RESERVED JUDGMENT

EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
MS M TURLAY	**V**	**AMAZON UK SERVICES LIMITED**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY ON: 15 & 16 JULY 2021

BEFORE: EMPLOYMENT JUDGE POVEY (SITTING ALONE)

REPRESENTATION:
FOR THE CLAIMANT: IN PERSON
FOR THE RESPONDENT: MS MOTRAGHI (COUNSEL)

RESERVED JUDGMENT & ORDERS

1. The Claimant's application to amend her claim of bullying to one of race discrimination is refused.

2. The Tribunal does not have jurisdiction to determine claims based solely upon allegations of bullying. As such, the claims of bullying are struck out.

3. The claims of direct discrimination on the basis of sex were brought out of time and not within a period considered just and equitable. The Tribunal does not have jurisdiction to determine them and they are struck out.

4. The claim of direct discrimination on the basis of disability was brought out of time and not within a period considered just and equitable. The Tribunal does not have jurisdiction to determine it and it is struck out.

5. In respect of the claim of discrimination based upon a failure to comply with a duty to make reasonable adjustments:

RESERVED JUDGMENT

a. The claim relying upon the PCP of "Ignoring my statement about Disability" was brought out of time and not within a period considered just and equitable. The Tribunal does not have jurisdiction to determine it and it is struck out.

b. The claims relying upon the PCPs of "Ignoring requests for proper accommodation for Disabled person", "Ignoring any questions related to request of accommodation for disabled person" and "Employer reduced working hours because of my health issues" were brought in time and the Tribunal has jurisdiction to determine them (the Reasonable Adjustment Claims').

c. The relevant period for the Reasonable Adjustment Claims is 10 March 2019 to date ('the Relevant Period').

6. The Claimant was a disabled person (as defined by section 6 of the Equality Act 2010) throughout the Relevant Period by reason of Type 2 Diabetes, Hepatitis B & E and Pancreatitis.

7. The Respondent's applications for a strike out or deposit order are not made out and are dismissed.

8. There will be a further preliminary hearing to consider what further case management is required to prepare the Reasonable Adjustment Claims for final hearing. The parties will be notified of the date, time and format of the hearing in due course.

REASONS

Background

1. The Claimant is an employee of the Respondent and has been since November 2016. She brings claims alleging various acts of discrimination based, initially, upon sex and disability. She also seeks to amend her claims to include race discrimination.

2. The Claimant commenced ACAS early conciliation on 25 August 2020. She issued her claim in the Employment Tribunal ('the Tribunal') on 8 October 2020. The Respondent resist the claims in full.

3. Following a preliminary hearing before Judge Brace on 13 January 2021, this case was listed for a two day hearing on 15 & 16 July 2021 to determine the following preliminary issues, the details of which are contained at Paragraph 6 of Judge Brace's order of 13 January 2021 ('the Issues):

RESERVED JUDGMENT

3.1. The Claimant's application to amend her claim to include a complaint of race discrimination.

3.2. Whether any of the complaints were presented to the Tribunal out of time and, if so, whether they should be allowed to proceed.

3.3. Whether the Claimant is a disabled person.

3.4. Any other case management as necessary.

4. That preliminary hearing came before me. On the second day (16 July 2021), the Claimant complained of feeling unwell. As such, it was agreed with the parties that the hearing would be adjourned, they would be afforded the opportunity to submit written submissions and thereafter, I would determine the Issues set out above on the basis of the evidence and submissions received and without a hearing.

5. The following case management directions were made by consent:

5.1. By no later than 30 July 2021, the Respondent may send to the Tribunal and the Claimant any further submissions it wishes to rely upon in respect of the Issues.

5.2. By no later than 27 August 2021, the Claimant may send to the Tribunal and the Respondent any written submissions she wishes to rely upon in respect of the Issues.

5.3. Thereafter, the Issues will be determined by Judge Povey without a hearing. The parties will be notified of the outcome in due course.

6. The Tribunal received written submissions from the Claimant and the Respondent in accordance with the above directions. The matter was referred back to me to determine the Issues accordingly. This is that determination.

7. In addition to the written submissions, I also had regard to a paginated bundle of documents ('the Bundle'), as well as the Claimant's oral evidence which she had been able to provide before feeling unwell.

Relevant Law

8. In respect of the time limits for bringing discrimination claims, section 123 Equality Act 2010 ('the EqA 2010') provides as follows:

> (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.

…

(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.

9. The effect of section 140B of the EqA 2010 is to disregard any period of ACAS early conciliation from the calculation of when the three month period in section 123(10(a) expires.

10. Section 6 and Schedule 1 of the EqA 2010 defines what it means to be disabled for the purposes of claims alleging disability discrimination.

Documents & Legal Advice

11. The extent of the legal advice obtained by the Claimant prior to starting her claims was examined in the course of the oral hearing. The manner in which that evidence was presented and examined was the source of objection by the Claimant, both in the course of the hearing and in her subsequent written submissions (at Paragraphs 35 & 36).

12. Specifically, the Claimant objected to some of the questions she was asked by Ms Motraghi in cross-examination and to some of the documents contained within the Bundle.

13. The Claimant's objections to the documents relied upon by the Respondent were explored at the outset of the hearing. The Claimant claimed that there were 10 documents which she claimed to have been told in the past had either been removed from her file or had been lost. The Claimant did not agree to these documents now being relied upon by the Respondent

14. As I explained to the Claimant at the time, there was a difference between whether documents could be included in evidence and what weight should be attached to them in reaching my decision. The Claimant did not get to decide what documents the Respondent could rely upon (in the same way, the Respondent cannot decide what documents the Claimant wants to rely upon). The documents complained of clearly existed and the Respondent wanted to rely upon them. The objections raised by the Claimant were better directed to how I should treat those documents in reaching my decisions and I explained to her that she would have an opportunity to address me on that when she made her submissions (which, as explained above, became written submissions following the early conclusion to the oral hearing).

15. I therefore allowed the documents to remain in the Bundle.

16. The Claimant also objected to a number of questions that she was asked in cross-examination. Her objections were primarily to questions put by Ms Motraghi about the frequency and timing of the legal advice received by the Claimant. The Claimant had already stated in her oral evidence that she had received legal advice about her employment matters. Ms Motraghi's questions sought further details.

17. As I explained to the Claimant, the nature of the questions was relevant to the issues I had to decide and it was, in my judgment, appropriate for Ms Motraghi to ask them. At the same time, I also reminded the Claimant that she was under no obligation to reveal the details of the legal advice received. That remained confidential. However, given that I was tasked with determining applications to amend the claim and extend time, when and how often the Claimant received legal advice was relevant.

18. The Claimant's evidence was that she had obtained legal advice on a number of occasions. She referred specifically to taking advice before starting her claims, during the preparation of her claims and after the hearing before Judge Brace. However, she was unable to recall how long it was before starting her claims that she had obtained advice. Some assistance was provided by a letter written by the Claimant to the Respondent's then-CEO, Jeff Bezos and dated 31 January 2020. In it, the Claimant raised a number of employment-related concerns. She also stated the following (at [320] of the Bundle):

> I write this letter with the advice of a lawyer.

19. In addition, the Claimant explained in her oral evidence that she had received legal advice on the contents of her ET1 claim form, had spoken to friends at the Ministry of Justice and researched information regarding the Tribunal process online. Although she was unable to recall when she had taken any of these steps, the Claimant was able to confirm, after consulting her records, that she also had a meeting with a lawyer on 6 May 2020.

Amendment of the Claim

20. At the hearing before Judge Brace, the Claimant alleged that her bullying claim was based upon her nationality and actually constituted complaints of direct race discrimination. She therefore wished to amend her claim to include race discrimination.

21. In both her ET1 and at the hearing before Judge Brace, the Claimant relied upon two periods of alleged bullying/race discrimination:

    21.1. The rejection of job applications in or around November 2017

21.2. Alleged treatment between November 2015 to October 2016, specifically by fellow employees, named as Sian Jenkins, Simon Rees and Zoltan Kandor.

22. Further to Judge Brace's directions, the Claimant provided the following explanation for why she had not included any prior reference to race discrimination in her ET1 (at [60] of the Bundle):

> I was bullied by Sian Jenkins and accused about doing things which I didn't do. I didn't know, that bullying because of nationality Is equal to race discrimination. I was not aware that very important is to tell Tribunal why I was bullied. Because of stress related to the situation of race discrimination I have had first episode of recurrent Pancreatitis in 2016. I am asking the Tribunal to amend my claim to include a complaint of direct race discrimination.

23. In the course of her oral evidence and in the written submissions that followed, the Claimant alleged that the race discrimination had never stopped and was on-going (see Paragraph 16 of the Claimant's written submissions).

24. In summary, I understood the Claimant's submission for why her application to amend her claim should be allowed to be two-fold – she was unaware that bullying because of her nationality constituted race discrimination and her claims were not out of time because the discriminatory treatment was a continuing act which had never stopped.

25. I had a number of difficulties with those submissions:

25.1. The Claimant had never previously claimed that the treatment she complained of was because of her nationality. Not only was it absent from her ET1, it was also absent from complaints she had raised with the Respondent prior to the current Tribunal claims. The Claimant's allegations in this regard had already been the subject of a grievance process by the Respondent, following an earlier letter the Claimant wrote to Jeff Bezos in April 2019 (at [286] of the Bundle). The Claimant's grievances were not upheld (per the Respondent's letter of 10 May 2019 at [292] of the Bundle). The Claimant referred in her letter to Mr Bezos to being bullied "*for no reason*". In her oral evidence, the Claimant sought to allege that the reference to bullying "*for no reason"* was obviously a reference to nationality. I did not agree. The shortcomings in that assertion were compounded by the absence of any reference in the letter or elsewhere to adverse treatment because of nationality (compared with clear complaints of alleged adverse treatment because of the Claimant's sex). It is one thing for the Claimant to say that she was not aware that unfavourable treatment because of nationality was a form of race discrimination under the EqA 2010. But that fails to explain why there was no evidence that the Claimant ever alleged,

prior to the hearing before Judge Brace on 13 January 2021, that the alleged unfavourable treatment was because of the Claimant's nationality.

25.2. The Claimant at various times has had the benefit of legal advice and assistance (per her oral evidence, above). If she had explained that she believed that she was subject to unfavourable treatment because she was Polish, she would have no doubt been advised that such treatment could constitute discrimination on the grounds of race.

25.3. The definition of the protected characteristic of race is at section 9 of the EqA 2010. Pursuant to Section 9(1)(b), race explicitly includes nationality. Given the legal advice received and the steps taken of the Claimant's own volition to inform herself of her claims (e.g. talking to friends at the Ministry of Justice and on-line research), it was far from clear why the Claimant had not appreciated (or had not been advised) that less favourable treatment because of nationality was race discrimination. This seemed all the more puzzling as the claims pursued include sex and disability discrimination, both also pursuant to the EqA 2010.

25.4. As stated above, it was only in the course of her oral evidence that the Claimant expressly claimed that the alleged race discrimination was a continuing act. She went on to claim that she had in fact stated that it was a continuing act in her ET1. However, despite a number of requests, she was unable to identify where, in terms, she had ever claimed the treatment was continuing. Rather, she went on to claim, variously, that the term bullying implied a continuing act, that her claim was within time because her complaints had been investigated by the Respondent, before again claiming that her ET1 included reference to the unfavourable treatment as a continuing act. Neither the ET1 nor the grounds of claim accompanying it stated, in any reasonable or objective sense, that the allegations of bullying (from which the race discrimination claims arise) were anything other than confined to two specific periods of time**.**

25.5. In addition, Judge Brace went through the claims and identified the two periods of alleged bullying (see, variously, [40] of the Bundle at paragraph 50; [44] of the Bundle at paragraph 1.3 under The Complaints; and [46] of the Bundle at paragraph 6.1). Judge Brace also gave the parties 14 days to respond if the list of issues was wrong or incomplete (see [36] at paragraph 16). The Claimant had not claimed at the hearing with Judge Brace that the bullying/race discrimination was on-going and did not respond to the invitation to amend the list of identified issues.

26. In effect, this was a bare assertion by the Claimant that the bullying/race discrimination was a continuing act. She failed to explain why she had not corrected Judge Brace, either at the time or within the following two weeks. If the Claimant really believed it was so obvious, it was reasonable to assume that she would have been clearly alerted to the fact that Judge Brace had only recorded the two periods in 2015-16 and the recruitment in 2017 as being the basis of the claim.

27. There is nothing presented to warrant expanding the Claimant's application to amend beyond the issues identified by Judge Brace. Despite the assertion, made very late in the day, that the alleged discrimination is continuing, nothing of substance has been presented which supports that contention. I have therefore determined the amendment application on the basis of the issues and claims as identified by Judge Brace.

28. Whether to allow the Claimant to amend her claim is at the discretion of the Tribunal. Central to determining how to exercise that discretion is a consideration of the relative injustice and hardship caused to the parties in either granting or refusing the amendment.

29. The Claimant relies upon alleged unfavourable treatment which occurred a number of years ago. Even if they had been originally pursued on the grounds of race discrimination, they have been brought significantly out of time. That is highly relevant when assessing the relative impact of allowing or refusing the amendment. As found above, the Claimant has had the benefit of legal advice at various times during her employment. If she had told her legal advisors that she believed she was mistreated because of her nationality, any competent employment lawyer would have advised that the same had the potential to be race discrimination. More importantly, having had the benefit of legal advice, it is far harder for Claimant to claim, as she now does, that she was unaware that bullying on the grounds of nationality constituted race discrimination.

30. Even if the amendment were allowed, the claims would continue to be out of time. The Claimant has failed, in my judgment, to adequately explain why it would be just and equitable to allow her to pursue those claims. There is no explanation for why they were not pursued earlier. There is no explanation for why she has chosen to pursue them now. Her claim to be ignorant of the correlation between nationality and race does not stand up to scrutiny, especially in the wake of receiving legal advice. In short, even if the claims of bullying were amended to claims of race discrimination, they would in all likelihood be struck out for being brought out of time. The Claimant would, in effect, be in no different position.

31. In contrast, were the claims of race discrimination allowed to proceed, the Respondent would be tasked with responding to allegations and claimed events which took place, at the very latest, almost three years and five years respectively before the Claimant brought her claims. That self-evidently would place the Respondent in a difficult position, having to

investigate events that were so historic, from witnesses whose memories would be significantly impeded by the passage of time (including some who would have to be tracked down as they are no longer in the Respondent's employment).

32. For all those reasons, the prejudice and injustice likely to be caused to the Respondent of allowing the amendment outweighs that which would be caused to the Claimant of refusing it. I therefore refuse the Claimant's application to amend her claims of bullying to claims of direct race discrimination.

33. It was not suggested by the Claimant that her claims of bullying were linked to any other potential cause of action for which the Tribunal has jurisdiction. As the application to amend has been refused, the Tribunal has no jurisdiction to consider the claims of bullying as they stand and they are, as a result, struck out.

Time: Discrimination Complaints

34. The Claimant pursues claims of direct sex discrimination, direct disability discrimination and a failure to make reasonable adjustments (per Paragraphs 59 – 61 of Judge Brace's order at [41] –[42] of the Bundle).

35. The Claimant began early conciliation on 25 August 2020. It ended on 25 September 2020 and the claims were presented to the Tribunal on 8 October 2020. Given the effects of section 140B of the EqA 2010, any claim which relies upon an allegation of discrimination occurring before 26 May 2020 will be out of time (unless the same is part of a continuing act).

Sex Discrimination Claims

36. The direct sex discrimination claims pursued by the Claimant were again set out by Judge Brace, at Paragraph 57 of her order (at [41] of the Bundle):

> The Claimant confirmed that her complaints, in relation to the unsuccessful application for the role of IT Support Technician in September 2017 and in relation to the unsuccessful application for a role as a Mechatronics Maintenance Apprentice in April 2019, were complaints of direct sex discrimination (s.13 EqA 2010).

37. It followed that both claims were brought out of time, by over two and half years and one year respectively.

38. The Claimant was notified that she had been unsuccessful in her application for the IT role by email on 22 September 2017 (at [220] of the Bundle). Later the same day, the Claimant emailed her response (at [219], emphasis added):

RESERVED JUDGMENT

> Thank you. I'm really surprised that I have been unsuccessful in the recruitment process. I study IT. I have documents that my study diploma is accepted in the U.K. I know how is computer build. I know how to repair computer, mobile phone (software and hardware), how to diagnose if issue is simple or not. I'm really surprise that is not enough. Because I'm girl? And in IT department are only men? I know that is not normal that I'm more interested with technology than with fashion and sorry about that.

39. In her oral evidence, the Claimant stated that she had not been surprised by the outcome and had expected to be discriminated against because she was a woman trying to secure a job in IT.

40. In respect of the Mechatronics application, the Claimant was notified on 12 April 2019 that the assessment centre was fully booked and no further applications were being accepted. In response, on the same day, the Claimant asked the following (at [290] of the Bundle, emphasis added):

> I past both test (English and Maths) and because assessment center [sic] session next week is now fully booked wait list is closing down? What about the equal treatment of applicants?

41. The Claimant also sent a letter to Jeff Bezos on 12 April 2019 (at [286] – [289] of the Bundle). In it, she made a number of refences to recruitment, including the following (emphasis added):

> …
> Few months later I read news: Specialists had been building computer programs since 2014 to review resumes in an effort to automate the search process and Amazon ditched AI recruiting tool that favored [sic] men for technical jobs. It was really big surprise for me or maybe not. I was only one girl who applied for IT position at this time in CWLI.
> …
> I was applying last month for Mechatronics Maintenance Apprentice at CWLI. I have got very interesting answer: We are sorry to inform you that that the assessment center [sic] session next week is now fully booked and we are closing down the wait list. Your application will not be considered further this year.
>
> Amazon doesn't care who is applying? Assessment center [sic] session next week is now fully booked and this is reason for closing down the wait list? Is this equal treatment for all applicants? How Amazon Recruitment Team can rejected application without assessment, where they can check my skills. Or because this job is mens [sic] job?
> …

42. Unlike the alleged race discrimination claims, the Claimant had been clearly aware from the outset that refusing to appoint someone to a job role because they are a woman is discriminatory. The evidence also showed that, when she was rejected for each post, she believed that her gender had played a part in the Respondent's decisions.

43. In addition, and as detailed above, the Claimant received legal advice at various times prior to starting her claims. In her oral evidence, when asked why she had not brought either of the sex discrimination claims earlier, the Claimant stated that she was pursuing her concerns internally and in accordance with the Respondent's policies and procedures.

44. In addition, and again apparently for the first time, the Claimant also suggested in her oral evidence that these were on-going acts of discrimination. She re-stated that belief in her written submissions (at Paragraph 20) and relied upon a printout of her job application history with the Respondent for the period from April 2017 to February 2020 (at [565] – [566] of the Bundle). The printout recorded 13 posts the Claimant had applied for. One was recorded as withdrawn and the other 12 recorded that she was "*No longer under consideration*." As I understood the Claimant's submissions, she was alleging that she had been unsuccessful in some or all of these job applications on the basis of her sex.

45. The Claimant's written submissions provided no detail as to which additional applications she believed gave rise to a claim of sex discrimination, still less what evidence she relied upon in support of such a contention. In addition, despite being explicitly afforded an opportunity by Judge Brace to clarify or amend any of the issues identified and recorded at the previous hearing, the Claimant did not do so. I am reminded that at that hearing, the Claimant had been explicit with Judge Brace, providing clear detail of the two instances of alleged sex discrimination relied upon. If the Claimant genuinely believed that there were other instances of sex discrimination, why did she not say so, either to Judge Brace during that hearing or subsequently per Judge Brace's directions? The Claimant clearly had an understanding of what sex discrimination can be – being refused an appointment because she is a woman – and had, in her mind, experienced such discrimination on two occasions. It was difficult to understand why these further allegations were only being raised now and, unfortunately, the Claimant provided no explanation.

46. As such, I was unable to find that the sex discrimination claims being pursued by the Claimant constituted on-going acts, such that they had been presented in time (on the basis of being conduct extending over a period, per section 123(3)(a) of the EqA 2010). It was therefore necessary to consider whether the direct sex discrimination claims had been commenced before the end of a period that was just and equitable (per section 123(1)(b) of the EqA 2010).

47. As noted above, the Claimant's explanation for the delay in bringing these claims was her adherence to the Respondent's internal policies and procedures. The Respondent treated the Claimant's letter of 12 April 2019 to Jeff Bezos as a grievance. A hearing was held on 19 April 2019 and the Respondent wrote to the Claimant on 10 May 2019, with details of the outcome of the grievance process (at [292] – [297] of the Bundle). The scope of the grievance included (but was not limited to) the allegations of

sex discrimination detailed above (the same grievance procedure addressed the Claimant's allegations which formed the basis of her claims of bullying and race discrimination, discussed above).

48. In respect of the sex discrimination claims, the Respondent explained how the successful candidates had been chosen for the posts applied for by the Claimant. None of the Claimant's grievances were upheld. The Claimant did not exercise the right of appeal afforded to her in the letter.

49. As set out above, the Claimant appeared to be of the view that she had been discriminated against on the grounds of her sex soon after each recruitment exercise. But even taking the Claimant's case at it's highest, there remains no explanation for why, even in the face of her grievance being dismissed, she waited a further 15 months before pursuing these claims (when she commenced ACAS early conciliation on 25 August 2020). As the sex discrimination claims were brought outside the usual three month time limit, it was for the Claimant to explain the delay. The failure to do so was compounded by the Claimant's access to legal advice at various stages prior to bringing these claims.

50. In conclusion, the Claimant:

    50.1. Was of the opinion that she had been unfairly treated by the Respondent because she was a woman shortly after two recruitment exercises in September 2017 and April 2019;

    50.2. Was aware in May 2019 that her concerns about those recruitment exercises had not been upheld by the Respondent;

    50.3. Obtained legal advice before beginning legal proceedings against the Respondent; and

    50.4. Failed to begin that process until August 2020.

51. I have also considered the balance of prejudice between the Claimant and the Respondent. If I extend time and permit the claims to proceed, the Respondent will be faced with allegations which are historic and which it was entitled to consider closed following the grievance process, the Claimant's failure to exercise her right of appeal and the further delay in bringing these proceedings. In addition, the Claimant's allegations, both then and now, appear to be based solely on the fact that her applications were unsuccessful. In contrast, certainly in the course of the grievance process, the Respondent provided a degree of clarity and explanation for why those applications had in fact been unsuccessful. In addition, Ms Motraghi explained in her written submission that a number of key witnesses are no longer employed by the Respondent.

52. In contrast, if I do not extend time, the Claimant loses the right to bring these claims against the Respondent.

53. Having regard to all those factors, I concluded that the direct sex discrimination claims had not been brought within a period which was just and equitable. The claims were brought significantly out of time. The Claimant has failed to provide an explanation for why she waited so long after the outcome of the grievance process to bring these claims. She has had the benefit of legal advice and yet the claims were still brought out of time with no adequate explanation and no details of the alleged discrimination, save for bare assertions. Whilst the Claimant will lose the right to pursue these claims, the prejudice to the Respondent of having to defend such stale claims places the balance of prejudice against the Claimant and in favour of the Respondent.

54. As the claims were not brought either within three months or such other period as was just and equitable, the Tribunal has no jurisdiction to consider them and they are struck out.

Disability Discrimination Claims

55. The Claimant informed Judge Brace that she was disabled by reason of hepatitis and Type 2 diabetes (at [35] of the Bundle). Further to Judge Brace's directions, the Claimant further alleged that she had a number of impairments which were related to hepatitis and diabetes, namely pancreatitis, glomerulonephritis, hyperlipidaemia, blood hypertension and ocular hypertension (see, for example, at [71] and [137] – [138] of the Bundle).

56. The Respondent accepted that the Claimant is disabled (as defined by section 6 of the EqA 2010) by reason of hepatitis and diabetes but did not concede that the other conditions listed above met the definition of disability. The Respondent also accepted that the Claimant was disabled by reason of hepatitis throughout her employment. The date upon which the Claimant met the definition of disability by reason of diabetes remained in issue.

57. However, the focus of the Respondent's submissions were that whether or not the Claimant was disabled by reason of other conditions was of secondary importance, since the allegations of disability-related discrimination were brought significantly out of time.

58. The Claimant alleged that she was subjected to direct disability discrimination in September 2018, when she was given a warning letter and a letter of concern regarding her continued absence from work. This followed a formal health review meeting between the Claimant and the Respondent on 11 September 2018 (see, for example, [265] of the Bundle). At the time, the Claimant had been absent from work for health reasons since February 2018.

59. As with her sex discrimination and bullying complaints, the Claimant raised the issuing of the letter of concern in her grievance hearing held on 19 April 2019. The grievance outcome letter of 10 May 2019 included the following information regarding the absence review process (at [294] – [295] of the Bundle):

    59.1. The Claimant was given a right of appeal against the letter of concern at the time it was issued in September 2018, which she did not exercise.

    59.2. The Claimant stated that she believed that she should not have been issued with the letter of concern because she had a disability.

60. As with the sex discrimination claims, and again taking the Claimant's claim at its highest (in that she wished to pursue an internal grievance before contemplating legal proceedings), the Claimant failed to provide an explanation for why she took no action in response to the May 2019 grievance outcome for a further 15 months (when she commenced ACAS early conciliation). The Claimant was of the opinion that she had been treated unfavourable by reason of being disabled, at least by the time of the grievance hearing in April 2019. Again, and by her own admission, the Claimant sought and obtained legal advice prior to starting these proceedings.

61. In her oral evidence, the Claimant again alleged that her claim of direct disability discrimination, which began with the letter of concern in September 2018 was part of an on-going problem, although I was not aware of any other allegations of direct disability discrimination being advanced by the Claimant. She did not add to the direct disability discrimination claims identified by Judge Brace (at [44] of the Bundle). As such, I took that to be a reference to her other disability-related claims, namely that the Respondent failed in its duty to make reasonable adjustments.

62. Further to Judge Brace's directions, the Claimant provided further details of the reasonable adjustment claims in the form of a schedule, to which, as directed, the Respondent added its comments and observations (the completed schedule appears at [130] – [135] of the Bundle).

63. The Claimant detailed four alleged provisions, criterion or practice ('PCP') in her schedule. On a proper reading of them, it appeared that three of the four PCPs were related to the reduction of the Claimant's hours from 40 to 20 per week. The other PCP appeared to relate to adjustments which the Claimant believed the Respondent should have made in the workplace but failed to do so. Three of four PCPs alleged a failure to act by the Respondent.

64. Two of the PCPs were described as occurring from June 2017 and to be ongoing. One was alleged to have occurred in October 2018 and the other was undated.

65. In response, the Respondent made the following observations:

    65.1. Leon Thomas, who was cited in the schedule as someone who either witnessed or perpetrated alleged disadvantage, left the Respondent's employment on 1 June 2018.

    65.2. The Respondent did reduce the Claimant's working hours from 40 to 20 hours, with effect from 10 March 2019 (as was notified to the Claimant in a letter dated 11 March 2019, at [283] of the Bundle). This was in line with an OH recommendation of 11 July 2018 (at [260] – [262] of the Bundle).

    65.3. It must have been clear to the Claimant when her various grievances were not upheld on 10 May 2019 that the Respondent would not be acceding to any of her further requests (such that had been made).

66. It follows from the above that, as the Respondent contended and taking the schedule at its highest:

    66.1. The alleged disadvantage under the first PCP could not have happened later than 1 June 2018 (since Mr Thomas left the Respondent's employment on that date).

    66.2. The second, third and fourth PCPs all related to the reduction in the Claimant's hours, which she was aware of following the OH meeting in July 2018 and, at the very latest, was aware of when her contract was changed with effect from 10 March 2019.

    66.3. In the alternative, the Claimant was aware from 10 May 2019 that the acts and omissions she alleged would not be addressed in her favour (upon her other grievances not being upheld).

67. As I understood it, the Claimant continues to be employed at 20 hours per week (although she has been on long-term sickness absence since February 2020). The Respondent's position from the outset was that the reduction in hours was first raised by the Claimant and the changes to her working hours were with the Claimant's consent (see Paragraph 6.6 of the Grounds of Resistance at [28] – [29], as well its response to the schedule at [135] of the Bundle). If the Claimant took issue with that fact, it was not clear in any of her evidence (whether written or oral) or her written submissions. I was similarly not aware of the Claimant disputing that Mr Thomas' employment with the Respondent ceased in June 2018.

68. The first reasonable adjustments allegation, on that basis, was brought significantly out of time and it is difficult to see how, in the manner in which it is presented (relating as it does to the conduct of a single, fellow employee who left office on 1 June 2018) it could be construed in any sense as a continuing act. Given the time that has elapsed, the findings referred to above regarding the Claimant's access to legal advice and her ability to pursue complaints and grievances with the Respondent, I concluded that the first reasonable adjustment allegation was not brought either within three months or such other period as was just and equitable. As such, the Tribunal has no jurisdiction to consider it and it is struck out.

69. However, as detailed above, the Claimant is still employed for 20 hours per week. Is there a continuing act of alleged discrimination, for the purposes of section 123 of the EqA 2010 (as opposed to an act which has continuing consequences)?

70. The Claimant appeared to suggest that she had subsequently expressed to the Respondent a desire to return to full-time employment and the Respondent had unreasonably failed to accede to her request (see the schedule at [132] – [134] of the Bundle). In her detailed Schedule of Loss, the Claimant included the following claims (at [379] of the Bundle):

> The Claimant should working full time as requested, with reasonable adjustment as requested since 29.08.2017/First Occupation Health Review.
>
> The short-term reduced working hours were accepted by the claimant as an adaptation stage upon return to work.
>
> The Claimant should working full time in IT department as result of application and reasonable adjustment since 01.01.2018.

71. In her letter to Jeff Bezos of 12 April 2019, the Claimant indicated that she was not ready to return to full-time work although she hoped to do so one day ("*I am waiting for another chance to apply for IT or similar position in CWL1 and if I will be ready I will go back for fulltime work"* at [288] of the Bundle).

72. In the course of an informal health review on 1 July 2020, the Claimant was recorded as expressing a wish to be transferred from her current post, saying the following (at [333] of the Bundle):

> Amazon policy I could be transferred and not work in pick pack. I can still work in Amazon but I asked if I can be transferred to an office I can work 10 hours but have health problems.

73. An occupational health ('OH') report of 10 July 2020 concluded that the Claimant was unfit to return to work due to her multiple health conditions (at [336] of the Bundle). A further review on 31 August 2020 advised that the Claimant was "*not fit for work in any capacity at present due to her*

poor physical resilience" before including the following (at [340] of the Bundle):

> I recommend that if operationally feasible, on Maria's eventual return to work, she be placed on an area that is line with her functional ability... This will hope to prove as a supportive measure in avoidance of exacerbating her current diagnosed health concerns, allowing her to be productive within the working environment. Maria's health concerns are longstanding and though be become controlled potential relapses of her symptoms may occur in the future, therefore you may wish to look at this being a long-term adjustment. Such actions should help to facilitate a safe, supportive and sustainable return to work and prevent Maria's employment having a negative impact on her health and well-being going forward.

74. The same report also included the following (at [341] of the Bundle):

> Would a change of working pattern to 5 hours per day facilitate a return to work for Maria?
>
> It is apparent that Maria feels she is not physical able to do her contracted hours on the department which she works due to the physical ability needed to perform this role well. Therefore, I recommend that if operationally feasible, on Maria's eventual return to work, she be placed on an area that is line with her functional ability, as listed above. This will hope to prove as a supportive measure in avoidance of exacerbating her current diagnosed health concerns, allowing her to be productive within the working environment. Maria's health concerns are longstanding and though be become controlled potential relapses of her symptoms may occur in the future, therefore you may wish to look at this being a long-term adjustment.
>
> What other TWA's are recommended if Maria was to return to work?
>
> It would be prudent to allow Maria to have Micro rest breaks when she feels it necessary if her symptoms become exacerbated.

75. A further referral to OH resulted in a report dated 24 November 2020, which included the following (at [348] of the Bundle)

> Based on the information available today, it is my opinion that Maria is fit to return to work with some adjustments to be considered. I would recommend for management to provide alternative duties that allow her to alternate between standing and sitting to alleviate some of the symptoms caused by prolonged sitting/standing. I would also suggest a phased return over a 3 week period to allow her to gradually rehabilitate back into work considering the amount of time she has been absent from work.
> …
> Maria perceives that her ill health has been caused by her work It Is for management to explore this and find ways in which she can be helped.
> Her anticipated date of return to work Is the 1st of Dec 2020.
> I have recommended alternative duties on a long term basis and a phased return for 3 weeks starting with 50% of her normal contracted hours.

> Maria informs me that she would like to work full time hours, it is for management to decide if this is operationally feasible.
> …
> I do not believe that the associate has a health condition that could lead to impaired performance.

76. In my judgment, there was evidence to support the Claimant's contention that the issue regarding whether or not the Respondent is under a duty to make reasonable adjustments to facilitate her return work has been continuing (and, as I understand, is continuing). As such, I am satisfied that this aspect of the Claimant's reasonable adjustments claim has been brought in time.

77. However, in light of the evidence presented, the claim needs to be amended and clarified. In effect, the second, third and fourth alleged PCPs in the Claimant's schedule broadly relate to the same allegation – that the Respondent is under a duty to make reasonable adjustments in the workplace to accommodate the Claimant's disabilities and facilitate her ability to work full-time. In addition, the Respondent could not have been subject to that duty earlier than 10 March 2019, when the Claimant's hours were first reduced.

78. Although this aspect of the reasonable adjustments claim has been brought in time, I was unable to conclude that it was linked to the allegation of direct disability discrimination, such as to bring that claim in time. There was no correlation between the events giving rise to the claim of direct disability discrimination (the issuing of a letter of concern in September 2018) and how the Respondent has managed the Claimant's hours and working roles since March 2019. It follows that the direct discrimination claim is not, as alleged, part of a continuing act.

79. Given my findings above as to the delay in bringing the claim, the failure to provide any meaningful explanation for the delay (certainly since she was notified of the outcome of the grievance in May 2019) and the receipt of legal advice, I concluded that the direct disability discrimination claim had not been brought within a period which was just and equitable. The claim was brought significantly out of time. The Claimant has failed to provide an explanation for why she waited so long after the outcome of the grievance process to bring these claims. She has had the benefit of legal advice and yet the claims were still brought out of time with no adequate explanation. Whilst, as with the sex discrimination claims, the Claimant will lose the right to pursue this claims, the prejudice to the Respondent of having to defend another stale claim places the balance of prejudice against the Claimant and in favour of the Respondent.

80. For all those reasons, the Tribunal does not have jurisdiction to determine the direct disability claim and it is struck out.

RESERVED JUDGMENT

81. The Respondent accepts that the Claimant was disabled by reason of hepatitis and diabetes. As recorded above, it was not in issue that the Claimant has been disabled by reason of hepatitis throughout her employment. The medical evidence in the Bundle appeared to also support the likelihood that the Claimant was disabled by reason of herdiabetes from at least March 2019 onwards (see for example the various fit notes, the June 2018 health review and the various OH reports, which either referenced diabetes as being the cause of her unfitness for work or described it as uncontrolled). As such, I found that, on balance, the Claimant was disabled by reason of diabetes from 10 March 2019 to date.

82. As for her other health conditions, the Claimant's GP records active dates for chronic pancreatitis (February 2020) and hypertensive disease (May 2019). Reliance was also placed on a letter dated 8 February 2021 from the Lipid & Heart Protection Clinic at Morriston Hospital, which listed the additional diagnoses of mixed hyperlipidaemia, recurrent pancreatitis since 2010, glomerulonephritis, ocular hypertension and fatty liver (at [166] of the Bundle).

83. Having regard to all the evidence provided, I was able to conclude that the Claimant was disabled by reason of pancreatitis. There was sufficient evidence, both from the various OH reports and the medical records, that the symptoms caused by the pancreatitis impacted upon the Claimant's ability to carry out day to day activities. There is reference to episodic and recurrent attacks, which cause pain and discomfort. Given the letter from Morriston Hospital, I was also satisfied that the Claimant was disabled by reason of pancreatitis from at least March 2019 onwards (and therefore disabled by reason of pancreatitis for the duration of her reasonable adjustments claim).

84. However, I was unable to find on the evidence presented that the Claimant was disabled (as defined by section 6 of the EqA 2010) by any of her other diagnosed conditions. There was simply insufficient evidence as to the impact of those conditions on the Claimant's day to day activities. The letters from the various specialist clinics did not indicate any functional limitations or restrictions. Indeed, the letter of 9 March 2020 from the Ophthalmology Department at Singleton Hospital reported that she had no acute symptoms by reason of the ocular hypertension, with the recommendation that the Claimant consider updating her glasses (at [327] of the Bundle).

85. For the avoidance of doubt, this does not mean that the Claimant's diagnoses are not accepted. They are. However, having a diagnosis is not the same as meeting the legal definition of disability. That requires a consideration of the impact of the symptoms of the diagnosed illness upon the Claimant's ability to function.

RESERVED JUDGMENT

86. In conclusion, the Claimant's reasonable adjustments claim regarding her working hours and requests she says she has made to change her role was brought in time and the Tribunal has jurisdiction to consider it. For the purposes of that claim, the relevant period is continuous from 10 March 2019. The Claimant was disabled by reason of Type 2 diabetes, hepatitis B & E and pancreatitis throughout that relevant period.

Strike Out & Deposit Orders

87. The reasonable adjustments claim detailed above is the only claim which was brought in time and which the Claimant is entitled to pursue. To the extent that the Respondent contends that the claim has no or little reasonable prospects of success (such that it should be struck out or subject to a deposit order), I was not satisfied that the threshold for either sanction was made out.

88. There appeared to be at least some evidence of the Claimant raising issues regarding her working hours and the role she was required to undertake, with reference to her health. There remain a number of significant and material factual disputes which require determination and it is in the interest of justice that the Claimant is permitted to pursue the claim.

Next Steps

89. As the scope the claims has changed significantly as a result of my decisions and mindful that the Claimant is a litigant in person, it would be helpful to hold a further preliminary hearing (by telephone), the purpose of which will be to decide what case management preparation is required to prepare this claim for a final hearing.

90. The parties will be notified of the time and date of that hearing in due course.

Order posted to the parties on
4 October 2021

EMPLOYMENT JUDGE S POVEY

Dated: 1 October 2021

……
For Secretary of the Tribunals
Mr Roche