decision*" by 1 September 2019.

(26) Ms Petrusewicz saw no reason why the claimant should not return to radio as this was her substantive position. She said "*you will return to the Radio team from Saturday 14th September…."* (page 166). Offers of mediation

and a mentor were repeated. The claimant swiftly replied that she would not be going to work again with the Radio Team.

(27) Ms Petrusewicz replied on 30 August (page 165) saying that she expected the claimant to return to radio on 14 September and that failure to do so would lead to disciplinary action for failing to follow a reasonable management instruction. Ms Petrusewicz asked the claimant to contact the scheduler about her return to work. The claimant replied on 12 September saying that she had made it crystal clear she was not going back to radio (page 163/164) and again asked for a final decision.

(28) A key email was sent by Ms Petrusewicz on 13 September 2019 (page 163) in which she said:

> *"As I have said…, your substantive role is in radio and this is where we expect you to work as from 14th September. This is our final decision".*

(29) It is not in dispute that the claimant was on authorised leave from 1 September 2019 and that she did not return to work on 14 September 2019. It is not in dispute that she did not return to work at any point after 1 September 2019. So far as the respondent was concerned, from 14 September 2019 this was an unauthorised absence. A disciplinary process was commenced on 14 October 2019.

(30) In relation to the breach of contract claim, it is also not in dispute that payday is the 15th of the month. On 15 October 2019 the claimant discovered she had not been paid for September (page 156). It is agreed that the claimant was not paid from 14 September 2019 through to the date of dismissal, save for a period of annual leave in October 2019.

(31) The claimant was given a final written warning at a hearing in her absence on 21 October 2019. The outcome letter was dated 20 December 2019; the claimant received it on 30 December 2019 (page 199).

(32) As there was no verbal dialogue between the claimant and her managers and no meetings took place during the dates referred to above, I am satisfied that the position of the parties is recorded in the email correspondence.

<u>The redundancy process</u>

(33) In November 2019 there was a further restructure proposal for BBC Arabic and on 26 November a Q&A paper was published on the reasons for this (page 105). This followed the earlier restructure in February 2018. In November 2019 it was proposed that 18 posts would go, there would be consultation and that voluntary redundancy would be offered to all staff whose substantive role was in radio (page 106). This included the claimant.

(34) On the same day, 26 November 2019, there was internal email correspondence (page 174) asking if the claimant had been in contact and the reply was that she had not. It was redacted and I was told that this email exchange was between the claimant's managers Ms Petrusewicz and Mr Soliman.

(35) In an email dated 29 November 2019 at 10:52 (page 101) the claimant was informed that her role was impacted by the proposals. She was told that there would be both individual and collective consultation. Attached to that email was a letter dated 27 November 2019 (page 102) by which she was formally put at risk of redundancy. The respondent said they would consider all options to avoid a compulsory redundancy. The covering letter did not mention the possibility of voluntary redundancy.

(36) Within about 2.5 hours, by 13:31 on 29 November 2019, the claimant emailed HR (page 110) to say: "*Can you please take note of my voluntary redundancy request? I work for BBC Arabic Radio which is currently running a saving project [she quotes her staff number]. Please let me know ASAP if my request can be approved and the earliest date on which I can leave".*

(37) On 2 December 2019 the claimant sent an email to Mr Soliman saying that she had read the attached documents and that she had sent a request for voluntary redundancy. She said "*Can you please let me know when should I expect the request to be approved and subsequently processed?"* (page 114). There was nothing in this email to say that she felt compelled to volunteer. She asked no questions about the redundancy exercise.

(38) There was an internal email from Mr Soliman at page 177 asking if the voluntary redundancy could be approved before the end of consultation.

(39) On 4 December 2019 at 09:04 Ms Petrusewicz sent an email to the claimant offering a telephone conversation about her request for voluntary redundancy. The claimant did not want to have a telephone conversation, she replied concisely at 10:36 saying: "*In my view, it's pretty simple and there's no need to waste anyone's time over it. I just need to know if the request can be approved and when it can be finalised?"* (page 113).

(40) Ms Petrusewicz replied at 13:37 on 4 December saying: "*If we were to approve the request, when would you prefer to leave under VR?".* The claimant was told it could be any time between 9 December and two months' time. The claimant replied: "*I think in my case the earlier the better so I'd like to leave on Monday 9th December"* (page 112).

(41) There was some further discussion about the termination date. The claimant suggested 31 December (page 111) but was told it would involve working back in radio. The claimant said she would not accept returning to radio she said the letter should have the "*original date*" meaning 9 December 2019. I find that this was not a fresh decision that the claimant needed to return to radio, it was a reference back to the original decision

that if the claimant wished to return to work she needed to do so in her substantive role. It was the consequence of the decision already made that if she wanted to return to work, it was back in her substantive role.

(42) The termination letter was dated 5 December 2019 giving a termination date of 9 December (page 119). It was a proforma letter sent to employees who take voluntary redundancy and was not amended in detail to reflect the claimant's situation. It referred to a consultation meeting and it is not in dispute that no such meeting took place. The claimant did not want such a meeting. She had made it clear that she did not want to "*waste anyone's time over it".*

(43) The letter told the claimant that the "*period between now and your leaving date"* - a period of four days – included her contractual notice and it had been agreed that she would not serve her full contractual notice. She was told that her "*equivalent earnings"* would be paid in lieu of notice and would be taxable. There were no "equivalent earnings" as the claimant was not being paid due to her refusal to return to work. I make no comment here on the reasons why she had refused. This is to set out the position as to her pay.

(44) The claimant signed an acceptance of her voluntary redundancy on 9 December 2019 (page 127). The voluntary redundancy payment was £27,690.97 (letter page 120).

(45) In submissions the claimant said that she was asked to return to her original role or to take voluntary redundancy. I find that the respondent did not present her with this choice. The claimant had the option to engage in the redundancy process to see if there were ways by which redundancy could be avoided and she chose not participate in that process. The two matters were separate, her grievance issues and the redundancy process. They were not part and parcel of the same matter and she was not offered voluntary redundancy as an alternative to going back to her original role.

<u>The submissions on prospects of success</u>

(46) The parties submissions are not fully replicated below. As set out above the tribunal had their written submissions and all submissions made, whether oral or written, were fully considered, even if not expressly set out.

<u>Unfair dismissal</u>

(47) The respondent reminded the tribunal that the claimant accepted that she was expressly dismissed and submitted that she cannot argue that she should not have been dismissed when (a) she insisted on it and (b) she was not given an ultimatum, because the outcome of the redundancy process was unknown. This was the start of the consultation process and

the redundancy exercise did not conclude until sometime after the claimant left.

(48) The claimant submitted that she did not insist on voluntary redundancy, she just asked if it could be approved and when it could be finalised. She also submitted that as she was not getting paid and she had "*no hope*" of her reasonable adjustment (moving teams) this was the best option for her and that the respondent was very keen to dismiss her as soon as possible. She also had a pending disciplinary process. The claimant agreed that she signed her acceptance of the voluntary redundancy letter.

(49) Breach of contract: On notice pay the respondent said that the entitlement to notice pay was rebutted by the agreement as to the early termination date of 9 December. On the entitlement to pay, the respondent submitted that the claimant refused to attend work and as she was unwilling to work and that the law is clear that she was not entitled to be paid.

(50) The respondent said that the claimant should not conflate compensation for the discrimination claim with contract law. If she did not want to work in the radio team, this may be a valid discrimination claim but it is not a contract claim. In her written submission the claimant raised for the first time a section 44 ERA health and safety claim – the respondent submits that this is not relevant to a contract claim and cannot be relied upon in a contractual dispute. It was also not part of the pleaded case.

(51) In her written submission the claimant said that she was not offered a fair opportunity to serve her notice and/or should have been allowed to serve her notice with a different team.

Submissions on continuing act of discrimination claim

(52) On the face of it the on the pleaded case, the claim for disability discrimination was out of time. The claim for disability discrimination and victimisation related to the respondent's decision not to agree to the claimant's request to move team.

(53) The respondent submitted that the claim was out of time and the claimant had no reasonable prospect of showing that it was within time. This is also subject to the just and equitable issue which was considered separately.

(54) The respondent's case was that the decision that the claimant should return to the radio team and therefore was not permitted to move teams, was made on 13 September 2019. This was when Ms Petrucewicz said (as set out above) "*your substantive role is in radio and this is where we expect you to work as from 14th September. This is our final decision".*

(55) The primary time limit expired on 12 December 2019. The ET1 was presented on 10 February 2020. The claimant commenced Early Conciliation on 6 January 2020, which was outside the primary time limit.

(56) The claimant said that this was a continuing act which extended to the date of dismissal and beyond. The claimant had also had further acts of victimisation but these were the subject of her amendment application which was to be dealt with on the conclusion of all the other issues for this hearing.

(57) The claimant referred to her disciplinary case in her ET1 Grounds of Complaint at paragraph 5 saying "*I was contacted by a hearing manager on 14 October 2019 to attend a disciplinary hearing. When asked about the prospects of outcomes, she confirmed that it doesn't include the possibility to move to another platform. Moreover, it could've resulted in dismissal….".* The claimant pointed out that the in disciplinary outcome letter dated 20 December 2019, the disciplinary officer said: "*my view is that the business was reasonable to expect you to return to work"* (page 200).

(58) In written submissions, paragraph 24, the claimant relied upon there being a discriminatory policy or practice, the application of which amounted to a continuing act of discrimination.

The relevant law on strike out

(59) Rule 37 of the Employment Tribunal Rules of Procedure 2013 provides that at any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds - (a) that it is scandalous or vexatious or has no reasonable prospect of success.

(60) Under Rule 39 where the Tribunal considers that any specific allegation or argument in a claim ….has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument. The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit. The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(61) In ***Anyanwu v South Bank Students' Union 2001 ICR 391*** the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact sensitive and require full examination to make a proper determination. It may be necessary to determine whether discrimination is to be inferred.

Decision on the unfair dismissal claim

(62) The claimant's suggestion that she was only enquiring about voluntary redundancy and that she did not seek voluntary redundancy was not

consistent with her email correspondence. This was abundantly clear that she did not want to discuss it, she did not want to waste anyone's time over it, she wanted to know if it could be approved and what was the earliest date upon which she could leave – in her case "*the earlier the better".* The claimant agreed that she signed her acceptance of the voluntary redundancy terms. This is not consistent with just making an enquiry about it. Whatever the claimant's internal thought processes and reasons for accepting voluntary redundancy, this not being a constructive dismissal claim, the respondent was entitled to take her application for voluntary redundancy at face value.

(63) The mistakes in the proforma termination letter were insubstantial in the circumstances and did not materially affect the position. The reference to a meeting was meaningless as both parties knew no such meeting had taken place and the claimant was clear that she did not want a meeting. The reference to being paid between now and the termination date could only have amounted at best to four days pay. The claimant knew she was not receiving any pay at that time. She was very clear that she did not want to meet and I find that even if she mistakenly thought she might be paid for four additional days, this would not have affected her very firm decision.

(64) The claimant was dismissed due to voluntary redundancy which is a dismissal in law. It was not relied upon as a constructive dismissal. The claimant relied upon it as an express dismissal. She actively sought voluntary redundancy; she did not want to discuss it; she did not wish to engage in the redundancy process which was at an early stage and its outcome was unknown; she did not want to take her chances in that exercise; she wanted voluntary redundancy at the earliest opportunity.

(65) Whatever the claimant's reasons for doing so, in putting herself forward and actively seeking termination by voluntary redundancy and signing her acceptance of it, she cannot complain that this method of termination was unfair to her. If this were the case, employers would be duty bound to explore with volunteers for redundancy their precise reasons for volunteering to check whether they might yet be exposed to an unfair dismissal claim. I find that employers are not under such duty.

(66) As such, I find that the claim for unfair dismissal has no reasonable prospect of success and is struck out.

Decision on the breach of contract claim

(67) On notice pay it is clear that the claimant chose 9 December 2019 as her termination date. She was given the option of 9 December 2019 as the earliest date or any time up to two months ahead. There was some discussion about working until 31 December but when the claimant understood that this was in her substantive role in radio, she reverted to her choice of 9 December.

(68) The claimant's reasons for not wishing to return to the radio team goes to her reasonable adjustments / disability discrimination claim and is not to be conflated with a breach of contract claim. Under pure contract law, the claimant was given the option of any time between 9 December and two months' forward. She could have chosen two months ahead. Given her choice of termination date of 9 December 2019 her claim for breach of contract for notice pay has no reasonable prospect of success and is struck out.

(69) In relation to her pay, the common law position is clear that the where the employee is ready and willing to work he or she is entitled to be paid under the contract. If the employee is not ready and willing to work, there is no entitlement to be paid. The claimant had made her position clear by saying in writing: "*I refuse to go back to radio".* As a matter of contract law, the claimant made it very clear that she was not willing to work under the terms of her contract of employment. As such I find that her claim to be paid under the terms of that contract has no reasonable prospect of success and is struck out.

Decision on continuing act

(70) The claim form makes clear the claimant's case that she was told that the disciplinary process was not going to deal with the question of moving to another platform or team. The disciplinary outcome letter was sent to her after the termination of her employment. She received the letter on 30 December 2019. The disciplinary officer said "*my view is that the business was reasonable to expect you to return to work".* This was not the disciplinary officer making a fresh decision, but expressing a view on the reasonableness of the decision already made. In any event that letter could not amount to a new decision on the place where the claimant was to work, because she was no longer employed by the respondent.

(71) The respondent said that the pleaded complaint was being asked to return to work on 14 September 2019 (ET3 Grounds of Complaint paragraph 4). The issue for the tribunal was whether the claimant could show there was a continuing act after that date.

(72) The claimant's case is not on point with ***Cast v Croydon College*** (below and relied on by both parties) where the tribunal found primary facts to the effect that there were several decisions which indicated the existence of a policy that the holder of the appellant's post should work full time. The Court of Appeal said at paragraph 22 (the section numbers refer to the predecessor legislation): *The authorities distinguish between a complaint of a 'one-off' discriminatory decision whether or not it has a long-term effect, which is governed by the general provision in s.76(1), and one of the application of a discriminatory policy or regime pursuant to which decisions may be taken from time to time, 'an act extending over a period' for which s.76(6)(b) provides.".* At paragraph 38 the Court of Appeal said *"If Mrs Cast's case is considered as a complaint of a number of decisions by the college, each amounting to a fresh refusal of a fresh request by her*

to work part time, then the most recent refusal would be the relevant one for the purpose of the time bar. As I have said, that would be so whether or not the refusals were the application of a policy or regime…."

(73) Applying ***Cast*** to this case, there was no fresh decision after 13 September 2019. The claimant's own pleaded case made clear that she was told by the disciplinary officer that her disciplinary case would not include the possibility of moving to another platform. The outcome letter (page 200) expressed a view that the decision made was reasonable, but this was not the making of a fresh decision and could not be, because the claimant was no longer in employment.

(74) As such I find that even if there was a continuing act, it did not extend beyond 13 September 2019 and the claim in relation to the decision not to allow the claimant to move teams is on the face of it out of time and subject to a consideration of the just and equitable test.

The just and equitable test

(75) The claimant gave evidence on this issue and on that evidence I find as follows:

(76) The claimant first sought legal advice a few days after the termination of her employment. She contacted the Citizens Advice Bureau by telephone. They told her that their office did not specialise in employment law so they referred her to ACAS.

(77) ACAS told the claimant about the three month time limit. On her evidence that this was a few days after the termination of her employment I find that this was no later than 16 December 2019, a week after termination of employment. ACAS also told the claimant about the Early Conciliation process and the claimant understood this as she was able to explain to the tribunal, her understanding of the stopped clock provisions. ACAS told the claimant that she could claim unfair dismissal and disability discrimination.

(78) When the claimant presented her claim on 10 February 2020, having gone through Early Conciliation, she believed that her claim was in time. The first time and she learned that there was a time limit issue, was when she read the ET3 in March 2020.

(79) The claimant is not a lawyer. When she presented her claim, this was the starting point and she believed that she would have the right to expand upon her claim as much as she wished. When the respondent told her that further and better particulars were required, she agreed. This led to a very substantial expansion of her claim which requires a detailed consideration of an amendment application. The claimant was informed of this by Employment Judge Welch at the preliminary hearing on 9 June 2020. The claimant has since done a great deal of research on legal

matters and her written submission for this hearing would do credit to a qualified legal practitioner.

(80) The claimant relied upon her health condition as making it just and equitable to extend time. Disability is conceded by the respondent. In terms of medical evidence there was only one entry from the claimant's medical records relied upon and this post-dated the issue of proceedings being an entry from her medical records dated 13 March 2020. It was not of a great deal of assistance in terms of understanding the claimant's [redacted] health during and immediately after the end of the primary limitation period (12 December 2020).

Submissions on the just and equitable test

(81) The claimant relies upon her health and lack of knowledge of the implications of the time limit for the 13 September 2019 decision.

(82) The respondent submitted that the claimant is a very capable individual who has shown her ability to deal with legal matters. The length of the delay in relation to 13 September 2019 is about two months. The respondent submits that in relation to the claimant's ill-health there is little to support this.

(83) In relation to the balance of prejudice the respondent relied upon ***Miller v Ministry of Justice 2016 EAT/0003/15*** at paragraph 12 which sets out two types of prejudice to a respondent: (a) the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence and (b) forensic prejudice caused by the passage of time for example on the cogency of evidence. The respondent said that they should not be put to the burden of defending the claim.

(84) The respondent submitted that if the amendment application was granted it would greatly expand the case that the respondent would have to meet. This was not put as a prejudice as yet, but it would open the door to such prejudice.

(85) The respondent submitted that the prejudice to the claimant was not great if the unfair dismissal claim did not survive, as the claim as pleaded was not in relation to a discriminatory dismissal.

The relevant law on time limits

(86) Section 123 of the Equality Act 2010 provides that:

> *(1) …….proceedings on a complaint within section 120 may not be brought after the end of—*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b) 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.*

(87) The just and equitable test is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that a tribunal will exercise its discretion to extend time. It is the exception rather that the rule - see ***Robertson v Bexley Community Centre 2003 IRLR 434.***

(88) In ***British Coal Corporation v Keeble 1997 IRLR 336*** the EAT said that in considering the discretion to extend time:

> *It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to –*
>
> *(a) the length of and reasons for the delay;*
>
> *(b) the extent to which the cogency of the evidence is likely to be affected by the delay;*
>
> *(c) the extent to which the party sued had cooperated with any requests for information;*
>
> *(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;*
>
> *(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.*

(89) However, in the applying the just and equitable formula, the Court of Appeal held in ***Southwark London Borough v Alfolabi 2003 IRLR 220*** that while the factors above frequently serve as a useful checklist, there is no legal requirement on a tribunal to go through such a list in every case, *'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion'*.

(90) This was approved by the Court of Appeal in ***Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 IRLR 1050*** when the Court noted that *"factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."*

(91) The tribunal must therefore consider:

i. The length and reasons for the delay
ii. The extent to which the cogency of the evidence is likely to be affected by the delay
iii. The prejudice that each party would suffer as a result of the decision reached

(92) The tribunal has a broad discretion to extend time in discrimination cases if it is just and equitable to do so, but it remains for the claimant to persuade the tribunal that the discretion should be exercised - ***Chief Constable of Lincolnshire Police v Caston 2010 IRLR 327***

(93) On continuing act, ***Cast v Croydon College 1998 IRLR 318*** was cited by both parties and holds that the application of a discriminatory policy or regime pursuant to which decisions may be taken from time to time is an act extending over a period. There can be a policy even though it is not of a formal nature or expressed in writing, and even though it is confined to a particular post or role.

(94) ***South Western Ambulance Service NHS Foundation Trust v King EAT/0056/19*** held that there are generally two ways that conduct might be said to form a continuing act. The first is where there are a series of separate discriminatory acts which are somehow linked as opposed to being isolated or unconnected. The second is where there is a discriminatory policy or practice, the application of which causes a continuing act of discrimination.

Decision on time limit

(95) The claimant was suffering from [redacted] at the material time and disability is conceded by the respondent. This affected her ability to deal with matters. It was only after the expiry of the primary time limit in relation to the 13 September 2019 decision, that the claimant became aware of the time limit. She did not understand the importance of the ET1 at the time and did not know until she saw the ET3 that the claim in relation to the 13 September 2019 decision was out of time. She calculated the time limit from the date of termination of employment.

(96) On the respondent's side, the obvious prejudice of having to meet the claim is the same in every case. On the forensic prejudice, there was little put forward other than the general position that memories fade with time.

(97) In terms of making this decision on the just and equitable test, I have not taken account of the amendment application. This is a separate matter to be considered on the relevant principles, including the question of time limits.

(98) The case as pleaded has the benefit of considerable documentary records, particularly during a period when the claimant declined meetings or telephone conversations and the dialogue is in the email

correspondence. This will assist witnesses when they come to prepare their witness statements. I was not told for example that any particular relevant witnesses had left the respondent's employment.

(99) Based on my decision above, the claimant can no longer pursue claims for unfair dismissal or breach of contract. The delay in this case is not substantial, it is just under two months. She takes the view that the respondent failed to make a reasonable adjustment in allowing her to move teams and that there was victimisation based on her January 2017 grievance. I do not share the respondents view that this is a claim of little value. The value of a finding in favour of a claimant can be as important as the financial value. The prejudice to the claimant if time is not extended is that her claim fails in its entirety.

(100) The claimant acted promptly in December 2019 and January and February 2020 on her understanding of the law at the time. She did not know until she saw the ET3 that the claim was potentially out of time in relation to the decision to refuse to allow her to move teams.

(101) The claimant has also had to deal with the difficulty of her acknowledged disability.

(102) For the above reasons I consider that the balance of prejudice lies in favour of the claimant and I take the view that it is just and equitable to extend time. The claim for disability discrimination and victimisation will proceed to a full merits hearing.

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Employment Judge Elliott
Date: 11 December 2020

Judgment sent to the parties and entered in the Register on: 11/12/2020

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_____ the Tribunal :