Appeal No. UKEAT/0086/20/AT

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 24 March 2021

Before

MATHEW GULLICK QC, DEPUTY JUDGE OF THE HIGH COURT

(SITTING ALONE)

MISS J SAKYI-OPARE — APPELLANT

THE ALBERT KENNEDY TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ROGER KISKA (Representative) Christian Legal Centre 70 Wimpole Street London W1G 8AX
For the Respondent	MR CRAIG BENNISON (of Counsel) Instructed by: Citation Ltd Kings Court Water Lane Wilmslow Cheshire SK9 5AR

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SUMMARY

PRACTICE AND PROCEDURE; JURISDICTIONAL / TIME POINTS

B

At a Preliminary Hearing before the Employment Tribunal to determine whether the Claimant's claims of discrimination and harassment had been brought in time (and, if not, whether to extend time), the Claimant made an application to amend to raise new matters post-dating the submission of the Claim Form. The Employment Tribunal held that the claim had been submitted outside the statutory time limit and declined to extend time. The Employment Tribunal's reserved Judgment did not determine the application to amend and the Employment Tribunal did not address the substance of the issues raised in that application in its written Reasons.

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The Employment Appeal Tribunal held that the Employment Tribunal had materially erred in law in not determining the application to amend the claim, even though the matters raised post-dated the filing of the Claim Form: **Prakash v Wolverhampton City Council** UKEAT/0140/06/MAA considered and applied. The matters raised in the amendment application were also potentially relevant both to the question of whether the Claimant had demonstrated a *prima facie* case that her complaint was one of conduct extending over a period for the purposes of section 123(3)(a) of the **Equality Act 2010** and to the question of whether, if she had not established a *prima facie* case, time ought to have been extended in relation to the other matters.

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The Claimant's appeal was allowed. The application to amend the claim and the issues raised with regard to time limits were remitted to a differently constituted Employment Tribunal for re-hearing.

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MATHEW GULLICK QC, DEPUTY JUDGE OF THE HIGH COURT

Introduction

1. I shall refer to the parties as they were before the Employment Tribunal: that is, as "the Claimant" and "the Respondent".

2. This is an appeal by the Claimant against the Reserved Judgment of the Employment Tribunal sitting at London Central (Employment Judge Sharma, sitting alone) dated 6 March 2019 and sent to the parties with written Reasons on 18 March, following a hearing on 1 March. By its Judgment, the Employment Tribunal found that the Claimant's claim against the Respondent had been issued outside the statutory time limit in section 123 of the **Equality Act 2010** (EqA) and that it was not just and equitable to extend time. The claim was therefore dismissed in its entirety.

3. The Claimant now appeals against that decision. Her appeal was initially rejected under Rule 3(7) of the **Employment Appeal Tribunal Rules**, but at a Rule 3(10) Hearing five of the six grounds of appeal were permitted to proceed. Before me, the Claimant was represented by Mr Roger Kiska, who had represented her before the Employment Tribunal. The Respondent was represented by Mr Craig Bennison of counsel, having been differently represented before the Employment Tribunal. The appeal was very well argued on both sides.

Factual Background

4. The Respondent is described in the Claimant's ET1 form as "a well-known LGBT youth homelessness charity". The Claimant was at the material time a social work student at Brunel University ("the University"). She was required to complete a 100-day work placement in order to qualify as a social worker. The Claimant started a placement with the Respondent on

11 October 2017. It was terminated by the Respondent on 18 April 2018 because the employee of the Respondent supervising the Claimant resigned. The Claimant expected to resume her placement once a new supervisor could be found.

5. The Claimant contends that during the placement she was the only Christian in the office and that employees of the Respondent engaged in conversations relating to her faith when she was present in which it was denigrated and ridiculed. This is denied by the Respondent.

6. On 24 May 2018, the Respondent wrote to the Claimant stating that the placement could not continue. The Claimant says that the Respondent made a complaint to the University about the Claimant's suitability as a professional social worker, regarding alleged negative comments made by the Claimant, which she says was an attempt to portray her as "unprofessional and prejudiced against LGBT people". The Claimant disputes the allegations that she says were made against her and contends that they were made because of her religion and that they constitute harassment by the Respondent on that ground. The allegations, it is said by the Claimant, resulted in professional suitability proceedings being commenced against the Claimant by the University.

7. The Respondent's case is that it did not make a complaint as such but responded to the University's request for details of the Claimant's behaviour on the placement. It denies that it has discriminated against or harassed the Claimant.

8. Following ACAS conciliation, the Claimant commenced proceedings in the Employment Tribunal against the Respondent on 5 October 2018, alleging, as I have said, discrimination and harassment on the grounds of religion in breach of the relevant **EqA** provisions. That was, on any view, well out of time with regard to the last of the acts expressly complained of in the ET1 claim form, which was the alleged complaint of 24 May 2018. The Claimant, however, contended that

the ongoing professional suitability proceedings by the University, which she alleged had been triggered by the Respondent's alleged complaint against her, was part of a course of conduct that was ongoing at the time of the presentation of the ET1 and so the claim was brought in time. In the alternative she sought an extension of time on just and equitable grounds.

9. On 15 January 2019, just over three months after she had presented her claim form in the Employment Tribunal, the Clamant was invited to a meeting by the University, which took place on 22 January 2019, to discuss what is described in her representative's note of the meeting, which was in evidence before the Employment Tribunal, as "a concern from her former placement agency, Albert Kennedy Trust". The note records that the Respondent had contacted the University to inform it that the Claimant had filed an Employment Tribunal claim and goes on to record that a senior university staff member suggested that the Claimant should have used the University's internal complaints procedure rather than file an Employment Tribunal claim against the Respondent. In her proposed amended Particulars of Claim, to which I shall return, the Claimant averred that the Respondent contacted the University after the issue of her claim, amounting to a continuation of the alleged harassment against her.

10. The matter came for a preliminary hearing before the London Central Employment Tribunal on 1 March 2019. The purpose of the preliminary hearing was set out in the notice of hearing as being to determine "whether the claim was lodged out of time and if so, to consider whether an extension of time should be granted to validate it". The Claimant prepared a short witness statement for the preliminary hearing, containing 21 paragraphs over five A4 pages, to address two issues: firstly, her reasons for not lodging the claim before October 2018; and secondly, the then-recent events of January 2019. The Claimant had also drafted amended Particulars of her claim, where the following two new paragraphs were proposed to be included by way of amendment:

> **"19A. On 15 January 2019, I received an email from my course leader at Brunel University, Holly Nelson-Becker ("Holly") inviting me to a meeting the following week "to discuss a concern from your former placement agency", AKT. The meeting took place on 22 January. Holly was joined by Kate Harvey, Assistant Director of Academic Services at Brunel. At that meeting:**
>
> **a. Holly made it clear that the meeting was arranged in response to the Department being contacted by AKT, who 'informed' them about my ET claim.**
> **b. There was a polite but firm indication by Holly that the University was unhappy about the fact that I brought the claim and concerned that this might adversely affect potential future work placements with AKT.**
> **c. Holly indicated that my decision to bring the claim would adversely affect the University's view of my professional suitability, and therefore (potentially) my career.**
> **d. Holly also indicated that the decision on whether my 62 days' work placement with AKT would count towards the 100 days necessary for my degree would be taken in "consultation" with AKT.**
>
> **19B. It is to be inferred that AKT continued to take active steps in relation to my work placement and my professional suitability proceedings within the University, until at least as January 2019. Those steps amount to continuation of the harassment pleaded above."**

11. It is apparent that the Claimant gave oral evidence at the preliminary hearing and that she was cross-examined. The Respondent did not call any witnesses at the preliminary hearing. Submissions were made by both parties' representatives.

The Employment Tribunal's Judgment and Reasons

12. The Employment Tribunal's Reserved Judgment was to the following effect:

> **"The Claimant's claim was lodged out of time and it is not just and equitable to extend time. The Tribunal therefore has no jurisdiction to hear this claim. This claim is therefore dismissed."**

I observe that the Judgment does not set out any decision on the Claimant's application to amend her claim to include the proposed paragraphs 19A and 19B of the Particulars of Claim, which related to the events of January 2019. I shall return to the significance of this in due course.

13. Given the issues raised by this appeal it is necessary to set out the relevant parts of the reasons given by the Employment Tribunal in full. They were as follows:

"A: THE CLAIM

1. By issue of an ET1 claim form received by their Tribunal on 5th October 2018, the Claimant, a social work student, who was on a work placement from Brunel University (the "University") with the Respondent, bought a claim for: -

a) Harassment on the grounds of religion; and
b) Discrimination on the grounds of religion.

2. The purpose of this Open Preliminary Hearing (the "Hearing") was to determine whether the claim was lodged out of time and if so, to consider whether an extension of time should be granted to validate it on the basis that it was just and equitable to do so.

3. At the Hearing, Mr Kiska, representing the Claimant, made an application to amend the Claimant's particulars of claim to include details of events which took place on 15 January 2019 and 22 January 2019 by the University but involving the Respondent. The Claimant sought to rely on these events as continuing harassment by the Respondent.

4. Ms Omotosho, representing the Respondent, made an application for a deposit order.

5. At the Hearing and in coming to my decision, I took account of the documents presented to me, namely the ET1, ET3, the written witness statement of the Claimant and her oral evident given at the Hearing under oath, the summary of the meeting of 22nd January 2019, the Amended Particulars of Claim, the Respondent's email of 24 May 2018 the Claimant [sic] response of that same date and the oral and written submission of Mr Kiska and Ms Omotosho.

B: FINDINGS OF FACT

…

[*Paragraphs 6-27 of the Reasons set out the chronology up until the filing of the ET1 on 5 October 2018*]

…

28. If time is to be calculated from the alleged last discriminatory act which the Claimant sought to rely upon (5 April 2018), then the last date for presenting the ET1 (without conciliation having been triggered) would have been 4 July 2018. This would mean that the ET1 had been submitted 13 weeks and 1 day out of time. If time is to be calculated from the date of the Claimant's termination of her placement, namely on 24 May 2018, then the last date for presenting the ET1 (without conciliation having been triggered) would be 23 August 2018. This would mean that the ET1 had been submitted 6 weeks and 1 day out of time.

29. At the Hearing, during cross-examination, the Claimant stated that she was aware of the three-month time frame for presenting a claim and that she was aware of ACAS.

30. At the Hearing, the Claimant stated that she had taken legal advice in July 2018.

31. I make the following findings, in my consideration of whether or not it is just and equitable to extend time, bearing in mind the section 33 Limitation Act 1980 checklist (as modified by the EAT in British Coal v Keeble (1997) IRLR 336, EAT):-

31.1 Regard to all the circumstances of the case: Merits of the Case. In my consideration of having regard to all the circumstances of the case, I considered the merits of the case based upon all the evidence presented to me at the Hearing.

31.1.1 In giving evidence at the Hearing, the Claimant stated that the professional suitability proceedings conducted by the University were not going her way. The University were not convinced that she was suitable to continue with the course. I find that on a balance of probability, the reason for commencing legal action against the Respondent was because of the University's professional suitability proceedings, which were not, as the Claimant admitted, going her way. I make this finding based upon the Claimant's email response of 24 May 2018 when she was informed that her placement would be terminated. She apologised for the hurt that she had caused everybody. In relation to her claims against the Respondent of it allegedly harassing her and discriminating against her, it is difficult to understand why she did not refer to these in her e-mail of 24 May 2018.

In response to the Respondent's email of 24 May 2018 where the Respondent (a) referred to its code of conduct required her to treat everyone she met with respect and in a manner that protected their dignity, values diversity and to promote inclusion (b) stated that she had made a trans-phobic comment which had breached the Respondent's code of conduct, the Claimant apologised for all the hurt she had caused. This response was not, on a balance of probability, consistent with somebody who had experienced harassment and discrimination.

The apology which the Claimant made in her email of 24 May 2018 was reflective of the apology which [a member of the Respondent's staff] stated she had made at the meeting of 9 April 2018, when he spoke to her about her comments regarding homosexuality as a sin. The claimant's email of 24 May 2018 was also reflective of the email of 9th April to which [the Respondent's staff member] referred to in the ET3 where he stated that the Claimant was enjoying her placement and felt part of the team.

31.1.2 Regard to all the circumstances of the case: Continuous Act

It was the Claimant's position (ET1, para 17) that the Respondent had made a complaint to the University questioning the Claimant's professional suitability. [Three of the Respondent's staff members] provided statements to substantiate that complaint. It was the Claimant's position that in such statements, the Respondent misrepresented the incidents to portray the Claimant as unprofessional and prejudiced against LGBT people. It is these complaints (ET1, para 19) that resulted in the professional suitability proceedings being carried out by the University. Thus, it was the Claimant's position that the professional suitability proceedings conducted by the University were a continuing act of the alleged discrimination and harassment carried out by the Respondent.

I find that the professional suitability proceedings carried out by the University were separate and different to any alleged harassment and discrimination by the Respondent (which in any event, I find, based on upon the evidence before me, to be unfounded, on a balance of probabilities).

I find that in relation to the incident of 5 April 2018, the Respondent did not inform the University of this. After the concerns meeting of 12th April 2018, Miss Finch of the University approached [one of the Respondent's employees] expressing the University's concerns. Even at that point, the Respondent stated its commitment to seeing the Claimant's placement through. It was the University itself that had decided to commence professional suitability proceedings.

Thus, the University's professional suitability proceedings were not, in my view, acts which could be described as continuing acts of the Respondent. The Respondent cooperated with the University when requested to do so by providing statements at the University's request (e.g. the email of 24 May 2018 from the Respondent to the Claimant stated that "Your University asked me to file a report of the incident that took place on 5th April").

The University was taking its own action against the Claimant. I find that whilst the professional suitability proceedings were being conducted by the University, there was nothing to stop the Claimant bringing an action against the Respondent for the alleged acts of discrimination and harassment. The Claimant alleged that the Respondent had carried out acts of discrimination and harassment, yet she took no action against the Respondent until 4 October 2018.

Therefore, I find that based upon the merits of the Claimant's case and my finding that the University's action did not comprise a continuous act of the Respondent's, it is not just and equitable to extend time on this basis.

It is not in my view just and equitable to put the Respondent to the trouble of defending a claim, the merits of which I believe to be weak, based upon the information which has been presented to me at the Hearing.

31.2 <u>Length and Reason for the delay</u>

If the 3-month statutory period set out in section 123(1)(a), Equality Act 2010 is calculated from the last alleged discriminatory act (5 April 2018), then there has been a delay of 13 weeks and 1 day. If the 3-month statutory period is calculated from the date when the Claimant was informed that the placement would not be renewed (24th May 2018), then there has been a delay of 6 weeks and 1 day. Both periods of delay are significant.

Both in giving evidence at the Hearing and in her ET1 (para 21), the reason given by the Claimant for the delay was because the professional suitability proceedings by the University were ongoing. Bearing in mind that the Claimant had confirmed in giving evidence at the Hearing that she was aware both of the 3 month statutory time period and of ACAS, I find that the reason for the delay and its length was such that it would not be just and equitable to extend time in this case. It was difficult to understand how the Claimant believed that professional suitability proceedings conducted by the University would resolve incidents of harassment and discrimination, which she alleged had been carried out by the Respondent.

31.2 <u>The prejudice each party will suffer as a result of my decision not to extend time</u>

As explained by the Claimant (ET1 para 2), the work placement is crucially important for her course at the University. A successful completion of 100-day work placement is necessary for her ability to qualify as a social worker. I accept that the Claimant will suffer serious prejudice by not having a work placement.

By me [sic] extending time, however, cannot affect the University's professional suitability proceedings where they are assessing their concerns based on the social work code of practice. The University's professional suitability proceedings are outside the Respondent's control and not related to the claims made by the Claimant against the Respondent. I find that the Claimant is directing her complaint towards the Respondent having failed to convince the University that she is suitable to continue with her course.

The Respondent, on the other hand, will suffer severe prejudice. One of the Respondent's key witnesses, the Claimant's former practice educator, Rebecca Walker, has now left the employment of the Respondent. She will be a key witness and the Respondent will be prejudiced in its inability to obtain a statement from Ms Walker.

The Respondent will suffer further prejudice due to the passage of time. As is clear from both the ET1 and the ET3, the Claimant did not raise the allegations at the time she alleged they occurred. The Respondent did not, therefore, investigate such matters at the time. The Respondent would have to investigate such matters which took place more than one year ago. This is prejudicial to the Respondent and will affect the cogency of the evidence.

For this reason, it is not just and equitable to extend time.

31.4 <u>Steps taken by the Claimant to take legal advice</u>

At the Hearing, the Claimant stated that she took legal advice in July 2018. She thereafter submitted her ET1. In cross-examination, the Claimant stated that she was aware of the statutory 3-month time limit and also that she knew about ACAS.

On the basis that she was aware of the 3-month statutory time limit, yet still issued her ET1 outside the requisite statutory period, it is not just and equitable to extend time.

<u>C: SUBMISSIONS</u>

32. <u>Ms Omotosho's submissions on behalf of the Respondent</u>

I summarise some (but not all) of Ms Omotosho's key submissions made on behalf of the Respondent: -

…

> [*Paragraph 32.1 sets out the Respondent's submission that the claim should have been brought in the County Court and not the Employment Tribunal, and the Employment Tribunal's reasons for rejecting that argument*]

…

32.2 Continuing Act

In relation to whether the various matters were linked so as to be continuing acts to constitute an ongoing state of affairs, Ms Omotosho submitted that the Claimant had failed to establish this. The professional suitability proceedings are being carried out by the University and to suggest that this is a continuation of harassment by the Respondent is, Ms Omotosho submitted "nothing short of perverse." Ms Omotosho referred to the case of <u>Hale v Brighton and Sussex Hospital NHS Trust [2017] 12 WLUK 215</u> in which it was held that a disciplinary process created a state of affairs that continued

until the conclusion of the disciplinary process. Ms Omotosho submitted that it was incorrect to suggest that issues arising from the professional suitability proceedings in relation to a student's workplace [sic] is similar to the ongoing effects of a disciplinary procedure in the workplace.

I accept that the alleged acts of harassment referred to in the Claimant [sic] ET1 and the Respondent providing feedback to the University at the University's request for the purposes of the University's professional suitability proceedings was not an ongoing harassment.

33. Mr Kiska's submissions on behalf of the Claimant

I summarise some (but not all) of Mr Kiska's submissions made on behalf of the Claimant.

33.1: Continuing Act

Mr Kiska submitted that by analogy with disciplinary proceedings at the workplace, the Respondent's complaint to the University and the ensuing professional suitability proceedings are parts of the same continuing act of an ongoing state of affairs which continues to this day. The campaign of harassment during the placement and malicious complaints triggering professional suitability proceedings are also part of the same continuing act.

I do not accept this submission. The University's professional suitability proceedings commenced independently from the Respondent, but the Respondent was asked to provide statements. I do not accept that these are so closely linked as to be part of the same continuing act.

D: THE LAW

34. The onus is always on the Claimant to convince the Tribunal that it is just and equitable to extend time. Ms Omotosho reminded me of the principle, and I have reminded myself that "the exercise of discretion is the exception rather than the rule": Robertson v Bexley Community Centre [2003] IRLR 34.

S55(1), Equality Act 2010: A person ("employment service – provider") concerned with the provision of an employment service must not discriminate against a person.

Section 56(2), Equality Act 2010: The provision of an employment service includes (a) the provision of vocational training.

Section 56(6) Equality Act 2010: "Vocational training" means (a) training for employment.

Section 123(1) Equality Act 2010: Proceedings on a complaint within section 120 may not be brought after the end of: -

(a) the period of three months starting with the date of the act which [sic] the complaint relates; or
(b) such other period as the employment tribunal thinks just and equitable.

E: CONCLUSIONS

The applications presented by both the Claimant and the Respondent were denied.

> **Bearing in mind the consequences to the Claimant as a result of my decision, namely not being able to pursue her claim, my decision to not extend time was given after very careful deliberation.**
>
> **The Claimant gave no reason for not presenting her claim in time against the Respondent. The professional suitability proceedings were carried out by a separate organisation to the Respondent, namely the University. The two are separate entities.**
>
> **Claims under the Equality Act 2010 are to be presented promptly. The Claimant and/or those representing her did not do so.**
>
> **For the reasons set out above, I determined that the Claimant has not shown that it is just and equitable to extend time."**

The Grounds of Appeal

14. As I have said, there are five grounds of appeal, in the following terms, by way of summary:

(1) The Employment Tribunal erred in law in making findings of fact regarding the merits of the case at paragraphs 31.1 and 31.1.2 of the Reasons, which was, it is submitted, erroneous and unfair in the context of a preliminary hearing to determine issues relating to time.

(2) The Employment Tribunal erred in law in failing to approach the question of whether the Claimant was complaining of, to use the statutory language, "conduct extending over a period" by determining whether she had raised a *prima facie* case in that regard.

(3) The Employment Tribunal erred in law in failing to determine the Claimant's application to amend.

(4) The Employment Tribunal erred in law by finding that the Respondent had been severely prejudiced because of its inability to call Ms Walker as a witness.

(5) The Employment Tribunal erred in law in making the findings it did about the prejudice to the Respondent in having to investigate the relevant events.

15. I should set out the provisions of section 123 **EqA**:

> **"(1) Subject to sections 140A and 140B 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.**
>
> **(2) Proceedings may not be brought in reliance on section 121(1) after the end of—**
>
> **(a) the period of 6 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.**
>
> **(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—**
>
> **(a) when P does an act inconsistent with doing it, or**
>
> **(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."**

16. I was referred during the course of the hearing to a number of authorities on the question of the proper approach to determine whether there is, to use the statutory language, "conduct extending over a period" for the purposes of section 123(3)(a) **EqA** and the proper approach to extending time on a just and equitable basis, and I shall refer to the authorities when I deal with the individual grounds of appeal.

Discussion

Ground 3

17. Ground 3 is the first ground of appeal that I will consider. Mr Kiska submitted that the Employment Tribunal should have dealt with the application to amend and that it had not done so. Mr Bennison submitted that the Employment Tribunal had concluded that the matters set out

A in the ET1 were out of time and that time ought not to be extended and it was unnecessary for the Employment Tribunal to determine the Claimant's application. In the alternative, he submitted that it was clear that the Employment Tribunal had dealt with the substance of the amendment application in its Reasons.

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18. I was referred by Mr Kiska to the decision of this Appeal Tribunal (HHJ Serota QC, Mr H Singh and Mrs R A Vickers) in the case of **Prakash v Wolverhampton City Council** UKEAT/0140/06/MAA, a Judgment given on 6 September 2006. In that case the employee had presented his claim form on 15 January 2004 asserting that he had been unfairly dismissed on 23 October 2003. Subsequent to the presentation of his claim form his appeal against the dismissal was allowed and he was reinstated. The Employment Tribunal found that his employment had terminated on 31 October 2004. Having concluded that the claim had been presented prematurely, it concluded that it had no jurisdiction to permit an amendment of the claim form, there being no existing claim capable of amendment. The Employment Tribunal held that the Claimant needed to present a further claim, which could be considered by a further Employment Tribunal. The Claimant's appeal was allowed on this issue, in relation to which this Appeal Tribunal held as follows:

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> **"61. The Respondent's case involves holding that an amendment can be allowed to add or substitute a cause of action that was not available when the originating application was first presented. There is nothing in the rules that expressly prevents such an amendment being allowed. It would obviously make sense, in a case such as this, to allow an amendment (if considered appropriate) rather than require the Claimant to issue a second originating application. We do not see any basis for the technical rule that used to apply at one time under the Rules of the Supreme Court that one could not permit by amendment the raising of a cause of action that had accrued after the issue of the writ.**
>
> **62. Statutes that deal with discrimination on the grounds of disability, race, sex and so on are phrased differently but claims under these statutes are frequently amended so as to add different causes of action. We see no reason in principle why a cause of action that has accrued, so as to speak, after the presentation of the original claim form, should not be added by amendment if appropriate. The claim form can still serve as a vehicle for the amendment even if the original cause of action is bad. Some support for this proposition can be found in the passage that we have cited from *Chaudhary v Royal College of Surgeons* [2003] ICR 1512.**

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> **63. We see no reason why the term 'present' should be given any technical meaning. In our opinion, a claim can be 'presented' as well by amendment as by the issue of a separate originating application. If this were not so, in very many cases amendments adding new causes of action would require to be initiated by the presentation of a fresh originating application rather than by amendment. In our opinion, such is neither current practice nor in accordance with common sense nor the law as we understand it."**

That case demonstrates that it is permissible to make an application to amend a claim to include within its events that post-date the presentation of the claim form. That applies, as this Appeal Tribunal stated at paragraph 62, "even if the original cause of action is bad".

19. In my judgement, the Employment Tribunal in the present case materially erred in law in failing to determine the Claimant's application to amend her claim. I consider that, properly construed, the Employment Tribunal's Judgment and Reasons demonstrate that it made no decision on the Claimant's application to amend. It is not referred to in the Judgment, which only relates to the question of time limits. nor is there any analysis of the amendment application's merits in the Reasons. It is correct that the application is referred to in paragraph 5 of the Reasons. Thereafter, however, not only is there no reference in the Reasons to the application to amend but there is also no reference to the events alleged to have taken place in January 2019 that formed the subject of the application. There is also no reference to the law applicable to applications to amend. Insofar as the Employment Tribunal's reference in section E of the Reasons to "the applications presented by both the Claimant and the Respondent" being dismissed is capable of being construed as including the application to amend the claim, then there is, as I have said, no reasoning to support a decision to dismiss the application to amend.

20. The Employment Tribunal was, in my judgement, required to determine the Claimant's application to amend before then addressing the time point that might have arisen in this case. The error made by the Employment Tribunal is, in my judgement, material to its ultimate decision

because the Claimant was contending that her claim form should be amended to include events that had taken place after it was filed. In my judgement, only in the context of there being a determination one way or the other of that application could the Employment Tribunal then go on to consider the issue of whether any other part of the claim was out of time by reason of there being no "conduct extending over a period" and, if so, whether time should be extended. That is particularly so because the Claimant's case was that the more recent events of January 2019 demonstrated a continuous and ongoing sequence of harassment on the part of the Respondent towards her, going back to the earliest of the events with which her claim was concerned. Whilst the Employment Tribunal in its Reasons rejected the Claimant's argument on there being "conduct extending over a period", in doing so it did not address the application to amend or the substance of the January 2019 allegations.

21. Further, if the application to amend had been allowed then even if the Claimant's arguments regarding there being "conduct extending over a period" had still been rejected then the inclusion of the more recent January 2019 allegation in the claim would have been a relevant (and, I emphasise, relevant: not determinative) factor in considering whether to extend time for the earlier allegations insofar as they had been presented out of time.

22. For these reasons, I reject Mr Bennison's submission that the Employment Tribunal was entitled to proceed as it did in not dealing with the application to amend. I also reject his alternative submission that the Employment Tribunal dealt with the substance of the proposed amendment.

23. On this basis alone, in my judgement, the decision of the Employment Tribunal that is challenged must be set aside and the application to amend and the issues relating to whether the claim was in time or whether there ought to be an extension of time remitted for a fresh hearing.

A The parties are agreed that in the event of this ground succeeding then the matter will have to be remitted. It should not be taken, however, as indicating either that the application for amendment ought to have been allowed or that it would have been decisive of any of the other issues that the Employment Tribunal was considering. I am, however, satisfied, for the reasons I have given, that the Employment Tribunal materially erred in law in failing to determine the application to amend.

The Remaining Grounds of Appeal

24. Given that the appeal falls to be allowed on ground 3, for the reasons that I have given, it is strictly unnecessary to determine the remaining grounds of appeal. The matters raised will in any event have to be reconsidered by the Employment Tribunal at the fresh hearing. I shall, however, briefly explain my conclusions in relation to those grounds.

25. In relation to ground 1, although I accept that the Employment Tribunal did consider a number of relevant factors, such as those referred to in **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640 and **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23 and that findings of fact may be made at a preliminary hearing on matters such as the reason for delay (see **Accurist Watches Ltd v Wadher** UKEAT/0102/09/MAA at paragraph 16), I consider that the Employment Tribunal did err in law in at least one part of its reasoning. The Employment Tribunal's consideration of the relevance when deciding whether or not to extend time of the merits of the Claimant's case (see paragraphs 31.1.1 and 31.1.2 of the Reasons and the un-numbered sub-paragraphs thereunder), in my judgement, demonstrates an error of law, because the Employment Tribunal purported to make findings of fact on the merits of the Claimant's allegations.

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26. In particular, at paragraph 31.1.2 the Employment Tribunal stated that the allegations of discrimination and harassment against the Respondent were, based on the evidence put before the Employment Tribunal at the preliminary hearing, "unfounded, on a balance of probabilities". The Employment Tribunal was not, however, in determining whether an extension of time should be allowed conducting the trial of the Claimant's case on its merits. There was inevitably much evidence not before the Employment Tribunal at the preliminary hearing. For example, the Claimant's witness statement concerned the issues of the reasons for delay and the application to amend, not the underlying events. There is a material difference between a finding that, for example, a Claimant has no realistic prospect of establishing their claim, which is relevant in a preliminary context, and a positive finding that it is "unfounded, on a balance of probabilities" based on the evidence given at a preliminary hearing, something which is addressed in the context of strike-out applications in cases such as **Short v Birmingham City Council** UKEAT/0038/13/DM at paragraph 5.

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27. I consider that the Employment Tribunal erred in law in adopting this approach to the evidence before it in the context of the application to extend time on a preliminary hearing. The Employment Tribunal might have concluded that it was an obvious and plain case in which the Claimant's claims could not succeed (see, for example, **Anyanwu v South Bank University Student Union** [2001] ICR 391), but that is not the basis upon which it made its findings when addressing the merits of the Claimant's case. I reject Mr Bennison's submission that the Employment Tribunal was doing no more than conducting a critical examination of the Claimant's case at its highest (see, for example, **E v X, L and Z** UKEAT/0079/20/RM and UKEAT/0080/20/RM at paragraph 50(9)).

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28. In relation to ground 2, I would not have allowed the appeal on this ground. Not without some misgivings, I accept Mr Bennison's submission that the Employment Tribunal's reasoning

does demonstrate that it considered the Claimant had not established a *prima facie* case of there being an act extending over a period and therefore that its decision was in accordance with the approach in the cases cited to me, such as **Commissioner of Police for the Metropolis v Hendricks** [2002] EWCA Civ 1686 and **Aziz v FDA** [2010] EWCA Civ 304, as explained by this Appeal Tribunal more recently in the case of **E v X, L and Z** to which I have referred. The crucial passage of the Reasons here is where the Employment Tribunal held that the professional suitability proceedings commenced by the University "were not […] acts which *could* be described as continuing acts of the Respondent" [emphasis added]. However, as I have already indicated, in so concluding the Employment Tribunal did not address the more recent allegations made by the Claimant relating to January 2019, and in any event the issue will have to be determined afresh by the Employment Tribunal at the further hearing for the reasons I have already given. I should not be taken as expressing any view on the outcome at that hearing one way or the other.

29. In relation to ground 4, during the course of argument it transpired there was some difference between the parties as to what had actually been said to the Employment Tribunal at the preliminary hearing. It is agreed the Respondent did not produce any evidence relating to its inability to contact Ms Walker and insofar as the matter was addressed before the Employment Tribunal it was by way of submissions only. Mr Kiska's recollection and view is that all that was said was that Ms Walker was no longer in the Respondent's employment (or, rather, as Mr Bennison indicated to me, contracted to work for the Respondent: it being the Respondent's position she was a contractor and not an employee). Mr Kiska submitted that the Employment Tribunal impermissibly concluded from that fact alone she would be unable to give evidence at the final hearing of the Claimant's claim. Mr Bennison did not dispute the proposition put forward by Mr Kiska in this latter respect; instead, he disputed its premise, contending that it had been

positively stated to the Employment Tribunal at the preliminary hearing that the Respondent was no longer able to contact Ms Walker. Had the appeal turned on this ground it might have been necessary to adjourn the hearing in order to investigate what had actually been said to the Employment Tribunal. As it is, however, it is unnecessary to do so. I observe that this issue ought to have been apparent well before the full hearing of the appeal and that the parties ought to have co-operated either to seek to agree between themselves what had been said or to seek directions in that regard from this Appeal Tribunal. As it is, however, the point is not material to the outcome of the appeal.

30. In relation to ground 5, I would not have allowed the appeal on this ground. I do not consider that it was not open to the Employment Tribunal to hold that the passage of time since the relevant events (having found there was not conduct extending over a period) had given rise to prejudice to the Respondent, or that the Respondent would have had to investigate matters going beyond the scope of any involvement in the University proceedings and its pleaded case in the ET3 response. Again, however, as with ground 2, this will be a matter for the Employment Tribunal to determine afresh at the further hearing, and I should not be taken as indicating one way or the other what conclusion the Employment Tribunal might reach on this point at that hearing.

Conclusion and Disposal

31. I therefore allow the appeal on ground 3. I remit the Claimant's application to amend her claim and the questions of whether the claim was in time and as to any extension of time to the Employment Tribunal for determination afresh. The parties were in agreement that if the appeal were to be allowed on this basis the case should be remitted to a different Employment Judge. Having regard to the guidance given by this Appeal Tribunal in **Sinclair Roche & Temperley v Heard and Anor** [2004] IRLR 763 I agree with the parties that in the context of this particular

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