

# THE FAIR EMPLOYMENT TRIBUNAL

CASE REF: 636/20FET

**CLAIMANT:** Iris Joan Jenkins

**RESPONDENT:** Northern Health & Social Care Trust

## JUDGMENT

The judgment of the tribunal on Preliminary Hearing is that in all of the circumstances it is not just and equitable for the tribunal to extend time as a condition of the claimant being allowed to proceed with her claim of victimisation. The tribunal has no jurisdiction to hear and to determine the claimant's complaint. That being so, for want of jurisdiction the complaint of discrimination by way of victimisation under Article 3 (1) (b) of the Fair Employment and Treatment (Northern Ireland) Order 1998 is dismissed by the tribunal.

### Constitution of Tribunal:

**Employment Judge (sitting alone):** Employment Judge Leonard

### Appearances:

The claimant was represented by Mr D Rafferty of SAW (Union).

The respondent was represented by Mrs Claire Mallon, Solicitor Consultant, of Business Services Organisation.

## INTRODUCTION

1. This matter has been listed for a Preliminary Hearing to determine the following preliminary issue:

*“Whether in all of the circumstances it is just and equitable for the tribunal to extend time as a condition of the claimant being allowed to proceed with her claim of victimisation”.*

2. The background to the matter is that, by claim dated 17 October 2020, the claimant claimed that she had suffered a detriment in that she was initially denied the chance of employment which, it was contended, amounted to victimisation on the grounds

that the claimant had in the past made a complaint and/or advanced proceedings concerning constructive dismissal. It was asserted that by not progressing the claimant's application for employment as a result of the claimant's past complaint concerning discrimination in the workplace, despite, so it was asserted, the claimant fulfilling all of the essential and desirable criteria for the role applied for, the respondent had failed in its duty not to victimise any prospective employee and the respondent had acted contrary to Article 19 (1) (a) (iii) of the Fair Employment and Treatment (Northern Ireland) Order 1998 (hereinafter referred to as "FETO"). The claimant's claim form provided further particulars of what was alleged. There were two named respondents (in the accepted part of the claim), these being, firstly, Northern Health & Social Care Trust and, secondly, Business Services Organisation. By Order of an Employment Judge dated 17 December 2020 the period of time given to the first and second-named respondents to enter a response to the claim was extended to 4 February 2021. A Direction was made, dated 15 March 2021, under Article 85 of FETO directing that matters which would otherwise fall to an Industrial Tribunal should be heard instead and determined by the Fair Employment Tribunal. By response dated 3 February 2021 submitted by Business Services Organisation ("BSO") in its own behalf and also on behalf of the Northern Health & Social Care Trust ("the Trust") BSO submitted that the proper and only respondent to the stated claim of victimisation was the Trust. In addition to that submission, an issue was raised in the response contending that the claim appeared to have been lodged outside the statutory time limit; it was asserted that the claimant ought to have lodged a claim no later than 11 June 2020, but the claim has not been lodged until 17 October 2020, that being four months outside the statutory time limit. Furthermore, it was asserted in the response that the Trust rejected the claim by the claimant that it had subjected the claimant to victimisation upon the stated grounds or at all. Further particulars were provided in the response.

3. The matter was case-managed. At a Case Management held on 11 May 2021 the claimant's representative withdrew the claimant's claim against the second-named respondent BSO and BSO was consequently dismissed as a respondent to these proceedings. The record of proceedings dated 13 May 2021 of the Case Management confirmed that the claimant's representative had formally conceded that the claimant's claim had been lodged outside the statutory time limit. However, the claimant's representative contended that, in all the circumstances of the case, it would be just and equitable for the tribunal to extend time as a condition of the claimant being allowed to proceed. The claimant's representative also confirmed at the Case Management that the single act of discrimination relied upon by the claimant was the decision of the Trust to withdraw an offer of employment to the claimant. This concerned the claimant's application for the role of a Public Health Staff Nurse. The claimant had been notified of this decision by the Trust on 11 March 2020; she had lodged her tribunal claim on 17 October 2020. The Employment Judge directed at the Case Management that a Preliminary Hearing would be held on 10 June 2021 to consider the preliminary issue (as above stated). It was further directed, by Order of the tribunal, that the parties were to mutually exchange all documents upon which they intended to rely and which were relevant to the issue to be determined at the Preliminary Hearing no later than 25 May 2021. Accordingly (and the tribunal shall return to this matter below) the parties' respective representatives were left in no doubt (as evidenced by the Record of Proceedings) that the matter had to be fully prepared and placed in a state of readiness for the Preliminary Hearing concerning any evidence and argument, this latter to be done by 10 June 2021.

4. The progression of cases through the Fair Employment Tribunal has been significantly affected and regrettably disrupted on account of Covid-19. For this reason, the progression of this case and, materially, the Preliminary Hearing has been significantly delayed; it is only now in a position to proceed. This delay is a matter of considerable regret, but otherwise unavoidable. The tribunal issued a Notice of Hearing dated 23 February 2022. This provided due notice to the respective representatives that the Preliminary Hearing was to take place on 10 March 2022. There was a suggestion made by the claimant's representative at hearing that extremely short notice had been given concerning the listing of the Preliminary Hearing. However, it is clear that a reasonable period of notice was provided to the parties.
5. The Preliminary Hearing duly proceeded with the Employment Judge and the respective representatives being present in person at hearing. At the outset of the hearing, it was confirmed that no witnesses were to be called in person and that no witness statements were to be tendered and that the matter was to proceed by way of written and oral submissions only and on the papers already before the tribunal. The respondent's representative submitted to the tribunal a written submissions document. This was dated 3 March 2022 and some of the content of this shall be alluded to below. The respondent's representative also made oral submissions at hearing. The claimant's representative did not make any written submissions to the tribunal; he relied upon oral submissions advanced at hearing. The claimant's representative is an official from the SAW (Union) ("the Union"). Again, certain of these latter oral submissions from the claimant's representative shall be alluded to below.
6. In the absence of any oral witness evidence at hearing and in the absence of any witness statements tendered, the tribunal was reliant upon any matters set out in the claim form, the response thereto and matters expressly addressed and recorded in the Record of Proceedings of the earlier Case Management. There was, however, a copy medical report submitted by the claimant's representative, this being without objection from the respondent. This consisted of a report dated 30 January 2021 from Dr Richard Bunn FRCPsych, MSc, Consultant Forensic Psychiatrist. The tribunal shall further allude to that report.
7. The tribunal carefully explored with the respective representatives matters which each wished to be considered concerning the issue in respect of which the tribunal was tasked with making a determination: whether in all the circumstances it would be just and equitable for the tribunal to extend time as a condition of the claimant being allowed to proceed with her claim of victimisation.

### **The Relevant Statutory Provisions**

8. The statutory provisions bearing upon the matter are as follows (with relevant extracts only being cited).

Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO)

***"Discrimination" and "unlawful discrimination"***

**3.—(1) *In this Order "discrimination" means—***

- (a) *discrimination on the ground of religious belief or political opinion;*  
*or*
- (b) *discrimination by way of victimisation; and “discriminate” shall be construed accordingly.*

(2) ....

(2B) .....

(3) .....

(4) *A person (“A”) discriminates by way of victimisation against another person (“B”) in any circumstances relevant for the purposes of this Order if—*

- (a) *he treats B less favourably than he treats or would treat other persons in those circumstances; and*
- (b) *he does so for a reason mentioned in paragraph (5).*

(5) *The reasons are that—*

(a) *B has—*

- (i) *brought proceedings against A or any other person under this Order; or*
- (ii) *given evidence or information in connection with such proceedings brought by any person or any investigation under this Order; or*
- (iii) *alleged that A or any other person has (whether or not the allegation so states) contravened this Order; or*
- (iv) *otherwise done anything under or by reference to this Order in relation to A or any other person; or*

(b) *A knows that B intends to do any of those things or suspects that B has done, or intends to do, any of those things ...*

### **Applicants and employees**

**19.—(1)** *It is unlawful for an employer to discriminate against a person, in relation to employment in Northern Ireland,—*

(a) *where that person is seeking employment—*

- (i) *in the arrangements the employer makes for the purpose of determining who should be offered employment; or*

- (ii) in the terms on which he offers him employment; or*
- (iii) by refusing or deliberately omitting to offer that person employment for which he applies; ...*

### **Complaint to Tribunal**

**38.—** (1) *A complaint by any person (“the complainant”) that another person (“the respondent”) —*

- (a) has committed an act of discrimination or harassment against the complainant which is unlawful by virtue of any provision of Part III or Article 32; or*
- (b) by virtue of Article 35 or 36 is to be treated as having committed such an act of discrimination or harassment against the complainant, may be presented to the Tribunal.*

*(1A) Paragraph (1) is subject to Article 20 of the Employment (Northern Ireland) Order 2003.*

- (2) The Tribunal shall not consider a complaint relating to an act which is unlawful by virtue of Article 25 if the act is one in respect of which an appeal, or proceedings in the nature of an appeal, may be brought to a court under any statutory provision ...*

### **Period within which proceedings must be brought**

**46.—** (1) *Subject to paragraph (5) to Article 46A and to any regulations under Article 22 of the Employment (Northern Ireland) Order 2003, the Tribunal shall not consider a complaint under Article 38 unless it is brought before whichever is the earlier of—*

- (a) the end of the period of 3 months beginning with the day on which the complainant first had knowledge, or might reasonably be expected first to have had knowledge, of the act complained of; or*
- (b) the end of the period of 6 months beginning with the day on which the act was done.*

- (5) A court or the Tribunal may nevertheless consider any such complaint, claim or application which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.”*

The Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020 provide at Schedule 1 for the Industrial Tribunals and Fair Employment Tribunal Rules of Procedure, 2020 (“the Rules”). Part 6 of the Rules provides for Case Management Orders and other powers and Part 9 for Preliminary Hearings. The relevant portions are as follows: -

### ***“Early case management***

**24.** *As soon as possible after the acceptance of the response or the application of rule 19(1), whichever is the earlier, an employment judge shall review the documents held by the tribunal that are relevant to the claim and shall do one or more of the following:-*

(a) ... (c)

(d) *issue any case management order appropriate to furthering the overriding objective including, but not limited to, any order dealing with—*

(i) ....;

(ii) *the identification of any preliminary issues and consideration of whether they should be dealt with at a preliminary hearing under rule 47 or a final hearing under rule 51;*

(iii) – (x) ...

### **PART 9 PRELIMINARY HEARINGS**

#### ***Scope of preliminary hearings***

**47.—(1)** *A preliminary hearing is a hearing at which the tribunal, notwithstanding any steps taken under rule 24, may do one or more of the following—*

(a) *conduct a preliminary consideration of the claim with the parties and make a case management order (including an order relating to the conduct of the final hearing);*

(b) *determine any preliminary issue;*

(c) *consider whether a claim or response, or any part, should be struck out under rule 32;*

(d) *make a deposit order under rule 34;*

(e) *explore alternative means of resolving the issues in dispute, including the use of conciliation.*

(2) *There may be more than one preliminary hearing in any case.*

(3) *“Preliminary issue” means, as regards any complaint, any substantive issue which may determine liability (for example, an issue as to jurisdiction or as to whether an employee was dismissed).*

#### ***Fixing of preliminary hearings***

- 48.—(1)** *A preliminary hearing may be directed by the tribunal on its own initiative following early case management under rule 24, at any time thereafter or as the result of an application by a party and the parties shall be given reasonable notice of the date of the hearing.*
- (2) *Where the hearing involves any preliminary issues, that notice shall be given at least 14 days prior to the hearing unless the parties agree to shorter notice and shall specify the preliminary issues that are to be, or may be, decided at the hearing.*

### **Constitution of tribunal for preliminary hearings**

**49.** *Preliminary hearings shall be conducted by an employment judge alone unless—*

- (a) *notice has been given under rule 48(2) that any preliminary issues are to be, or may be, decided at the hearing; and*
- (b) *a party has requested in writing that the hearing be conducted by an employment judge acting with either one or two other members in accordance with regulation 10, and in that case an employment judge shall decide whether it would be desirable for the hearing to proceed in accordance with the party's request."*

9. Taking into account the foregoing statutory provisions, the tribunal is satisfied that it is properly constituted; no objection has been taken in regard to this by the parties, including in reference to any of the material provisions of the Rules.

### **The Submissions and any Matters of Relevant Evidence**

10. It has been readily conceded by the appellant's representative that the claimant's claim has been made considerably outside the statutory period provided for by Article 46 (1) of FETO. The task of the tribunal therefore included exploring any reason or reasons accounting for the delay in the institution of proceedings.
11. The respondent's representative provided a helpful "key events" timeline, which timeline was not disputed by the claimant's representative. This timeline reads as follows:-
- The claimant commenced employment with the respondent on 1 March 1987 and this continued until the claimant's contract of employment was terminated under the respondent's Managing Attendance Protocol on 23 October 2018.
  - The claimant made a complaint of unfair dismissal in 2018 against the respondent (which was the subject of a settlement).
  - On June 2019 the respondent commenced a recruitment process for the post of Public Health Nurse, Band 5, School Immunisation Team (some of the references are to "Band 6" but that is immaterial to this determination). This

post was to be based in Braid Valley, Ballymena. The claimant applied for this post. A conditional offer of employment was made to the claimant, following interview.

- As part of the pre-employment checks, references were sought. A reference was provided, dated 27 February 2020. As a result of this, an issue was identified. A decision was taken to withdraw the conditional offer of employment on 10 March 2020.
- The claimant was advised of this decision to withdraw the conditional offer by letter dated 11 March 2020.
- On 12 March 2020, the claimant appealed the decision to withdraw the conditional offer.
- On 21 July 2020 the respondent issued its appeal outcome; that reversed the decision and reinstated the offer of employment to the claimant.
- On 25 August 2020 the claimant commenced employment with the respondent in the post originally applied for.
- On 18 September 2020 the claimant first made contact with the Labour Relations Agency and on 29 September 2020 the Labour Relations Agency issued an Early Conciliation Certificate to both the claimant and the respondent.
- On 17 October 2020 the claimant lodged a claim with the tribunal.

12. Again, without objection from the claimant's representative to any of the dates hereinafter stated, in submissions the respondent's representative clarified to the tribunal the following material dates. The protected act relied upon by the claimant in this matter took place on 11 March 2020; this protected act was the action of the respondent in issuing to the claimant the letter confirming withdrawal of the conditional offer of employment. No act of continuing discrimination has been asserted in this case. Accordingly, any alleged discrimination (and victimisation) is asserted to have crystallised at that date, 11 March 2020. This latter provides a fixed reference point. This is a fact which has been fully conceded by the claimant's representative for the purposes of limitation of time. The respondent's representative also states (again, without objection from the claimant's representative) that the last possible date for the claimant to lodge her claim (allowing for the appropriate extension of time to facilitate conciliation before initiation of proceedings) would have been 22 June 2020. The claim was then lodged with the tribunal on 17 October 2020; it was therefore almost 4 months out of time. It must be emphasised that the claimant's representative fully and expressly conceded that the claim was almost 4 months out of time: that point has not been contested in these proceedings. The claimant's representative, further, made clear to the tribunal that the claimant did not delay, upon receipt of this 11 March 2020 letter of notification, in seeking advice and assistance. She promptly approached the Union for advice, forthwith upon receipt of this notification from the Trust.

13. The claimant's representative also confirmed, again for the avoidance of any doubt, that when the initial approach had been made to the Union by the claimant, the



representative had fully and properly explained to the claimant the pertinent statutory time limitation which would bear upon the claimant taking any legal action to seek redress in the matter. The representative's understanding, as he expressed it to the tribunal, was that the claimant personally had fully understood matters of time limitation for the reason that time limitation had been clearly explained to the claimant by the representative, from the outset.

14. The claimant's representative held a number of meetings, discussions and other interactions, both personally and also by telephone and by email, with the claimant and with her husband. The representative's account of these various interactions however was not detailed or specific. Nonetheless, the tribunal's best understanding, available from the explanation provided, was that there was an ongoing process of engagement between the claimant and the Union, with the claimant on the number of occasions meeting to discuss matters and seeking advice and assistance concerning the matter. There was certainly nothing in the available evidence to suggest any manner of a breakdown in a process of continuing and regular communication conducted between the claimant and the Union.
15. In the absence of the claimant being available to provide direct evidence to the tribunal in her own account, or indeed in the absence of any other source of corroborative or explanatory evidence, the tribunal endeavoured to seek from the claimant's representative any additional information available which might be of assistance to the tribunal's deliberations. As far as the tribunal understands matters, from exploring things with the claimant's representative (and leaving aside, for the moment, the issue of the medical report which the tribunal shall address presently) the representative's understanding and assertion was that the appellant was in some way inhibited or impaired, on account of material psychological issues, from personally instituting proceedings, or instructing the Union to issue proceedings on her behalf, in a timely manner. However, this could not be for want of understanding of time limitation. In assessing the claimant's representative's assertion, the latter appears to have consisted of something ranging, perhaps, between personal reluctance to institute formal legal proceedings and significant psychological inhibition in so doing. When closely questioned by the tribunal about this important issue, the claimant's representative conceded that he did not fully comprehend the claimant's thinking throughout the material time. Putting the representative's submission at its height, there was a suggestion advanced that the appellant had been significantly affected, indeed traumatised, on account of certain earlier events alleged to have occurred around the time that the claimant had instituted the earlier tribunal proceedings - connected in some way with the presence, as an actor, of the same individual in particular events leading up to the earlier termination of her employment (in 2018) - with that same person alleged to have been also instrumental in the withdrawing (so it was contended) of the claimant's conditional offer of employment in March 2020. It was asserted that the claimant, on account of the foregoing, had been reluctant to, or inhibited from, proceeding with legal action, at least for a number of months.
16. The claimant's representative accordingly endeavoured to submit that psychological issues adversely affected the claimant to such a degree that she was effectually prevented from instructing her representatives in the Union to issue proceedings prior to the expiry of the statutory time period and indeed for a significant time thereafter. On this latter point, when questioned by the tribunal concerning any

cause for the further significant delay after the expiry of the statutory time period until 17 October 2020, the representative was unable to provide any cogent explanation to the tribunal. There was nothing explaining what particular factor or factors might have caused a change of heart and might have induced proceedings to be then issued. In the absence of any evidence from the claimant (or any other pertinent evidence from any other source, save as is mentioned immediately below) the tribunal was effectively deprived of otherwise potentially relevant evidence which might have assisted in the tribunal's deliberation.

17. There was, however, some documentary evidence available to the tribunal of potential significance. This consisted of a medical report dated 30 January 2021 from Dr Richard Bunn FRCPsych, MSc, Consultant Forensic Psychiatrist. Dr Bunn had seen the claimant on 22 December 2020 as a self-referral to Kingsbridge Private Hospital for the purpose of a psychiatric opinion. Dr Bunn directed his report to the claimant's General Practitioner, Dr Swinerton, of Ballyclare Group Practice. The tribunal requested the claimant's representative, in clarification of his submission, to specifically draw to the tribunal's attention any relevant extract or extracts from Dr Bunn's report which might potentially have assisted the tribunal in understanding any asserted impediment preventing the claimant, either in a personal capacity or through her representative, issuing proceedings within the statutory period or indeed in a timely manner upon the expiry of that period and indeed anything which might account for the additional delay of four months. The extract from Dr Bunn's report thus identified by the representative, in response to the tribunal's invitation, consisted of the concluding penultimate paragraph, which reads as follows: *"In my opinion, her presentation can be attributed to her work-related stress and even though she has not fully recovered she is engaging in employment which is beneficial for her."* This extract from the medical report, accordingly, was identified by the claimant's representative as constituting the objective evidential basis upon which the representative sought to rely.
18. In a submission responding to this, the respondent's representative stated that there was nothing whatsoever contained in Dr Bunn's report which related to the issue of the claimant's capacity to issue legal proceedings in a timely manner. This was materially so in regard to the period under scrutiny by the tribunal. That period commenced with the notification to the claimant of the withdrawal of the employment offer in March 2020 and ended with the date of issue of proceedings. The respondent's representative also drew to the tribunal's attention the fact that Dr Bunn's report was based upon an examination that was conducted on 22 December 2020. It was to be noted, so it was submitted, that prior to that December examination by Dr Bunn, the claimant had commenced employment with the respondent. This employment commenced on 25 August 2020. At that specific time the claimant had, so it would appear, no apparent issue inhibiting her in commencing this employment.
19. The tribunal further explored with the claimant's representative the extent of the available medical evidence, noting that this solely was reliant upon Dr Bunn's report. It seems that no endeavour was made to seek additional medical evidence including, perhaps, from the claimant's General Practitioner. Endeavouring to account for this, the claimant's representative explained to the tribunal that the matter had been originally listed for a Preliminary Hearing at the direction of the Employment Judge for 10 June 2021. However, the representative had, regrettably, sustained a personal injury around this time and had a period of sickness absence.

During his absence from work with the Union, the representative's work had not been attended to by other Union officials. It appears to have been left in abeyance and this seems to have included work in the instant case. When the representative had returned from sickness absence, the Union had been engaged in other quite demanding work, including a very significant and time-consuming legal matter. It was explained that the available personnel pool within the Union to attend to such work was quite small. Consequently, the representative (and the Union) had taken no further steps to obtain additional medical evidence (nor indeed, it appears, to secure anything else in order to endeavour to enhance the claimant's case evidentially). The representative also asserted that obtaining medical reports involved a protracted process.

20. In terms of the matter of the claimant's capacity and any inhibiting factors, the respondent's representative drew to the tribunal's attention the fact that on 12 March 2020 the claimant had commenced an appeal within the Trust against the decision to withdraw the conditional offer. The respondent's representative, accordingly, emphasised in submissions that this inescapable fact exposed a contradiction. On one hand, the claimant appeared perfectly capable of commencing an appeal within the Trust's internal procedures whilst, at the very same time, she was being portrayed by her representative as incapable, personally or via the Union, of issuing tribunal proceedings in a timely fashion. Both of these positions, it was asserted, could not be correct; these could not coexist in terms of capacity either at or throughout the critical time period following on from the receipt of the March 2020 notification.

### **The Tribunal's Determination of the Capacity Issue**

21. The tribunal wishes to address, initially, the specific issue of the claimant's capacity to issue proceedings, or to instruct the Union that proceedings were to be issued on her behalf, at the material time. [It must be mentioned, for the avoidance of doubt (as these matters are often addressed in other jurisdictions of the Employment Tribunal which apply a different test, that of reasonable practicability - where capacity issues are sometimes raised) that the tribunal at all times has borne in mind that the applicable test in this case is one of justice and equity, not reasonable practicability]. Having examined all of the available evidence and information, in the context of the submissions (and in the absence of hearing anything directly from the claimant or from any other witness who might have otherwise assisted) the tribunal's considered conclusion is that there is nothing in either the report from Dr Bunn, or indeed elsewhere, which might enable the tribunal readily to conclude that there was any medical cause or basis which might have significantly impaired the claimant concerning the timely issue of proceedings. It was a matter for the claimant and for her Union representatives to determine the matter of evidence (having indeed been afforded a considerable amount of time to prepare the case) and to identify and put forward the means whereby the tribunal might be persuaded of the claimant's case, given that the onus very clearly rested with the claimant. This conclusion must be taken in the context of the concession on the part of the claimant's representative that, from the very outset of the period under scrutiny, the Union had (indeed quite properly) fully advised the claimant concerning time limitation - she had without any doubt fully understood the pertinent advice given by the Union. Examining the issue, the conclusion is that there was no material impairment nor any psychological inhibition accounting for the delay. This conclusion is reinforced by the fact that, at the time under scrutiny, the claimant

appeared quite capable of taking other formal steps, including the institution of an internal appeal with the Trust. The specific evidence from Dr Bunn's report, coupled with the assertions made by the claimant's representative in argument, are insufficient. The further conclusion must be that the claimant, absent of any disabling or intervening factor, made a conscious and unimpaired decision - of her free will - not to issue proceedings, despite her awareness of time limitation. It is not for the tribunal to speculate as to what subsequently might have ultimately caused a change of heart and why the claimant then, somewhat belatedly, decided to issue proceedings on 17 October 2020. There has been no evidence regarding that. For these reasons, the tribunal cannot accept as having any validity or force the arguments comprised in submissions advanced by the claimant's representative on this specific point.

### **The Tribunal's Determination of the Broader Justice and Equity Issue**

22. The other issue to be addressed by the tribunal relates to the exercise of the tribunal's broad discretion in cases of this type, which are to be decided on the basis of justice and equity and taking into account any relevant factors. Firstly, there was an issue of contention in this case as to whether there was any potential loss at all incurred by the claimant. The submission for the respondent was that there was just no evidence of any loss having been incurred by the claimant, linked to the matter of possible detriment. It was explained that the claimant had submitted her application for one of a number of posts available at that time. Notwithstanding that the provisional offer had been made and that this provisional offer was then withdrawn, only to be subsequently reinstated, the claimant's commencement of employment in the post ultimately secured occurred on 25 August 2020. Other personnel, so the tribunal was informed, who were recruited by the Trust for these posts also commenced employment on the same date as did the claimant. This being so, there was no loss of earnings. Loss of earnings however appeared to be the assertion made by the claimant in the case. In opposing the submission, the claimant's representative stated that the claimant would indeed have commenced in this employment earlier than August 2020. The proof of this, so the representative asserted, was derived from the experience of another individual who had been successful in securing a post and who had started in that post in March 2020. The claimant's representative argued that there was a significant delay in the employment commencing. There had been a consequent quite significant loss of potential earnings. This amounted to some £10,000-£12,000, in the best estimation of the representative. However, the claimant's representative did not endeavour to introduce any specific evidence to support the foregoing assertion. Indeed, the identity of the other individual who was alleged to have started in March 2020 was not given, whether by name or by other means of identification. The tribunal was given no account of any other specific circumstances surrounding the stated employment of that other person. However, the respondent's representative submitted that there was no evidence whatsoever to support this latter submission. This might have included any necessary evidence accounting for any of the relevant circumstances. This would have been essential in order to enable the position of that stated other (unnamed) party to be compared to the claimant's position. On account of these opposing submissions, this issue of potential loss is very much a matter of contention and one which shall be addressed further by the tribunal in reaching a determination concerning the balance of potential detriment, this being a matter for proper consideration by the tribunal. It is to be further noted that there

was no other detriment alleged in the submissions made on behalf of the claimant other than financial loss grounded upon the foregoing assertion.

23. The case law concerning the matter is reasonably well-settled. A number of points in that regard may be usefully stated. The discretion available to any tribunal is wide and the tribunal may take into consideration matters which it properly considers to be relevant. The tribunal is entitled to consider matters including the following: the length and any reasons for the delay; the extent to which cogency of evidence might be affected by delay; the extent to which parties have cooperated with requests for information; the promptness with which the parties acted once they knew of facts giving rise to a cause of action; any steps taken to obtain appropriate professional advice once the parties knew of the possibility of taking legal action (see **British Coal Corporation v Keeble [1997] IRLR 336**). Although these are relevant factors to be considered, there is no legal obligation on the tribunal to go through the list, providing that no significant factor is left out (see **Southwark London Borough v Afolabi [2003] IRLR 220**).
24. When considering whether to grant an extension of time under the “just and equitable” principles, any fault on the part of the claimant is a relevant factor to be taken into account. In some cases incorrect legal advice might be a valid reason for delay in bringing a claim, but that does not appear to be a factor in this case. In answering the question as to whether to extend time, the tribunal needs to examine the cause of the claimant’s failure to bring the claim in time. In the case of **Accurist Watches Ltd v Wadher UKEAT/0102/09** Underhill J. stated that, whilst it was always good practice in any case where findings of fact need to be made for the purpose of a discretionary decision, for the parties to adduce evidence in the form of witness statements, with the possibility of cross-examination where appropriate, it was not an absolute requirement of the rules that evidence should be adduced in this form. A tribunal is entitled to have regard to any material before it which enables it to form a proper conclusion on the facts in question, including an explanation for the failure to present the claim in time; such material may include statements and pleadings or correspondence, medical reports or the inferences to be drawn from undisputed facts or contemporary documents.
25. A helpful case was cited in argument by the respondent’s representative, that being the case of **Abertawe Bro Morgannwg University Local Health Board v Morgan [2014] UKEAT/0305/13** (unreported). Paragraph 52 of that Employment Appeal Tribunal decision (per Langstaff J.) reads as follows: -

*“Though there is no principle of law which dictates how sparingly or generously the power to enlarge time is to be exercised ... a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to do so, and the exercise of discretion is therefore the exception rather than the rule (per Auld LJ in **Robertson v Bexley Community Centre [ 2003] EWCA Civ 576, [2003] IRLR 434 (CA)**). A litigant can hardly hope to satisfy this burden unless he provides an answer to two questions, as part of the entirety of the circumstances which the tribunal must consider. The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was. “*

26. However, in determining whether or not to grant an extension of time, all the factors in the case should be considered (see ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278***). Notwithstanding the breadth of the available discretion, such discretion is not without limits. The onus, accordingly, must rest with the party seeking an extension to satisfy the tribunal that time ought properly to be extended. Further, insofar as it may be an issue whether any claimant was pursuing an internal appeal, this is one factor to consider, but which may be set against all other pertinent factors (see ***Robinson v Post Office [2000] IRLR 804***). As can be seen from ***Apelogun-Gabriels v London Borough of Lambeth [2001] EWCA Civ 1853*** there is no general principle that an extension should always be granted where delay is caused by a claimant invoking an internal grievance or appeal procedure, unless the employers could show some particular prejudice.
27. A preliminary hearing held under rule 47(1) of the Rules may determine any preliminary issue, including the issue identified for determination by this tribunal. The tribunal has now given full consideration to the preliminary issue. Taking all relevant factors into account, the determination of the tribunal is that time ought not to be extended in all of the circumstances of this matter. This determination is arrived at, firstly, for the reason that no compelling case has been advanced by the claimant's representative, when a fair and reasonable opportunity had been afforded to do so over quite a considerable period of time, by the adduction of appropriate evidence or other information, such as would be necessary to satisfy the tribunal that any financial loss or other detriment had potentially been incurred by the claimant. The onus lies with the claimant in that regard and it has not been discharged. (See ***Accurist Watches Ltd v Wadher*** mentioned above and Underhill J's observations in regard to this issue, specifically, and the matter of evidence, generally, in this case; the adduction of relevant evidence would have been quite helpful in the instant case where a number of effectively evidentially-unsupported assertions have been made in submissions for the claimant) Furthermore, no other specific prejudice has been identified by the claimant's representative in the presentation of this case and in the arguments advanced before the tribunal pertaining to the adverse consequences that might flow from any refusal to extend time. The issue of any prejudice potentially to be sustained by the claimant, if the time extension were to be refused, must be clearly identified - the onus rests with the claimant to do that. Accordingly, the tribunal must be satisfied that there is some proper basis supporting any argument of prejudice. Furthermore (bearing in mind that the tribunal must seek to identify the reason why the primary time limit has not been met) there has been no satisfactory, evidentially-supported, account afforded concerning both of the two time periods under scrutiny. Firstly, scrutiny must be directed to the time leading up to the expiry of statutory time limitation. Secondly, the tribunal is entitled to examine any explanation afforded for any further passage of time up to the date of issue of proceedings. In respect of neither of these periods of time under discussion has the tribunal been afforded a full and satisfactory explanation grounded upon some cogent evidential basis. As mentioned, this applies both to any reason why proceedings were not issued within the primary time limit and, furthermore and thereafter, why proceedings were not then issued at a much earlier stage after the time limit had expired. Indeed, it appears that the claimant's representative was somewhat at a loss in addressing the tribunal and in giving some manner of an explanation concerning the claimant's thinking in that regard. The reliance placed solely upon the medical report of Dr Bunn is insufficient.

28. Accordingly, the judgment of the tribunal is that, taking account of all of the circumstances, it is not just and equitable for the tribunal to extend time as a condition of the claimant being allowed to proceed with her claim of victimisation: time is not extended under the provisions of Article 46 (5) of FETO. As a consequence, Article 46 (1) is applicable: the tribunal has no jurisdiction to hear and to determine the claimant's complaint. That being so, the complaint of discrimination by way of victimisation under Article 3 (1) (b) of FETO is dismissed by the tribunal, for want of jurisdiction.

**Employment Judge:**

**Date and place of hearing: 10 March 2022, Belfast.**

**Date decision recorded in register and issued to parties:**