EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109906/2021(V)

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Held in Glasgow on 24 February 2022
(Preliminary Hearing in public conducted remotely by CVP);
Written representations from parties dated 3 and 7 March 2022; and
Private deliberation in chambers on 30 March 2022 and 18 May 2022

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Employment Judge Ian McPherson

Mrs Marie Robertson **Claimant**

15 **In Person**

Age Refined Limited **Respondents**
20 **Represented by:**
Ms Catherine Greig
Solicitor

25 **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The reserved Judgment of the Employment Tribunal, having heard both parties' evidence in Preliminary Hearing, and having thereafter considered both parties' written representations in private deliberation in chambers, is that:

(1) The Tribunal finds that the ACAS certificate relied upon by the claimant in
30 relation to this claim, having been issued on 9 June 2021, when there was a previous ACAS certificate issued on 17 May 2021, is not a valid certificate for the purposes of **Section 18A of the Employment Tribunals Act 1996**, and accordingly the Tribunal should have considered rejecting the claim under **Rule 12 of the Employment Tribunal Rules of Procedure 2013**.

35 (2) However, having considered **Rule 12 (2ZA),** the Tribunal finds that the claimant made an error in providing the incorrect ACAS EC certificate number, on presenting her ET1 claim form, on 10 June 2021, and that it would not be in the interests of justice to reject the claim for that reason.

(3) Further, having considered the evidence led by both parties, and their respective closing submissions, as set forth in their further written representations, the Tribunal finds that the age harassment complaints, in terms of **Section 26 of the Equality Act 2010**, as specified by the claimant in her further and better particulars provided on 7 September 2021, were presented out of time, and that it is not just and equitable, in terms of **Section 123 of the Equality Act 2010**, to extend the time for bringing that part of her claim against the respondents.

(4) In these circumstances, the Tribunal does not therefore have jurisdiction to consider the claimant's complaint of alleged age harassment against her by the respondents, and the Tribunal accordingly dismisses that part of her claim against the respondents. The remaining parts of her claim are unaffected by this Judgment.

(5) The remaining parts of the claimant's claim against the respondents shall now proceed to be listed for a Final Hearing in person in due course before a full Tribunal for full disposal, including remedy, if appropriate, and the clerk to the Tribunal is instructed to issue date listing stencils to both parties.

(6) Case Management Orders for that Final Hearing are issued, under separate cover, along with this Judgment.

REASONS

Introduction

1. This case first called before me as an Employment Judge sitting alone at the Glasgow Employment Tribunal for a one-day public Preliminary Hearing by CVP on Thursday, 24 February 2022, further to Notice of Preliminary Hearing issued by the Tribunal to both parties on 16 December 2021, as set down by Employment Judge Robert Gall at a telephone conference call Case Management Preliminary Hearing held before him on 14 December 2021.

2. It thereafter called again before me, in chambers, on Wednesday, 30 March 2022, to consider both parties' written representations. Although, by letter from the Tribunal, dated 17 March 2022, both parties had been advised that there would be a Preliminary Hearing in chambers on 29 March 2022 to consider parties' written submissions, and that they were not required to attend, in the event, on account of other judicial business allocated to me that day, that date as intimated to parties had to be changed.

3. Only recently have I managed to complete my private deliberation in chambers, and progress to issue of this my finalised Judgment, and for the resultant delay, I again apologise to both parties, further to the written apology issued by the Tribunal, on my behalf, on 28 April 2022.

Claim and Response

4. On 10 June 2021, following ACAS early conciliation on 9 June 2021, the claimant, acting on her own behalf, presented her ET1 claim form against the respondents, complaining of unfair dismissal, by unlawful selection for redundancy, arising from the termination of her employment as a clinic co-ordinator, on 7 April 2021, and also complaining of discrimination on the grounds of age, described by her in a paper apart as "***age discrimination***", and "***personal abuse / humiliation".*** She also complained of unlawful withholding of wages, and being owed holiday pay, arrears of pay, and other payments.

5. The claim was accepted by the Tribunal administration, and served on the respondents on 14 June 2021, requiring an ET3 response by 12 July 2021. The case was listed for a telephone conference call Case Management Preliminary Hearing on 27 August 2021.

6. Thereafter, on 12 July 2021, an ET3 response was lodged on behalf of the respondents by their then solicitor, Mr Stuart Robertson of Gilson Gray LLP, Glasgow, defending the claim. That response was accepted by the Tribunal, on 16 July 2021, and, following Initial Consideration by Employment Judge

Robert Gall, on 20 July 2021, he instructed that the case proceed to the listed telephone conference call Case Management Preliminary Hearing on 27 August 2021.

5 7. On 27 August 2021, the case then called before Employment Judge Robert King, for a private, Case Management Preliminary Hearing, conducted remotely, by telephone conference call, given the implications of the ongoing Covid-19 pandemic, where the claimant appeared on her own behalf, and the respondents were represented by Ms Catherine Greig, solicitor with McMahon 10 Law, employment lawyers, Glasgow. In her respondents' PH Agenda, provided on 20 August 2021, Ms Greig had called on the claimant for fuller details of the allegations of harassment.

8. Judge King's written PH Note and Orders dated 6 September 2021 was 15 issued to both parties under cover of a letter from the Tribunal on 1 November 2021. It included various case management orders, including orders for further details of the claim, and that the case should be listed for a Final Hearing, before a full Tribunal panel, to determine all remaining issues, including remedy, if appropriate, in respect of the claimant's claims that she 20 was unfairly dismissed in terms of **Section 98 of the Employment Rights Act 1996** ; that her dismissal was directly discriminatory on grounds of her age in terms of **Section 13 of the Equality Act 2010** ; that she was subjected to harassment by her employer on grounds of her age in terms of **Section 26 of the Equality Act 2010**; that she is owed unpaid holiday pay that she is due 25 under the **Working Time Regulations 1998**; and that she suffered unauthorised deductions from her wages in terms of **Section 13 of the Employment Rights Act 1996**.

9. Thereafter, on 7 September 2021, the claimant provided further and better 30 particulars of her claim, and 4 specific instances of incidents of alleged age discrimination and harassment, said to have occurred in October 2020, early November 2020, mid December 2020, and 24 November 2020. Further, on 23 September 2021, she provided a schedule of loss detailing the compensation sought by her from the respondents.

10. On 28 September 2021, Ms Greig, solicitor for the respondents, opposed an application made by the claimant (on 28 September 2021) for documents and further information from the respondents, and, on 29 September 2021, Ms Greig made an application to be allowed to amend the ET3 response to insert a new paragraph under the heading of jurisdiction, as she submitted that the claimant's allegations of harassment had been presented outside the time limit in **Section 123 of the Equality Act 2010,** and therefore the Tribunal has no jurisdiction to hear them.

11. The claimant opposed that application to amend the response, by objections made on 1 October 2021. Following referral to Employment Judge Mary Kearns, as the allocated Judge, on 21 October 2021, she instructed that a one-hour telephone conference call Case Management Preliminary Hearing be arranged to discuss all the outstanding applications. Thereafter, on 4 November 2021, the case was listed for that telephone conference call Case Management Preliminary Hearing to be held on 14 December 2021.

12. On 14 December 2021, the case called before Employment Judge Robert Gall. The claimant appeared on her own behalf, with Ms Greig attending as solicitor for the respondents. Judge Gall's written PH Note and Orders dated 16 December 2021 was issued to both parties under cover of a letter from the Tribunal on 20 December 2021. He allowed the respondents' amendment to the ET3 response, to raise the time-bar point, and he fixed 24 February 2022 as a Preliminary Hearing on time bar in relation to the discrimination claim.

<u>Preliminary Hearing before this Tribunal</u>

13. This Preliminary Hearing was a remote public Hearing, conducted using CVP, under **Rule 46 of the Employment Tribunals Rules of Procedure 2013.** The Tribunal considered it appropriate to conduct the Hearing in this way, and parties did not object. In accordance with **Rule 46**, the Tribunal ensured that members of the public could attend and observe the Hearing. This was done via a notice published on the ***Courtserve.net*** website.

14. No members of the public attended this Hearing, but the respondents' representative, Ms Greig, was accompanied (online, but at a separate location) by Ms Michelle McLean, the owner of the respondents' business. Ms Greig had lodged, and the Tribunal and both parties, as also Ms McLean, all had access to the Joint Bundle of Documents running to some 22 documents, extending across 81 pages.

15. The claimant had arranged for a witness to attend on her behalf, a Ms Yvonne Dorrans, and Ms Dorrans had logged into the CVP platform, and she was waiting in the lobby. After discussion with the claimant, where she advised that Ms Dorrans (formerly a nurse practitioner with the respondents) was there only to speak to allegation 1 (October 2020), and not all 4 allegations, and Ms Greig stated that she had no questions for Ms Dorrans about the date of the first allegation, the claimant indicated that she no longer intended to call Ms Dorrans, at this stage, and so that witness did not participate in this Preliminary Hearing. The claimant agreed that Ms Dorrans be excused from further attendance at this Hearing.

16. After further preliminary discussion with both parties, at the start of this Hearing, there was then an adjournment, to allow the respondents' solicitor, Ms Greig, at my suggestion, to prepare and submit a written skeleton argument for the respondents, with any case law authorities, for the assistance of the Tribunal, as also the claimant as an unrepresented, party litigant, to try and put her on an equal footing with the respondents' solicitor, in terms of the Tribunal's overriding objective under **Rule 2** to deal with the case fairly and justly.

17. Ms Greig thereafter provided a 5-page, typewritten skeleton argument for the respondents, sent to the Tribunal, and copied to the claimant, by email sent at 11:19am. She queried whether, as regards allegation 4, with no reference to any protected characteristic, that was an allegation of age-related harassment?

18. Further, she cited the terms of **Section 123 of the Equality Act 2010** (time limits) and made reference to 3 cited case law authorities (being **Adedeji**, **Rathakrishnan**, and **Morgan** – full citations are given later in these Reasons). Her submission was that the **Section 26** harassment claims are out of time, and that the time period should not be extended.

19. Ms Greig further stated that the respondents' position is that allegation 3, if it was an act of discrimination, occurred on 13 December 2019, which she submitted was the last occasion the claimant received a Botox treatment from Ms McLean, and not mid December 2020 as stated by the claimant. If so, then that predates the reason given by the claimant for not bringing her claims in time, being that from September 2020 onwards, she felt her employment was under threat, following a dispute in relation to a pay rise.

20. Even if the reason given by the claimant was accepted in relation to allegations 1, 2 and 4, Ms Greig's submission stated that that does not explain the delay after the claimant's employment ended, on 7 April 2021. She submitted that these complaints are substantially out of time, and that the claimant had made an informed decision to take no action within the time limit, yet she had immediately sought advice from ACAS, in March 2021, when she was at risk of redundancy, but she chose not to do so in relation to the harassment claims.

21. In summary, Ms Greig's skeleton argument was that it would not be just and equitable to grant an extension of time in terms of **Section 123(1)(b),** and that the **Section 26** claim for harassment should be dismissed.

22. By agreement with both parties, evidence was heard first from Ms McLean, and she was cross-examined by the claimant. Thereafter, the claimant was examined in chief by me, as the presiding Judge, after agreement by Ms Greig for the respondents, as an appropriate way to proceed, given the claimant's status as an unrepresented party litigant.

23. While, it emerged, the claimant was giving evidence from her niece's flat, and she was in the same room, at one point, following observation by Ms Greig, the claimant confirmed she was thereafter on her own, and I was satisfied that the claimant was not being coached or assisted by any unseen third party while giving her evidence. Similarly, when Ms McLean had given her evidence earlier, from what appeared to be her business premises, and at a separate location from Ms Greig, I was likewise satisfied that she too was not being coached or assisted by any unseen third party while giving her evidence.

24. Having heard evidence led by both parties, I reserved judgment to be issued in writing, and with reasons, as soon as possible after further procedure to receive and consider both parties' closing legal submissions. The skeleton argument for the respondents, intimated to the Tribunal, with copy to the claimant, by Ms Greig's email of 24 February 2022 at 11:19, was placed on the Tribunal's casefile, but in light of evidence given by the claimant about an earlier ACAS early conciliation certificate, and an earlier (rejected) ET claim, the issues for determination by the Tribunal were widened, and so a fresh written skeleton argument was required by way of the respondents' closing submissions for the Tribunal, and reply thereafter from the claimant.

25. The issues for determination by the Tribunal were reset as detailed below, as intimated to both parties, on my instructions, by email from the Tribunal clerk, sent on 25 February 2022, and confirming the respondents' skeleton argument and updated list of case law authorities should be submitted by no later than 4.00pm on Thursday, 3 March 2022, with the claimant to reply within no more than 7 days thereafter.

26. Parties were advised that written submissions were not an opportunity to introduce fresh evidence, and that following receipt of both parties' written closing submissions, I would proceed to private deliberation in chambers, on the papers only, and without the need for a further attended Hearing with parties.

27. Arising from the Preliminary Hearing on 24 February 2022, and a part-withdrawal of the claim, I made a **Rule 52** Judgment dated 25 February 2022, as issued to both parties on 28 February 2022, stating :

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> *"The claimant's allegation no.4 (incident alleged on 24 November 2020, as per her e-mail to the Glasgow ET of 17 September 2021, being additional information ordered by the Tribunal) being part of her complaint of alleged harassment by the respondents on grounds of age, in terms of **Section 26 of the Equality Act 2010**, having been withdrawn by the claimant, at this Preliminary Hearing, on the basis she accepted that incident was not age related harassment, in terms of **Rule 51 of the Rules contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013,** that allegation within that part of the claim against the respondents is dismissed by the Tribunal under **Rule 52,** but the other three allegations remain insisted upon by the claimant."*

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<u>Issues for the Tribunal</u>

28. The revised issues for the Tribunal were set forth as follows:

(a) whether, in light of the earlier ACAS early conciliation certificate R138242/21/35 issued to the claimant on 17 May 2021, and her earlier (rejected) ET1 claim form in case 4109838/2021 (presented on 31 May, and rejected on 8 June 2021), the ET1 in the present claim, 4109906/21, presented on 10 June 2021, and relying on ACAS early conciliation certificate R145332/21/51 issued to the claimant on 9 June 2021, is a valid claim, giving the Tribunal jurisdiction, or should be rejected, having regard to **Section 18A of the Employment Tribunals Act 1996, and Rules 10 and 12 of the Employment Tribunals Rules of Procedure 2013.**

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(b) whether, if there is a valid claim before the Tribunal, the claimant has brought her harassment claims (in terms of **Section 26 of the Equality Act 2010**) within the time limit set by **Section 123 of the Equality Act 2010**, and **Section 140B of the Equality Act 2010;**

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(c) whether, if presented out of time, having regard to the alleged harassment being the 4 incidents specified in the claimant's email to the Tribunal of 17 September 2021 @13:58, the Tribunal should grant an extension of time to the claimant on the basis that it is just and equitable to do so.

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Findings in Fact

29. Arising from the evidence given by both parties at this Preliminary Hearing, and the information provided in the ET1 claim form, and ET3 response, as well as documents in the Tribunal's casefile, including the two ACAS Early
10 Conciliation Certificates issued to the claimant, I have made the following findings in fact :

(1) The claimant, who is aged 60, was formerly employed by the respondents from 1 May 2016 to 7 April 2021 as a Clinic Co-ordinator at their business premises in Glasgow.

15 (2) During her employment with the respondents, and since its termination, the claimant has been employed as a Clinical Co-ordinator for NHS Greater Glasgow and Clyde.

(3) The claimant worked on a part-time basis for the respondents, as well as working in the NHS. She worked 26 hours per week for the
20 respondents.

(4) The respondents are a medical cosmetic business located in Glasgow city centre and specialise in non-surgical cosmetic treatments. They employ 7 people, and the business owner and company director is Michelle McLean, aged 42 at the date of this
25 Hearing.

(5) The claimant presented her ET1 claim form in this case to the Employment Tribunal on 10 June 2021.

(6) The claimant there complained, at section 8.1 of her ET1 that, amongst other things, she had been discriminated against on the

grounds of age, and, in a paper apart, she detailed "***age discrimination***", and "***personal abuse / humiliation***".

(7) In particular, the claimant there stated, as follows:

"*3) AGE DISCRIMINATION.*

5 *Following from the wages dispute, Michelle started making comments to me about my age saying that she would soon have to get me a chair lift to get me up & down the stairs of the clinic (I am a very fit 59yr old) .One of the benefits for working in his environment was to have facial treatments i.e Botox, fillers* 10 *etc. My last treatment was carried out by Michelle at the end of 2020, and while I was being preped for the procedure she said to me, I don't know if I've got enough Botox in the clinic to sort your face out, I felt totally humiliated. On other occasions she would instruct me to undertake a task, then change it half way* 15 *through, then change it again . Finally when the task was complete ,the way she had instructed after constantly changing it several times, she would say that wasn't how I wanted that done, I would leave the area and she would turn to other members of staff and say do you think Marie's getting a bit old* 20 *or his sort of environment? (Age Refined is an aesthetics clinic) & I was at least 18yrs senior to most of the staff. On another occasion she suggested I had a touch of dementia Some of these comments may be supported by a colleague statement if required.*

25 *4) PERSONAL ABUSE/ HUMILIATION*

I was given a gift of a very hard to come by Perfume by one of my colleagues . I wore it next day & whist we were at our morning meeting, a different colleague commented on it saying she loved it, Michelle turned to me and said I think it's 30 *disgusting, you smell like shite, she then ran into her office and*

came back with her own perfume and sprayed it all over me. I felt totally embarrassed & humiliated by her action, This was not an isolated case. I dreaded going into the clinic some days, as I never knew what sort of mood I would be met with. My confidence was being chipped away at a little at time. Some of my colleagues witnessed these episodes but I doubt if any of them present will support my claims as they are still in employment at Age Refined. I felt my employer was victimising me in the hope I would resign, As my age was now becoming an issue for her (I witnessed her do this to another employee same age as me at the beginning of 2020) It is my belief that the pandemic was a perfect opportunity for Michelle McLean to end my employment under the disguise of Redundancy."

(8) In presenting her ET1 claim form, the claimant stated, in the affirmative, at section 2.3 of the ET1 claim form, that she had an ACAS early conciliation certificate number, and she expressly provided that number as being **R145332/21/51.**

(9) A copy of that ACAS early conciliation certificate was produced to the Tribunal. It shows that **9 June 2021** was the date of receipt by ACAS of the EC notification, and that **10 June 2021** was the date of issue by ACAS of that certificate, which was issued to the claimant by email.

(10) The certificate confirms that the claimant had complied with the requirement under **ETA 1996 s18A** to contact ACAS before instituting proceedings in the Employment Tribunal.

(11) On that ACAS certificate, the respondents were shown as the prospective respondent by their company name, and at the address of their business, being the name and address given by the claimant when providing the respondents' details at section 2 of the ET1 claim form.

(12) At administrative vetting of the ET1 claim form, the Tribunal clerk checked, as per **Rule 10(1) (a) of the ET Rules of Procedure 2013**, that the claim form was date stamped, and on the prescribed form, and, as per **Rule 10(1)(b)**, that it contained the minimum information required, including that it contained an early conciliation certificate number or exemption box ticked, and that the early conciliation number entered on the ET1 matched the early conciliation number exactly as it appeared on the early conciliation certificate.

(13) The Tribunal clerk did not identify any substantial defects, in terms of **Rule 12(1) (a) / (f),** requiring referral to an Employment Judge, or Legal Officer. The clerk gave the claim the administrative jurisdictional codes **UDL, DAG, WTR/AL, and WA**, for unfair dismissal, age discrimination, holiday pay and unlawful deduction from wages, as the applicable heads of complaint.

(14) The claim against the respondents was accepted under case number **4109906/2021,** and Notice of Claim served on the respondents on 14 June 2021.

(15) In her Preliminary Hearing Agenda, presented to the Tribunal on 8 July 2021, with copy provided to the respondents direct by email, the claimant provided further details of her claim about harassment, at section S7 in Schedule 1 to her Agenda, stating as follows:

"S.7 If your claim is about HARASSMENT:

(1) Give brief details of all instances of the "unwanted conduct" that you complain of including, in each case, the date (s) and the person (s) responsible.

THE UNWANTED CONDUCT STARTED AROUND SEPTEMBER / OCTOBER 2020 IN THE FORM OF DEROGATORY COMMENTS AND THE PERSON RESPONSIBLE FOR THESE COMMENTS WAS MICHELLE MCLEAN. SHE TOLD ME AT MY AGE SHE WOULD HAVE

TO GET A CHAIR LIFT FITTED IN THE CLINIC FOR ME. SHE ALSO SAID TO ME ON ANOTHER OCCASION “I THINK YOU’VE GOT A TOUCH OF DEMENTIA MARIE ”. WHILE BEING PREPED FOR A PROCEDURE SHE SAID TO ME “I DON’T THINK THERE IS ENOUGH BOTOX IN THIS CLINIC TO SORT OUT THE WRINKLES ON YOUR FACE “(AGE REFINED IS AN AESTHETIC CLINIC)

(11) Why do you think that the conduct was related to a protected characteristic?

THESE WERE ALL AGEIST COMMENTS

(111) Do you say that this conduct had the purpose or effect of violating your dignity? If so how?

YES, I FELT HUMILIATED & DEGRADED BY THE COMMENTS

(1V) Do you say that this conduct had the purpose or effect of “creating an intimidating, hostile, degrading, humiliating or offensive environment” for you? If so, why?

YES, I FELT SINGLED OUT BY THESE COMMENTS AND I WAS VERY OFFENDED BY THEM I FELT HUMILIATED AND MY CONFIDENCE WAS BEING UNDERMINED AS SHE WAS MAKING REMARKS ABOUT MY AGE TO OTHER MEMBERS OF STAFF”

(16) On 12 July 2021, an ET3 response was presented on the respondents’ behalf, by their then solicitor, Mr Stuart Robertson of Gilson Gray LLP, Glasgow, defending the claim, as per an attached paper apart.

(17) In particular, it was denied that the claimant’s dismissal was for a reason related to her age, and denied that she had been discriminated against by the respondents. Her allegations of

personal abuse / humiliation were denied, and the respondents requested further and better particulars of the allegations.

(18) That ET3 response by the respondents was accepted by the Tribunal administration, and a copy sent to the claimant and ACAS on 16 July 2021. At Initial Consideration by Employment Judge Gall, on 20 July 2021, he considered the file and did not dismiss the claim or response, but ordered that the claim proceed to the listed Case Management Preliminary Hearing by telephone conference call on 27 August 2021.

(19) At that Case Management Preliminary Hearing by telephone conference call on 27 August 2021, Employment Judge King made various case management orders, including an order for the claimant to provide further details of her claim by 10 September 2021, including in respect of her allegations of harassment on the grounds of her age.

(20) Following on from that Preliminary Hearing, by email of 7 September 2021 to the Glasgow ET, copied to the respondents' new solicitor, Ms Catherine Greig at McMahon Law, Glasgow, the claimant provided further and better particulars, as follows:

"Following on from the preliminary hearing of Friday 27th August 2021, when you requested further information of the claims made by myself in relation to Age Discrimination and Humiliation comments, directed at myself from your client Miss Michelle McLean. Please see points listed below:

1) DATE /TIME: October 2020

PEOPLE PRESENT: MICHELLE McLEAN & YVONNE DORRANS

WHERE INCIDENT TOOK PLACE & WHAT WAS SAID:

One of the treatment rooms in the clinic, Michelle McLean asked Yvonne Dorrans if she thought I was OK? Yvonne answered Yes but questioned Michelle as to why she had asked that question, Michelle replied saying "don't you think she's getting a bit old and forgetting stuff" Yvonne's totally disagreed and replied saying "Marie is more than on the ball"

Which takes me on to Miss McLeans comment to me from slightly earlier that day when she was giving me conflicting instructions then changing her mind several times to how she wanted the job done. After I had completed the task she said that was not how she wanted it, I reminded her she had changed her mind several times which she denied instead saying she was beginning to think I had a wee bit of dementia.

2)DATE /TIME: Early November 2020 around 6pm

PEOPLE PRESENT: MARIE ROBERTSON and MICHELLE McLEAN

WHERE INCIDENT TOOK PLACE &WHAT WAS SAID:

At Miss McLeans request I came up from my work station in the basement to the ground floor. When she called me I responded to let her know I had heard her but didn't go up immediately as I was finalising some work that I didn't want to leave till the next day. When I arrived up onto the ground floor a couple of minutes later, and as I reached the reception desk Miss McLean said, " if it takes you this long to make the stairs maybe I should think about getting a chair lift fitted for you to get you up and down the stairs".

3) DATE / TIME: Mid Dec 2020 at the end of the working day after clinic closed (Actual date can be confirmed by viewing my patient notes that Miss McLean will have on file.

PEOPLE PRESENT: MARIE ROBERTSON & MICHELLE McLEAN

WHERE INCIDENT TOOK PLACE & WHAT WAS SAID:

Treatment room on ground floor adjacent to stairs leading to 1st floor. While I was on the treatment couch being prepared for a Botox treatment Miss McLean said to me "I don't think I have enough Botox in the clinic to sort out the wrinkles on your face"

4) DATE /TIME: Approx 9.30am on Thursday 24th Nov 2020

PEOPLE PRESENT: MARIE ROBERTSON, MICHELLE MCLEAN, LAURA MILLER

WHERE INCIDENT TOOK PLACE & WHAT WAS SAID:

At the first workstation in the basement area of the clinic. I was given a gift of an exclusive perfume by one of my colleagues on Tuesday 17th November 2020 and I wore it for the first time on Thursday 19th November 2020.While waiting for other staff members to congregate for the morning meeting my colleague Laura Miller commented on it saying "She loved that fragrance" at this Michelle McLean turned to me and said "I think it's disgusting you smell like shite" she then ran into her office and returned with her own perfume and sprayed it all over me."

(21) At this Preliminary Hearing, on 24 February 2022, the Tribunal heard evidence first from Ms Michelle McLean, aged 42, the respondents' clinical director, and an advanced nurse practitioner with 22 years' experience.

(22) Ms McLean gave evidence to the Tribunal about the dates alleged by the claimant for the alleged acts of age-related harassment of the claimant.

(23) She referred to, and spoke in evidence about, her preparation of document 3 in the Joint Bundle, at page 17, being a rota for the claimant from March 2020 to March 2021. After the first Covid-19 lockdown on 23 March 2020, all staff were on 100% furlough, until the clinic re-opened on 25 June 2020. The rota showed the claimant's workdays from 9:30am to 6pm, as well as when she had requested time off, and annual leave.

(24) This rota showed the clinic was closed to all staff, between 5 and 17 October 2020, and that the 2nd Covid-19 lockdown was from 21 November 2020 until 11 December 2020, with the 3rd lockdown from 23 December 2020, when the clinic was then closed for about 5 months. The claimant was made redundant on 7 April 2021, and she had been furloughed from 23 December 2020 until her effective date of termination on 7 April 2021.

(25) Ms McLean then referred to the claimant's 4 alleged acts of harassment, as detailed in her email of 7 September 2021 to the Glasgow ET, a copy of which was produced to the Tribunal as document 9 in the Joint Bundle, at pages 24 and 25.

(26) Dealing with the first alleged harassment incident, stated by the claimant to have occurred in October 2020, Ms McLean, in her evidence to the Tribunal, stated that there were only certain dates that she and Yvonne Dorrans were on duty together, and as she (Ms McLean) was away on holiday for the October week, the clinic was closed 12/17 October 2020, she had pinpointed that the only possible days were October 1st, 20th, 23rd and 27th, so that 27 October 2020 was the latest possible date.

(27) As regards the second alleged harassment incident, stated by the claimant to have occurred in early November 2020 around 6pm, Ms McLean, in her evidence to the Tribunal, stated that, from the rota, it could be seen that the claimant only worked certain days, being 3, 5, 6, 10, 11, 12, 13, 17, 19 and 20 November 2020, and that the

second Covid-19 lockdown started on 21 November 2020, and ran to 10 December 2020.

(28) Further, Ms McLean added, as she then had a 4-month-old baby, and her child's nursery was on reduced hours, she usually left the clinic to pick up her baby at around 4.00pm to 4.30pm, and so she would not be at work around 6pm.

(29) Dealing with the third alleged harassment incident, stated by the claimant to have occurred in mid-December 2020, at the end of the working day, after the clinic had closed, Ms McLean, in her evidence to the Tribunal, stated that the claimant had referred to the actual date being confirmed by viewing the claimant's patient notes that Ms McLean would have on file.

(30) Ms McLean stated that the clinic was open, between lockdowns 2 and 3, from 11 to 23 December 2020, and the rota showed that the claimant only worked 7 shifts in that period, on 11, 15, 17, 18, 21, 22 and 23 December 2020.

(31) She further explained that as Christmas is the clinic's busiest time of the year, when the lockdown was ordered by the First Minister, the clinic had full diaries, with 3 weeks of patients to be moved. They were working to deal with patients who had lost their appointments, and there was no time for staff to have treatments done, and that there were no staff treatments in December 2020.

(32) Further, Ms McLean stated that she had looked at the claimant's medical records, from 22 February 2019 to 26 June 2020, a copy of which were produced to the Tribunal as document 2, in the Joint Bundle at pages 7 to 16.

(33) In particular, Ms McLean stated that the claimant had signed a consent form, on 22 February 2019, for a treatment with Hyalase to dissolve hyaluronic acid dermal fillers, and a patient note for the claimant, created on 1 April 2019 (copy produced to the Tribunal at

page 8 of the Joint Bundle), which showed there had been a staff training night with a Botox treatment, and another patient note for the claimant, created on 13 December 2019 (copy produced to the Tribunal at page 13 of the Joint Bundle), which showed there had been a Botox training, but as the claimant was on antibiotics for a tooth infection, Laura Miller, a new nurse practitioner, got the treatment.

(34) Ms McLean advised the Tribunal that she specifically recalled this Botox training because the claimant needed dental treatment, and she had been struggling to get to a dentist. As such, Ms McLean stated that she sent the claimant to her dentist, across from the clinic, and she got her fixed, and she paid for it.

(35) In this regard, Ms McLean referred to document 4 in the Joint Bundle, at page 18, being a WhatsApp message to her, from the claimant, on the Age Refined chit chat, on 12 December 2019, referring to her dental situation and saying : "***I cannot thank you enough Michelle people like you are few and far between you are an absolute angel."***, followed by a smile halo and a love heart emoticon.

(36) Ms McLean also referred the Tribunal to another patient note for the claimant, created on 26 June 2020 (copy produced to the Tribunal at page 16 of the Joint Bundle),which showed there had been a repeat Botox, as part of staff development training, where Laura Miller had injected the claimant, as Ms McLean was 9 months pregnant. Her baby was born on 3 July 2020. That was the last staff Botox treatment of 2020.

(37) In this regard, Ms McLean referred to document 5 in the Joint Bundle, at page 19, being a WhatsApp message to her, from the claimant, on the Age Refined chit chat, on 27 June 2020, referring to her Botox treatment and saying : "***PS thanks Michelle for***

providing my Botox And thanks Laura for administering it … I feel like a new woman this morning Xx."

(38) Asked by her solicitor to explain routes open to employees if they had any concerns in the workplace, Ms McLean stated in her evidence to the Tribunal that the respondents are registered with HCIS (Health Care Improvement Scotland), and that they have lots of policies and procedures, like the NHS, including a bullying & harassment policy, and if there is a case for concern an employee can report to a regulatory body.

(39) Ms McLean referred the Tribunal to the respondents' Bullying & Harassment Policy, in place since 2019, and a copy of which was produced as document 10 in the Joint Bundle, at pages 26 to 28, along with a staff record signing sheet, showing the claimant's name and the date 1 October 2019.

(40) In addition to herself as Manager, Ms McLean stated that she had an Assistant Manager, and if an employee raised a concern, it would be treated in confidence. She further stated that the respondents' policies are assessed by HCIS as correct, and that staff sign to show that they are aware of them. Also, added Ms McLean, she has an HR company, HR Services Scotland, for the business, and details are available to employees in the staff room.

(41) Asked by her solicitor to explain how communications with staff worked during Covid-19 lockdowns, Ms McLean, in her evidence to the Tribunal, stated that the claimant lost her phone, and directly messaged her between 14 and 29 January 2021, and she referred to the transcript of those messages that she had exported from WhatsApp messages from the claimant and put into the Word document produced to the Tribunal as document 6, at page 20 of the Joint Bundle.

(42) Ms McLean further stated that the respondents pride themselves on their constant communication with staff throughout the lockdowns, with team meetings over Zoom, and the HR company was open, and it did not close. She stated that the claimant, like any employee, could contact her direct, and as document 6 shows, she did do so. On 14 January 2021, the claimant had asked her to add her back into the group chats with her new number.

(43) Further, Ms McLean then spoke to document 7 in the Joint Bundle, at pages 21 and 22, and document 8, at page 23, with copy messages between 1 February and 6 March 2021, from the Age Refined WhatsApp work group chat, exported into a Word document.

(44) There is nothing in that chat to give an inkling ghat the claimant was unhappy about harassment, or that she had potential claims to bring to a Tribunal. The claimant was removed from that chat group after her redundancy on 7 April 2021 when her employment with the respondents was terminated.

(45) As regards the fourth alleged harassment incident, stated by the claimant to have occurred at approx. 9.30am on 24 November 2020, Ms McLean, in her evidence to the Tribunal, stated that that date was during the second Covid-19 lockdown, and the claimant might be mixed up, as Laura Miller, referred to as being present, was out of the country on that date.

(46) The respondents' work rota showed, document 3 at page 17 of the Joint Bundle, the claimant's last day was 20 November 2020, and the lockdown started the next day. As such, Ms McLean wondered if the claimant maybe meant Thursday, 19 November 2020, as 24 November referred to by the claimant as being a Thursday was actually a Tuesday. Ms McLean commented that she did not know what date the claimant means to refer to as the date of this alleged incident.

(47) At this Preliminary Hearing, the claimant cross-examined Ms McLean, before later giving her own evidence as to the circumstances of bringing her Tribunal claim against the respondents.

5 (48) In her cross-examination of Ms McLean, the claimant queried why, as part of document 2, at page 8, the patient record for the claimant showed created on 1 April 2019, and last update 21 December 2021 by Ms McLean. She made the same point as regards the note at page 13, showing created 13 December 2019, and last update 14
10 December 2021 by Ms McLean.

(49) Ms McLean explained that the date created date is the date of treatment, and medical notes are done as close to the treatment date as possible. She stated that nothing on them it had changed from the creation date, and she had accessed them after these
15 Tribunal proceedings had been raised to give information to her solicitor. She was insistent that nothing had changed in the contents of the notes from when first created.

(50) Referring to the staff signature records for the respondents' Bullying & Harassment Policy (document 10), at page 29 of the Joint Bundle.
20 Ms McLean stated it had been signed by the claimant, on 1 October 219, as shown, and when the claimant stated that it was "***most definitely not my signature***", Ms McLean stated that at the claimant's appraisal, in November 2019, or thereby, the claimant had signed that she had been made aware of all the respondents'
25 policies, and she had had an appraisal every year, and they were in her staff folder.

(51) Ms McLean stated that the claimant had not come to her, or the HR company, with any concerns. When the claimant stated that, by March 2021, she was "***totally isolated***", Ms McLean stated that she
30 was unaware of that. She had a 6- or 7-month-old baby, and she felt communications were warm and friendly.

(52) In reply, the claimant stated that : "***Had I come to you, my life would have been made a misery. I kept jolly to keep my job.***" When Ms McLean then stated that she had kept everybody in a job until March 2021, the claimant then accepted that there was a bullying & harassment policy, but she had not read it before.

(53) In her own evidence in chief to the Tribunal, the claimant confirmed that her employment with the respondents had ended on 7 April 2021, and that she presented her ET1 claim form on 10 June 2021, after having been to ACAS for early conciliation. She confirmed the 4 acts alleged of age-related harassment were as specified by her in her email to the Tribunal on 7 September 2021, as reproduced for the Tribunal at pages 24 and 25 of the Joint Bundle.

(54) Having heard Ms McLean's evidence, the claimant was asked if she had any greater clarity as to which day, in October 2020, she says was the date of the first incident. She replied stating that she had a pay dispute with Ms McLean, but she did not know exactly what date this incident occurred on.

(55) Referring to one of the many WhatsApp messages produced by the claimant, produced to the Tribunal at pages 33 to 48 of the Joint Bundle, the claimant referred in particular to the message (at page 37) from Yvonne Dorrans, on Friday, 2 July 2021. The claimant had asked Ms Dorrans: "***Hey do you remember roughly when cow face was making the age est*** [sic] ***remarks about me***." The answer from Ms Dorrans was ***"I think it was around sept / Oct time."***

(56) The claimant was then asked if she had any greater clarity as to which day, in early November 2020, she says was the date of the second incident. She replied stating that she did not know specific dates for any of this, as she had tried to put it out of her mind, and she did not take notes of when exactly it happened. She denied that

Ms McLean ever stayed away from the clinic, and stated that Stacey Allison, another employee, was sent to pick up the baby.

(57) Further, the claimant was then asked if she had any greater clarity as to which day, in mid-December 2020, she says was the date of the third incident. She replied stating that she was "***100% sticking with that date***" and added that she was in touch with the superintending pharmacist for her last 4 years' prescriptions. She stated that she had asked for these 3 weeks ago, but she did not have any documents to produce to the Tribunal at this Hearing, as it takes up to 30 days to get them

(58) Finally, the claimant was then asked about the date of the fourth incident, which her further and better particulars of 7 September 2021 (page 25 of the Joint Bundle) had specified as 9:30am on Thursday, 24 November 2020. She replied stating that that date was obviously in error, as the gift of perfume was on 17 November 2020, when Ms Dorrans gave her the gift before she left to go to Australia, and the incident was definitely towards the end of November 2020.

(59) The claimant acknowledged that she had been to ACAS on 9 June 2021, and that she had received her ACAS EC certificate on 10 June 2021. She had referred to that EC certificate when presenting her ET1 claim form to the Tribunal on 10 June 2021. She agreed that the effective date of termination of her employment with the respondents was 7 April 2021.

(60) Further, the claimant stated that she did not go to ACAS about these 4 incidents in October / December 2020, stating that she went to ACAS in June 2021, as she had been made redundant. She then stated that she had gone to ACAS for advice when the redundancy process started in March 2021. She recalled having met with Ms McLean and HR on 15 or 16 March 2021, and after that she phoned ACAS for advice about the redundancy process, and she stated that she told them about everything else.

(61) The claimant advised the Tribunal that she understood from ACAS she had 3 months from the time of her redundancy, less one day, not 3 months from the allegations of harassment. She thought it would cover all her cases, regardless of how far back. She added that she did not seek ads vice from elsewhere, e.g., CAB, solicitor, or Google.

(62) Looking at the respondents' rota, produced to the Tribunal at page 17 of the Joint Bundle, the claimant agreed that she had remained an employee of the respondents from October 2020 through to 7 April 2021. She accepted that that rota was factually accurate, and added that when the respondents furloughed her, she was still employed with the NHS, and working with the NHS as a clinical co-ordinator with Greater Glasgow and Clyde NHS, a job she had had for about 26 years.

(63) Further, the claimant accepted that she was not physically unable to do things, nor was she unwell, nor away anywhere, given it was lockdown, at various points during that period October 2020 to April 2021. She referred to a deterioration in her relationship with Michelle McLean from October 2020, describing Ms McLean as very up and down at times, and stating that she (Ms McLean) gathers others around her, but she (the claimant) kept her head down, and kept on with her job. She hoped that Ms McLean would move on to somebody else.

(64) The claimant accepted that she knew that there was a bullying & harassment policy, but she explained that she took no action under that policy, as she was afraid for her job with the respondents. Referring to the policy document, at page 28 of the Joint Bundle, she referred specifically to the third bottom bullet point stating : ***"If it is necessary to relocate or transfer one party, we will consider allowing you to choose whether you wish to remain in post or be transferred to another location."***

(65) Further, the claimant also referred to the last bullet point of that policy stating : ***"Even if your complaint is found not to be valid, then we will consider possible arrangements which mean that you and the alleged harasser do not have to continue to work together. This might include transferring either you or the alleged harasser, or rescheduling work."***

(66) The claimant then stated that she had to keep quiet, and hope everything would die down, as she had had 5 years of a good relationship with Ms McLean, and she did not know what had changed.

(67) Speaking of the period April to June 2021, the claimant stated that she carried on in her other job, and she referred the Tribunal to WhatsApp text messages with a friend, Yvonne Dorrans, as produced in the Joint Bundle lodged with the Tribunal, at page 42, showing that, on 26 March 2021, she had been on to ACAS again, and she described the advice she received from the lady at ACAS as "***phenomenal***."

(68) Further, the claimant referred to the message, produced at page 43, showing that, on 5 April 2021, she had written : **"*I'm going down bullying, age discrimination and the woman from ACAS said the thing about my wages i.e. paying / not paying then I'm the only one being made redundant is defo a case for unfair dismissal."***

(69) The claimant also advised the Tribunal that when the lady from ACAS told her 3 months less one day to bring a claim, she thought she meant in relation to October / December 2020, and the ACAS adviser knew the claimant was getting made redundant, sand said it was 3 months less one day to bring a claim.

(70) The claimant stated that she raised bullying with ACAS, and maybe her understanding was wrong, but ACAS told her to contact Ms

McLean and giver her 30 days to respond. She did that, but said that Ms McLean ignored her about the pay dispute, which is the matter she raised with her, and it was not to do with bullying or harassment.

5 (71) At this stage in her evidence to the Tribunal, the claimant referred to the message produced at page 44 of the Joint Bundle, dated 5 May 2021, stating : "***No nothing, so I spoke to ACAS yesterday and they say I have to write to her AGAIN…"*** She added that it was a different ACAS adviser, as she soke to a different ACSS 10 person every time she called there.

(72) Further, the claimant then referred to another message produced in the Joint Bundle, this time at page 45, dated 13 May 2021, stating : "***So my email got totally ignored by McLean*** (3 laughing face emoticons inserted) ***so now going to contact ACAS to say I want*** 15 ***to start tribuneral*** [sic]".

(73) The claimant also referred to the message, also on 13 May 2021, reproduced at page 45, stating : " ***My head is bursting just looking at this stuff but I will power thru it today make sure of all my facts then call ACAS in the morning and see where it goes from*** 20 ***there."***

(74) In her following message, on 18 May 2021, copy produced at page 47 in the Joint Bundle, the claimant stated : ***"… ACAS have given me he go ahead to take cowface straight to tribuneral*** [sic] ***Guy called me yesterday and said I had complied with everything*** 25 ***they asked of me and fact that she ignored my emails and let deadline come and go theyre happy for me to skip the early consolidation*** [sic] ***and issued me with the certificate to say I have followed all protocol, …"***

(75) The claimant clarified that "***cowface***" referred to Michelle McLean, 30 and she apologised for her use of that language, and said that she

received her ACAS certificate on 9 June 2021, and that she had found the paperwork in presenting her ET1 claim form ***"overwhelming."***

(76) Further, the claimant then said that the first she had heard about an ET1 claim form was, she guessed, around 18 or 19 May 2021, when she spoke to the ACAS chap, and she filled in the ET1 and sent it to the Tribunal, and they sent it back to her, as she had put down the wrong name for the respondents, and so it was rejected. She had left out something in the ET1 paperwork about the respondents' name, but while she had paperwork from the Employment Tribunal, she was not giving evidence from her own home.

(77) As she was giving evidence remotely on CVP, the claimant checked her iPad and her emails from Glasgow ET, and she then advised that she had submitted her ET1 on 14 or 17 May 2021, but it was rejected by Glasgow ET on 8 June 2021 under reference **4109838/2021**, and she read from an email sent to her by a Jillian Lowe in the Glasgow ET vetting and registration team.

(78) At 14:51 on 24 February 2021, as she was giving evidence to this Tribunal, the claimant forwarded to the CVP clerk, and to Ms Greig, solicitor for the respondents, the email she had received from Ms Lowe at Glasgow ET on 8 June 2021 at 11:47.

(79) It was forwarded to the Judge at 14:54, and included the attachments sent by the Tribunal to the claimant. These documents were added to the Joint Bundle and referred to in evidence at this Preliminary Hearing. This emerged as new information, unknown to the respondents, and to the Judge.

(80) When asked further about the matter, the claimant accepted that the documentation now produced to the Tribunal showed that she had an earlier ACAS certificate, she having notified ACAS on 14 May 2021, they issued her certificate on 17 May 2021, and she had then

presented her ET1 claim form on 31 May 2021, which was rejected by the Tribunal on 8 June 2021, as the claim was defective because the claimant had provided an early conciliation number but the name of the respondent on the claim form was different to that on the early conciliation certificate.

(81) Specifically, the ACAS EC certificate **R138242/21/35**, issued on 17 May 2021, showed Age Refined Ltd as the prospective respondent, but at section 2.1 of her ET1 claim form, presented on 31 May 2021, the claimant had inserted the respondents' details as Michelle McLean (Age Refined Ltd). The claim form had been rejected by a Legal Officer under **Rule 12**, and it was returned to the claimant with the Tribunal's letter of 8 June 2021, which advised her that the relevant time limit for presenting her claim had not altered.

(82) The claimant did not make any application for reconsideration of the rejection of 8 June 2021, by returning the rejected ET1 and remedying the defect by amending in manuscript the name of the respondent at section 2.1 to correspond with that shown on the ACAS EC certificate cited.

(83) She advised this Tribunal that she did not do that and use the first ACAS certificate number as she believed that her claim had been rejected by the Tribunal. Further, she stated, she found the whole situation "***confusing***," and she added "***I'll put my hands up to that Judge."***

(84) Instead, the claimant advised the Tribunal that she phoned ACAS, told them her claim had been rejected by the Tribunal, but she did not think that she told ACAS about the earlier EC number, and she did not use earlier number that in the fresh ET1 presented on 10 June 2021, as she had received the fresh EC certificate from ACAS on that date, so she used that new EC number.

(85) Asked if there was anything else she wished to add, that she had not already been asked about by the Judge, the claimant stated that she says it is just and equitable to let her claim go ahead to hear evidence, and she asked for the "***green light***" to do so. She then added that she needed her job with the respondents, she had kept her head down, and hoped something would change.

(86) Developing her argument about it being just and equitable to allow her to proceed, the claimant stated that things had gone into lockdown, and it was very unprecedented times. She was on furlough, she could not do work for the respondents, so she could not have gone to ACAS or to the Employment Tribunal to bring this issue forward.

(87) The claimant made no response to the Judge's comment that ACAS and the Employment Tribunal were both functioning throughout the lockdowns. She stated that she kept her mouth shut, as she wanted to keep her job, as she needed her job, and that there was no option for her to use the respondents' buying & harassment policy, as it matters were not resolved, there might be an option for her to be moved to another area, and she knew there was no other area, and that Ms McLean would not be moved as it was her company.

(88) Under cross-examination by the respondents' solicitor, Ms Greig, at this Preliminary Hearing, the claimant (when asked about the fact that she had been to ACAS at an earlier stage, and presented an earlier ET1 claim form that had been rejected by the Tribunal, causing her to go back to ACAS, and then present the current ET1 claim form) stated that she thought that, as she was on furlough, she could not go to ACAS after the October / December 2020 incidents, although she conceded that she had gone to ACAS in March 2021, when on furlough, although she stated that she did not realise then that she would be made redundant.

(89) As regards the first alleged harassment incident, in October 2020, the claimant agreed with Ms Greig that she was not on furlough then, and she added that she was happy that it would all die down, go away and she would keep her job.

5 (90) As regards the fourth alleged incident, in November 2020, the claimant stated that it was not connected with her age, it was "***just harassment"***, and nothing to do with her age as a protected characteristic under the **Equality Act 2010**. She stated that she had never heard of **Section 26** of that Act , but then accepted that it had 10 been raised at an earlier stage in proceedings at a Case Management Preliminary Hearing before another Judge.

(91) At that stage, the claimant confirmed that she would drop allegation 4, as it is not age related, and Ms Greig, solicitor for the respondents, sought a **Rule 52** dismissal of that allegation. A **Rule** 15 **52** part-withdrawal judgment was granted in favour of the respondents following upon this part-withdrawal of the claim.

(92) The claimant then stated that she had been employed by the NHS for roughly 26 years, on a part-time basis, concurrently with being employed part-time by the respondents. At the NHS, she stated, she 20 was a member of the GMB trade union, and while she knew you could access trade union support, she had never done so in 26 years.

(93) Further, added the claimant, she did not ask any trade union official, even informally, for advice, and while she now recognised that might 25 be seen as naïve, she thought the trade union was to do with her job in the NHS, and not any other employment.

(94) The claimant accepted that she knew there was a harassment palsy at Age Refined Limited, but having read the bullet points at the end of that policy, she stated that she was concerned that if a complaint 30 was not resolved, the parties involved might be separated. While

accepting that that policy had earlier steps set out, the claimant stated she could not see that herself and Ms McLean could have come to an amicable decision about anything.

(95) Asked to look at the "***informal approach***", set out in that policy, as shown at the last two bullet points on page 27 of the Joint Bundle, suggesting that an informal approach should be considered, as sometimes the person concerned may be unaware that their behaviour is unacceptable, the claimant stated that she gave that very little thought, as she alleged that the same thing had happened to two other employees before her, and they were "***got rid of.***" She added that when she went to Ms McLean in October 2020, about an August wage rise, she had been very threatening to her, and she described her as being ***"hostile.***"

(96) While stating that she probably thought about matters between October and November 2020, the claimant stated that there was no point in discussing matters with Ms McLean, as she had already had the situation about her wages. She described conversations during lockdown as a challenge, and stated that Ms McLean had ignored her on 14 January 2021 when the claimant contacted her direct about her new phone number.

(97) The claimant stated that she did participate in work group chats, but after she commented, she stated that things just went quiet. Asked to look at document 11 in the Joint Bundle, at page 30, being a copy of her email to Ms Greig on 4 February 2022 at 00:06, as provided by her, after Judge Gall's PH Note of 14 December 2021, replying to the respondents' document 1 in the Bundle (at pages 1 to 6), the claimant agreed that she had said there (at paragraph 7 of her email) that the "***last physical date worked in Age Refined was 23rd Dec 2020."***

(98) The claimant further accepted that following the Teams meeting with Ms McLean and HR on 16 March 2021, she immediately contacted

ACAS, an organisation that she always knew were there, even although she stated she did not know what they did. She recalled that her niece, Natalie Taylor, had suggested that she phone ACAS, and she "***threw it out there***." The claimant stated that she did not think she soke to her niece about matters prior to March 2021.

(99) Further, the claimant accepted that having been a trade union member at the NHS, with the GMB for maybe 25 to 26 years, she did not seek advice there, nor from the CAB. She stated that she knew of the existence of the CAB, and that she had tried to phone them a while ago, and get an appointment, but she had phoned ACAS straightaway.

(100) Asked about the date of her allegation 3, about the Botox treatment, the claimant stated that she thought it was December 2020, and she knew she was there, on that plinth, and that there should be a prescription for it. While she had asked the respondents to produce documents, she stated that the documents produced for this Hearing were "***hand-picked records."***

(101) When asked by the respondents' solicitor, Ms Greig, whether she was saying that the respondents had deliberately chosen not to give a December 2020 medical record to her, the claimant stated that she did not know that, but she was adamant that this incident was December 2020, despite Ms McLean's evidence that the clinic was only open 8 to 1o days, and with no staff treatments.

(102) While agreeing the clinic was only open for a short time that month, the claimant said it was not correct that no staff got treatments, as she assumed there were more staff than just her who did. She agreed that she had sent thank you messages to Ms McLean about her dental treatment and Botox, and these were in the Bundle used at this Hearing.

(103) Asked if she had any evidence about December 2020 in her possession, the claimant stated that she did not have a diary, and her phone broke in December 2020. She did however recall going to the House of Fraser, on 12 December 2020, and buying Ms McLean a present to thank her.

(104) She added that Ms Dorrans (who left at the end of November 2020, just before that lockdown) was the only person to keep in contact with her. She explained that she could not ask others as they still work in the clinic for the respondents, and they would be trying to keep their jobs.

(105) Asked about Jen Carswell, a current employee of the respondents, the claimant stated that she was not in conversation with her, and that she had stepped away after the claimant was put on redundancy. The claimant did not recall if she had sent her a thank you, explaining that her phone was not working in the last week of December 2020.

(106) When asked about the Botox treatment on 26 June 2020, and Ms McLean being heavily pregnant, the claimant stated that the clinic was in lockdown, and they should not have been injecting anybody. She agreed she had sent a thank you message on 27 June 2020.

(107) However, when asked about a December 2019 Botox treatment, the claimant stated that she did not remember that, and that she had not signed the note produced at page 13 of the Joint Bundle. Also, she added, "**I'd have to be off my head to let somebody stick 6 needles into me"**. She did not think this treatment happened at all, given she had had dental treatment 2 days before. While page 13 showed Ms McLean and Laura Miller signing, the claimant stated that she had never seen a countersigning before.

(108) Asked about the message on 26 March 2021, as produced at page 36 of the Joint Bundle, sent by her to Yvonne Dorrans (and stating :

"***I'm thinking she's been planning this"***), the reply, referring to "Irene", was clarified as being an Irene McCoag, and the context as being age discrimination.

(109) Further, when asked about the message on 2 July 2021, at page 37, and "***cow face was making age est*** [sic] ***remarks"***, the claimant identified "***cow face***" as being Michelle McLean, and clarified that it was Yvonne Dorrans who had replied saying she thought these remarks were around September / October 2020. The claimant added that Ms McLean had removed her from the work group chats on 7 April 2021 after her redundancy.

(110) Asked about her reply to that message, stating "***Cheers, I'm still filling form in lol going over everything with a fine tooth comb don't' want to miss anything,"*** the claimant guessed that that might be a reference to filling in the ET1 form.

(111) When asked to look at the message sent by her to Yvonne Dorrans and Jennifer Carvill, on 8 February 2021, as produced at page 38 of the Joint Bundle, stating : ***"I'm just going along with her just now coz so many people losing jobs and I don't really want to be one of them at the moment but I'm keeping everything up my sleeve coz I know sooner or later somethings coming my way",*** the claimant agreed that at that time she was still on furlough, still an employee, and the redundancy process had not started.

(112) By way of further explanation of her position, the claimant stated that Ms McLean was up and down, and "***she chose her victims very well.****"* She added that she did not want to raise a claim then, as she wanted to keep her head down, and she hoped that it would all go back to normal.

(113) Asked about the message sent on 15 February 2021, as produced to the Tribunal at page 39 of the Joint Bundle, stating "**She is a fucking crackpot she makes it up as she goes and tries to tie**

everybody up in knots with her lies", the claimant explained that the "she" referred to is Ms McLean, and that this was a message from the claimant herself to either Yvonne Dorrans or Jennifer Carvill.

5 (114) The claimant further stated in her evidence at this Hearing that : "***My life was being made a misery by Michelle McLean but I needed my job.***" She added that her messages to the group chat were untrue, as she needed to keep her job, and she was not as happy as she was making out in those messages, but she was

10 "***probably playing to her ego***," meaning Ms McLean. She further stated : "***I was fighting for my job.***"

(115) Asked about her message, on 26 March 2021, at page 42 of the Joint Bundle, where she had stated that she was on to the ACAS woman again, the claimant stated that that was during the at risk of

15 redundancy process, and she agreed that by 15 / 16 March 2021, she knew she was at risk of losing her job. She added that there was no pint in using the bullying and harassment policy as she always wanted to keep her job.

(116) Further, when asked about her message, on 5 April 2021, as shown

20 at page 43 , the claimant stated that that may well have been a message to Yvonne Dorrans, and it referred to "***going down bullying, age discrimination."*** She also agreed that, at that stage, she was still an employee, until 7 April 2021.

(117) When asked why, if she had decided that on 5 April 2021, to bring

25 an age discrimination clam, yet her ET1 claim form was not accepted by the Tribunal until after the 10 June 2021 ACAS EC certificate, the claimant explained saying that she had filled in the form in May 2021, but it was rejected by the Tribunal. She was made redundant on 7 April 2021, and she said that she had been told to

30 wait until the end of April 2021 to check everything with her wages.

(118) After going to ACAS, in May 2021, and what she described as "***negotiation***" with Ms McLean, the claimant stated that ACAS told her to wait until she got her final payment from the respondents. She went to ACAS on 14 May 2021, got an ACAS EC certificate on 17 May 2021, and lodged her ET1 claim form on 31 May 2021, and it was rejected by the Tribunal on 8 June 2021.

(119) Asked why, in the ET1 claim form presented on 10 June 2021, she had used the second ACAS EC certificate, issued on 10 June 2021, rather than the earlier certificate issued on 17 May 2021, the claimant stated that she phoned ACAS and they gave her a new EC number, but this was "***all a bit hazy"*** to her, as she was shocked to get the Tribunal rejection letter of 8 June 2021.

(120) Notwithstanding the terms of the Tribunal's letter of 8 June 2021, the claimant stated in her evidence to the Tribunal that she did not understand why the Tribunal had rejected her claim. She stated that she told ACAS it had been rejected by the Tribunal, but conceded that she probably did not tell ACAS that she had already got an EC certificate. She further stated that she needed justice, and she wanted to get her claim back on track.

Tribunal's Assessment of the Evidence led at the Preliminary Hearing

30. The only witnesses led at the Preliminary Hearing were Michelle McLean, the respondents' owner, and then the claimant herself. Ms McLean was the first witness to be heard by the Tribunal, and that at the suggestion of the Judge, as the respondents were disputing / seeking to clarify the claimant's dates of the alleged 4 incidents, and, in particular, the Botox treatment, where the claimant alleged December 2020, and the respondents suggested that date was in error, and it was, in fact, they submitted, in December 2019.

31. Ms McLean's evidence was taken on 24 February 2022, when she was examined in chief by her solicitor, Ms Greig, for one hour, from 11:30am until 12:30pm. This was then followed by cross-examination by the claimant, after

the lunchbreak, starting at 1:30pm, and concluding at 2:03pm, when the claimant's own evidence in chief started, taken by the Judge, as agreed with both parties. The claimant's evidence in chief lasted about one hour, 5 minutes, until 3:10pm, when she was then cross-examined by Ms Greig, the respondents' solicitor, until her evidence ended at 4:13pm.

32. I directed that it was not in the interests of justice to go straight to closing submissions, and so I made case management orders for Ms Greig to provide a revised skeleton argument for the respondents within 7 days, to take account of the evidence led, and any further legal submissions the respondents might want to make, given the fact of an earlier ACAS EC certificate and rejected ET1 claim form, and for the claimant to thereafter reply within a further 7 days. The claimant having withdrawn her allegation 4, I stated that I would issue a **Rule 52** part-withdraw dismissal judgment in favour of the respondents, as sought by Ms Greig.

33. In her written submissions to the Tribunal, the claimant, in particular at her paragraphs (19), (24), (31), (32) and (35), was not shy in setting forth her views about her own evidence being preferred to that of Ms McLean as a witness, where she stated as follows:

> *19) I believe the evidence of the claimant on the day should be the preference*
>
> *24) As I stated during the preliminary hearing (DOC 10 page 29) the hand writing and signature on this document are NOT my writing and have been forged. When I cross examined Miss McLean on this, and asked her to explain, ONCE AGAIN, she had no answer to it.*
>
> *31) My handwriting and signature were forged on bullying and Harassment Policy see (DOC 10 page 29)*
>
> *32) Handpicked notes to suit respondent (DOC 2 pages 7 to 16)*
>
> *35) It is my position that the respondent has been neither open or honest at anytime during these proceedings and I believe her honesty*

is questionable as is her credibility. (DOC 12 page 39) is a reflection of above points

34. I found the respondents' witness, Ms McLean, to be a straightforward, plain-speaking witness, whose evidence came across well, and it was vouched by reference to many of the documents in the Joint Bundle spoken to in evidence by her. Her testimony was not undermined by the claimant's cross-examination. I found Ms McLean to be a credible and reliable witness.

35. The claimant, on the other hand, I found to be a confused and confusing witness. It seemed to me that her evidence ebbed and flowed according to what she saw as the best way to present her case to the Tribunal. Her answers to questions, whether in chief, or in cross, were often scattergun.

36. While she came across as a plain-speaking person, who is clearly still aggrieved at the way she was treated by the respondents, which she still regards as being discriminatory and unfair, I did not regard her as being wholly open and transparent in her evidence to the Tribunal. Rather than say she was lying, I prefer to give her the benefit of the doubt, and say that she was confused, or perhaps had selective amnesia, when answering a direct question of clarification from me at the start of the Hearing, before the adjournment, and before any evidence was taken from either party.

37. At the start of the Hearing, and again after she had been sworn, the claimant confirmed that she had presented her ET1 claim form, on 10 June 2021, after ACAS early conciliation, but it was only later on, in her evidence in chief, that the claimant referred to how, in fact, she had submitted an ET1 in May 2021, after earlier ACAS EC, but that earlier claim was rejected by the Tribunal.

38. This evidence was new information to the respondents, and to the Judge, and it had never been flagged up before by the claimant in earlier stages of the current claim, nor when the Joint Bundle was being prepared for this Preliminary Hearing. A pause in proceedings resulted, while she forward to Ms Greig, and the CVP clerk for my attention, the email and documents she had received from Glasgow ET on 8 June 2021.

39. This is the very point taken by Ms Greig, in her written closing submissions for the respondents, where, at paragraph (45), she stated as follows:

> *45. In relation to the interests of justice, I submit that the claimant has not been open and transparent with the Tribunal in relation to this matter. At the beginning of the Preliminary Hearing on 24 February 2022 (prior to the adjournment at 10.40am), while taking down a chronology of events from the claimant, Judge McPherson asked the claimant directly if the EC Certificate issued on 9 June 2021 (R145332/21/51) was the only EC Certificate she had, and the claimant confirmed directly that there was no earlier EC Certificate. Then when giving her evidence under oath, while being asked for reasons about the delaying until 10 June 2021 in bringing her current claim, she revealed that there was an earlier EC Certificate, contradicting her earlier statement to the Judge. The claimant had ready access to this information and emailed the first EC Certificate and first ET1 claim form to the Tribunal during the hearing. In these circumstances, if subs 12(2ZA) applies, it would still be in the interests of justice to reject the claim.*

40. Where there was a conflict between the claimant's evidence, and that given by Ms McLean, as with the date of the Botox treatment, I have preferred Ms McLean's account, because her oral testimony was supported by contemporary documents, as produced to the Tribunal in the Joint Bundle, and while the claimant challenged the respondents' productions as being selective, and hand-picked, she did not produce any alternative contemporary documents to support her own position that the Botox treatment was indeed December 2020. She simply continued with her assertion that it was December 2020.

41. In her written closing submissions, at paragraph (9), the claimant stated as follows:

> *9) At no time was I aware that this could be classed as 2 separate claims months into the tribunal process. I was only aware that one*

claim certificate was current and the previous was nil and void due to being rejected on 8th June 2021. In contrary to point 45 on the respondents first submission from the respondent, I have been open and honest thru out this process and as I have no legal representation I have relied on and followed the guidance given from ACAS and the Employment Tribunal.

42. This was her reply to Ms Greig's written submission, at her paragraph 45, where the respondents' solicitor had stated as I have already reproduced at my paragraph 39 of these Reasons, as above.

43. In reviewing the evidence available to the Tribunal, I do not accept the claimant's contentions in her paragraph (9). She must have been aware that there were two separate claims to the Tribunal. When her second ET claim was accepted by the Tribunal administration, on 14 June 2021, it was given a separate case reference number from her earlier claim (under a different case reference number).

44. Nor do I accept her contention that rejection of her 1st ET claim on 8 June 2021 made her first ACAS EC certificate of 17 May 2021 "***nil and void***". On any objective basis, that is not a fair and reasonable assessment of the situation : the roles of ACAS and the ET are distinct, and arise from them being in separate legal bodies. She was issued with two separate ACAS EC certificates, on different dates, and with different reference numbers.

Reserved Judgment

45. When proceedings concluded, on the afternoon of Thursday, 24 February 2022, at 4:21pm, the claimant, Ms Greig and Ms McLean were advised that Judgment was being reserved, and it would be issued in writing, with Reasons, in due course, after private deliberation by the Tribunal, following receipt of both parties' further written submissions.

46. Following an enquiry from the respondents' solicitor, on 27 April 2022, a reply was sent by the Tribunal clerk, to both parties, on 28 April 2022, explaining that I was on annual leave w/c 4 April 2022, and so unable to start writing up

that week, and thereafter I had been chairing a 10-day Final Hearing in person, in another case, with a full panel, so my availability to complete the writing up in this case was affected.

47. Further, I was on annual leave from 3 to 10 May 2022, which also impacted on my ability to revise and complete my draft Judgment. I apologised to both parties for the delay, and confirmed I would seek to progress Judgment as soon as possible in w/c 16 May 2022. In these circumstances, I apologise to both parties for the resultant delay in this Judgment being issued outwith the Tribunal administration's target date of 4 weeks from date of the Hearing.

Respondents' Closing Submissions

48. Ms Greig's closing submissions for the respondents, as submitted to the Tribunal, with copy to the claimant, by email of 3 March 2022, sent at 14:34, contained two major elements.

49. As a full copy is held on the Tribunal's casefile, and I had access to it in writing up this Judgment, it is not necessary nor proportionate that I repeat its full terms (extending to 82 paragraphs, extending over 16 typewritten pages) *verbatim*, but it is helpful that I note and record here the first 4 paragraphs, as follows:

> ***"First submission for the respondent**.*
>
> *1. The current claim 4109906/2021 does not contain an early conciliation number within the meaning of the statutory early conciliation scheme. In terms of rule 12(2) of the Employment Tribunal Rules 2013 there is a mandatory requirement to reject the entire claim.*
>
> *2. The respondent's submission is that the entire claim must be rejected in terms of rule 12(2).*
>
> *3. Alternatively (which is denied), if rule 12(2ZA) applies, the claimant did not make an error in relation to an early conciliation number, and there is no interests of justice grounds not to reject. The entire claim must be rejected in terms of rule 12(2ZA).*

***Second submission for the respondent*.**

4. If the entire claim 4109906/2021 is not rejected, then the respondent's submission is that (a) the s26 harassment claims were not brought within the time limit set by s123 of the Equality Act 2010 and (b) it is not just and equitable to extend the time to bring the claims. See summary of issues to take into account at paragraphs 80 and 81 below."

50. As part of her written submissions for the respondents, Ms Greig referred the Tribunal to the following list of authorities:

LIST OF AUTHORITIES REFERED TO – SHOULD THE CLAIMANT'S ENTIRE CLAIM BE REJECTED?

Compass Group UK & Ireland Ltd v Morgan [2017] ICR 73
https://www.bailii.org/uk/cases/UKEAT/2016/0060_16_2607.html

Commissioners for HM Revenue and Customs v Serra Garau UKEAT/0348/16
https://www.bailii.org/uk/cases/UKEAT/2017/0348_16_2403.html

E.ON Control Solutions Ltd v Caspall [2019] 7 WLUK 319
https://www.bailii.org/uk/cases/UKEAT/2019/0003_19_1907.html

Zhou v North East London NHS Trust UKEAT/0066/18/LA)
https://assets.publishing.service.gov.uk/media/5b7ffa2340f0b67f49ab9f67/North_East_London_NHS_Foundation_Trust_v_Ms_S_M_Zhou_UKEAT_0066_18_LA.pdf

Employment Tribunals Act 1996
https://www.legislation.gov.uk/ukpga/1996/17/section/18A

Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013
https://www.legislation.gov.uk/uksi/2013/1237/schedule/1

5 **Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014**
https://www.legislation.gov.uk/uksi/2014/254/contents/made

LIST FOR AUTHORITIES REFERRED TO – WOULD IT BE JUST AND
10 EQUITABLE TO EXTEND TIME?

Equality Act 2010 - s123 Time limits
https://www.legislation.gov.uk/ukpga/2010/15/section/123

15 **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23**
https://www.bailii.org/ew/cases/EWCA/Civ/2021/23.html

Rathakrishnan v Pizza Express (Restaurants) [2016] IRLR 278
20 https://www.bailii.org/uk/cases/UKEAT/2015/0073_15_2310.html

Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] IRLR 1050
https://www.bailii.org/ew/cases/EWCA/Civ/2018/640.html

25 51. The other specific part of her written submissions that it is appropriate to note and record here in full is what Ms Greig stated at her paragraphs 80 and 81, which I accordingly reproduce here, for ease of reference:

80. My submission is that it is not just and equitable to extend time because –

30 *a. there is substantial delay here, both during and after employment.*

5
10
15
20
25

b. Allegation 3 – there is no reason for delay – this alleged incident predates the "threat"

c. Even at its highest, there is still a conscious decision not to raise a claim within the original time limit, or without delay thereafter. This is a high risk strategy and the claimant has to bear the consequences of her choices.

d. In relation to the claimant's evidence about her reason, namely the "threat to job", we submit the claimant's evidence is not credible. See the conflicting WhatsApp messages, (the extremely friendly and supportive messages to the respondent – see pages 20 – 23 contrasted with contradictory unpleasant messages to Yvonne Dorrans and others for example Doc 12 page 32 and 41). The claimant's credibility is undermined.

e. We ask the Tribunal to reject the "reason" given by the claimant during her oral evidence, and instead rely on the claimant's own contemporaneous record Doc 12 page 38 – the true motivation was a deliberate decision not to raise the claims because she was keeping them to use only as retaliation to any future action of the respondents. In these circumstances it would not be just and equitable to extend time.

81. Finally, although the advice from Adedeji is not to mechanically follow a checklist, would like to touch upon some of the other issues which may be relevant.

a. the complaints are substantially out of time.

b. she was not ignorant of her rights or any facts relating to the claim.

c. she had access to advice and information. She is currently and has been a member of a trade union for around 26 years, in relation to employment with a different employer. She was aware of the

existence of ACAS and of the Citizen Advice Bureau and had assistance and advice from family members and friends.

d. she was not suffering from any relevant ill health that may have contributed towards a delay.

5 *e. She was not out of the country or otherwise incapacitated.*

f. The reasons for the delay were of her own making;

g. The delay has prejudiced the respondent. There is an inevitable impact on the cogency of evidence given the historic nature of the claims. The delay has prevented or inhibited the respondent from
10 *investigating the claim while matters were fresh. The evidence of those events is likely to be less good than if the issue had been raised nearer the time. This is a s26 harassment claim, and so the exact words and context are important to meet the statutory test. It will turn on the precise words used. For example Allegation 1 is Ms McLean allegedly*
15 *saying to a Yvonne Dorrans "do you think Marie is ok, don't you think she's getting a bit old and forgetting stuff". The exact words used may be extremely important in establishing whether or not statements were "because of" a protected characteristic. The Scott Schedule information was supplied in September 2021, almost a full year after*
20 *Allegation 1. Also, in relation to Allegation 3, between 12 – 18 months may have passed, before claim was lodged, longer until full details were produced in the Scott Schedule.*

h. Considering the balance of prejudice, the claimant would be unable to pursue a claim of age discrimination (which may or may not
25 *have any merit) if you do not exercise discretion in her favour. If you decide to exercise your discretion in her favour the respondent will be put to the cost and expense of defending a discrimination by harassment claim and its ability to do so is likely to have been affected.*

i. There is a public interest in the enforcement of time limits which
30 *are exercised strictly in employment tribunals.(this principle was*

commented on with approval by the Court of appeal in Adedeji at para 24.)

Claimant's Written Submissions

52. The claimant's written closing submissions for the Tribunal were emailed by her to the Glasgow ET, with copy to Ms Greig, on 7 March 2022 at 18:26. While, in the Tribunal's email of 25 February 2022, both parties were clearly advised that their written closing submissions were not an opportunity to introduce fresh evidence, I need to note and record here that the claimant's written submissions did include further information that she had not spoken to in her oral evidence to the Tribunal on 24 February 2022.

53. Specifically, the claimant provided her summary of dates and times with regards to contact with ACAS via telephone between 17 March and 13 May 2021, and her belief that all calls are recorded by ACAS, and her list of dates and times on 9 June 2021 to relevant parties (at ACAS Helpline, ACAS Customer Service, and ACAS Conciliation Support). This is detailed information that was not given by her in her evidence at the Preliminary Hearing, where she spoke in very general terms about these contacts.

54. As a full copy is held on the Tribunal's casefile, and I had access to it in writing up this Judgment, it is not necessary nor proportionate that I repeat its full terms (extending to 37 paragraphs, extending over 7 typewritten pages) *verbatim*, but it is helpful that I note and record here the first 4 paragraphs, as the substance of the claimant's reply to Ms Greig's submissions for the respondents was set forth in her 4 opening paragraphs, as follows, which were very much drafted as the flip side of the respondents' coin, as can be seen from their reproduction here:

FIRST SUBMISSION FOR THE CLAIMANT

1) In light of the earlier ACAS early conciliation certificate R138242/21/35 issued to the claimant on 17 May 2021, and

5

earlier (rejected) ET1 claim form in case 4109838/2021 (presented on 31 May, and rejected on 8 June 2021), the ET1 in the present claim, 4109906/21, presented on 10 June 2021, and relying on ACAS early conciliation certificate R145332/21/51 issued to the claimant on 9 June 2021 is a valid claim.

2) The claimants position is that the full claim should be upheld in the interest of justice.

10

SECOND SUBMISSION FOR THE CLAIMANT

15

3) There is a valid claim before the Tribunal, the claimant has brought her harassment claims (in terms of Section 26 of the Equality Act 2010) Even though presented out of time, with the harassment being the 4 incidents specified in the claimant's email to the Tribunal of 17 September 2021 @13:58, the Tribunal should grant an extension of time to the claimant on the basis that it is just and equitable to do so.

20

4) The entire claim 4109906/2021 should be upheld.

<u>Issues for the Tribunal</u>

25

55. The 3 issues before me for my judicial determination were those as recorded above at paragraph 28 of these Reasons, to which I refer back for ease of reference. I deal with them below, in my Discussion and Deliberation.

<u>Relevant Law</u>

30

56. The Tribunal received detailed written submissions for the respondents from Ms Greig, their solicitor, and the Tribunal is obliged to her for the thorough and fulsome nature of those submissions, with recitation of appropriate statutory provisions and case law references cited by her on the respondents' behalf, which I am sure must have been of assistance to the claimant as an

unrepresented, party litigant, in putting together her own written submissions for the Tribunal. I am content to gratefully adopt her narration of the relevant law as fairly and accurately stated, and, other than some further case law discussion on time-bar / extension of time in discrimination claims, which I give later in these Reasons, there is nothing I can usefully add to it by way of any additional self-direction on the relevant law.

57. In addition to providing hyperlinks to the relevant case law authorities, Ms Greig, within her written submissions, digested the relevant legal principles to be drawn from those cited case, and the legislation, looking at the legal framework, and then making her various submissions on behalf of the respondents.

58. As an unrepresented, party litigant, the claimant in her written submissions did not understandably address me on the relevant law, and, indeed, I had no expectation that she should so address me on the relevant law. I did explain to her that she was entitled to comment on the law, as presented to me by Ms Greig, as an officer of the Court, and in accordance with her professional duty as a solicitor, but that I would be addressing myself on the relevant law to apply to the facts of the case as I might find them to be after assessing the whole evidence led before me at this Preliminary Hearing.

59. The claimant made no legal submissions to me on the matter of her claim against the respondents. She expressed her position, at her paragraphs (36) and (37), as follows:

> *36) I, the claimant have no legal background and I'm not going to pretend to know the legal jargon re sections and rules of Employment Tribunal etc but the facts are thus: There has been a lot of time waisting* [sic] *on the respondents behalf bringing in evidence that had absolutely no bearing to the case. The claimant has been open and honest thru out all proceedings, even before being asked to swear under oath.*

37) It is the claimants position that in the name of justice and equitability an extension of time should be granted in relation to all remaining harassment claims, and the full claim as a whole should be upheld and preferred version of events in all circumstances should be that of Marie Robertson.

Discussion and Deliberation

60. The rules concerning claim forms and the Employment Tribunal's jurisdiction are to be found in the **Employment Tribunals Rules of Procedure 2013**, and Ms Greig's written submissions for the respondents have correctly referenced **Rules 10 and 12** in particular. She has also correctly cited the substantive legislation on ACAS early conciliation as found in **Section 18A of the Employment Tribunals Act 1996.**

61. As shown in my findings in fact, recorded earlier in these Reasons, at administrative vetting of the ET1 claim form in this case, the Tribunal clerk checked, as per **Rule 10(1) (a) of the ET Rules of Procedure 2013**, that the claim form was date stamped, and on the prescribed form, and, as per **Rule 10(1)(b)**, that it contained the minimum information required, including that it contained an early conciliation certificate number or exemption box ticked, and that the early conciliation number entered on the ET1 matched the early conciliation number exactly as it appeared on the early conciliation certificate.

62. The Tribunal clerk did not identify any substantial defects, in terms of **Rule 12(1) (a) / (f),** requiring referral to an Employment Judge, or Legal Officer. As such, the claim, as presented on 10 June 2021, was accepted by the Tribunal administration, and served on the respondents on 14 June 2021. It was only in the course of the claimant's evidence at this Preliminary Hearing that it emerged that there had been an earlier EC notification on 14 May 2021, and an earlier ACAS EC Certificate issued on 17 May 2021, leading to an earlier ET1 claim presented on 31 May 2021, and rejected by the Glasgow ET on 8 June 2021.

63. Ms Greig's written submissions, at paragraphs 16 to 27, have cited the relevant extracts from the EAT judgments in **Compass Group UK & Ireland Ltd v Morgan, HMRC v Serra Garau,** and **E.ON Control Solutions Ltd v Caspall.** So too she has correctly identified the change in the legal framework, as from 8 October 2020, when new paragraphs were added to the **ET Rules of Procedure 2013,** in particular **Rule 12(2ZA).**

64. Had the claim form been rejected under **Rule 10 or 12**, the claimant would have been notified of that fact, and had the right to seek a reconsideration of that rejection within 14 days under **Rule 13**. As Ms Greig referenced, at paragraph 35 of her written submissions, **Rule 12(1)(da)** states that the Tribunal staff shall refer a claim form to an Employment Judge if they consider that it may be one which institutes relevant proceedings and the early conciliation number on the claim form is not the same as the early conciliation number on the early conciliation certificate.

65. In that event, **Rule 12(2ZA)** provides that the claim shall be rejected if the Judge decides that it is of a kind described in **Rule 12(1)(da)**, unless the Judge considers that the claimant made an error in relation to the early conciliation number, and it would not be in the interests of justice to reject the claim.

66. In support of her headline argument, at paragraph 2 of her written submissions, that the entire claim must be rejected in terms of **Rule 12(2), I** note that Ms Greig, further down in her written submissions, at paragraphs 41 to 44, made various submissions to the Tribunal, and it is appropriate, at this stage, to refer to those arguments for their full terms, as follows:

> *41. Rejection may be avoided under rule 12(2ZA) only if both parts of the rule are satisfied i.e. that "the claimant made an error in relation to an early conciliation number* **and** *it would not be in the interests of justice to reject the claim."*

42. My submission is that the claimant did not make an error in relation to an early conciliation number. In fact she reproduced the number on the second EC certificate correctly into her second ET1 claim form. No typographical error in relation to a number was made. However the respondent's main submission is that no "error in relation to an early conciliation number" was made, because there was no valid early conciliation number. The number on the second EC certificate was not part of the mandatory scheme. The use of the word "and" means both conditions must be satisfied.

43. Alternatively, if subsections 12(1)(da) and 12(2ZA) apply, it would still be in the interests of justice to reject the claim. Prior to the introduction of these new rules in 2020, any mistake in reproducing the number of a valid EC Certificate led to an automatic rejection of the claim, even as starkly as in ***Zhou v North East London NHS Trust UKEAT/0066/18/LA)*** *https://assets.publishing.service.gov.uk/media/5b7ffa2340f0b67f49ab9f67/North_East_London_NHS_Foundation_Trust_v_Ms_S_M_Zhou_UKEAT_0066_18_LA.pdf*

44. where the last two numbers of the EC number were missed off in the claim form and the claim was rejected. However the facts of the present case can be distinguished. In the present case the claimant obtained a first EC Certificate following the prescribed procedure. However she made an error in the first claim form she lodged, and the first claim form was rejected. Instead of lodging a corrected claim form, with the first EC Certificate, she initiated a second EC process and obtained a second EC Certificate. She made no error in reproducing the second EC number into the second claim form, so there is no minor or administrative error, which in my submission subs 12(2ZA) is designed to address, to avoid the harsh result in cases like ***Zhou****.*

67. In her written submissions for the respondents, at paragraph 45, which I have already reproduced earlier in these Reasons, at my paragraph 39 above, Ms

Greig ended her submission stating that : ***"In these circumstances, if subs 12(2ZA) applies, it would still be in the interests of justice to reject the claim."***

68. The claimant, in paragraph 1 of her written submission to the Tribunal, submits that her claim is valid, and at paragraph 2, she goes on to submit that her full claim should be upheld in the interests of justice. She does not specifically address the **Rule 12(2ZA)** point, but it is implicit, in reading her entire written closing submission, that she seeks to be allowed to continue with her whole claim against the respondents. Indeed, her paragraph 4, submitting that her entire claim should be upheld, is a clear indicator of that being her position on this matter.

69. It is not, however, the purpose of this Preliminary Hearing to consider her whole claim. This Preliminary Hearing has a restricted remit, as per the issues for the Tribunal already identified above at my paragraph 28, earlier in these Reasons. If her entire claim is not rejected by the Tribunal, then, unless otherwise dismissed or struck out by the Tribunal for another reason, or parties resolve matters amicably outwith the Tribunal (perhaps via ACAS), it will go forward to an evidentiary Final Hearing in due course, where both parties can lead evidence, cross-examine the other party's witnesses, and make closing submissions to a full Tribunal of a Judge and two lay / non-legal members of the Tribunal.

70. Having carefully considered matters, and Ms Greig's various arguments as to her first submissions for the respondents, I do not regard them all as well-founded.

71. I do find that the ACAS certificate relied upon by the claimant in relation to this claim, having been issued on 9 June 2021, when there was a previous ACAS certificate issued on 17 May 2021, is not a valid certificate for the purposes of **Section 18A of the Employment Tribunals Act 1996**, and accordingly the Tribunal should have considered rejecting the claim under **Rule 12 of the Employment Tribunal Rules of Procedure 2013**.

72. However, having considered **Rule 12 (2ZA),** I have found that the claimant made an understandable error in providing the second ACAS EC certificate number, on presenting her second ET1 claim form, on 10 June 2021, and that it would not be in the interests of justice to reject the claim for that reason.

5 73. In my view, the claimant's error is understandable given that she is an unrepresented, party litigant, and also given the confused situation she found herself in, at that time, viewed against the fact that the set question on the ET1 claim form (at section 2.3) asks "***Do you have an Acas early conciliation certificate number?"***, to which there are then two boxes to tick
10 against either ***"Yes"*** or ***"No".*** On any view, she having ticked ***"Yes",*** that was an honest answer by her to the set question.

74. If ***"Yes,"*** you are then asked by the ET1 claim form to give the certificate number. The set question does not envisage a situation where there might be more than one certificate and, if so, what a claimant is supposed to do then
15 by way of answer. Nor, as per **Serra Garau**, is their any guidance note / warning notice on the ET1 claim form (or, to be fair, on any ACAS EC certificate) to a claimant that a second EC certificate from ACAS is not a certificate for the purposes of **Section 18A**.

75. In giving the number of the second EC certificate, rather than the first, the
20 claimant answered giving the correct certificate number from the most recent ACAS EC certificate. On any view, she cannot reasonably be criticised for so answering, or for only giving one certificate number when she knew she had received two certificates from ACAS.

76. The thrust of Ms Greig's submissions, at paragraphs 42 to 45 of her written
25 submissions for the respondents, was that there was no typographical error as the claimant reproduced the number on the second certificate correctly in her second ET1, and that there was no minor or administrative error, as instead of returning and lodging a corrected ET1, with the first certificate number, she instead initiated a second EC process, obtained a second EC
30 certificate, and then presented a second ET1.

77. I have sought to interpret the Rules not as a barrier to justice, but as a gateway. The interests of justice have to have regard to the interests of both parties, and not just the respondents, and to adopt Ms Greig's interpretation of **Rule 12** would in my view be to close the door of the Tribunal to the claimant who seeks to vindicate her employment rights by suing her former employer.

78. It is clear that the claimant embarked on a valid process of early conciliation via ACAS on 14 May 2021 and she obtained the ACAS certificate compliant with **Section 18A** on 17 May 2021. To grant Ms Greig's motion to strike out the whole claim now as invalid would, in my view, be an exercise of elevating form over substance if the claim were now to be rejected.

79. As I see matters, the fact that the claimant went to early conciliation with ACAS allowed the respondents the opportunity to engage in that process, and try to resolve the claimant's dispute before the Tribunal claim began, and that fact gives some weight to why, in the interests of justice, this claim should not simply be rejected, without considering the arguments about whether, if the claim (in whole, or in part) was presented late, the claimant should be granted an extension of time on just and equitable grounds.

80. In the context of a technical error, as to the ACAS EC reference number used, there is undoubtedly greater prejudice caused to the claimant, than to the respondents, if I were to simply reject this claim. I have decided that the claim will not be rejected under **Rule 12(2ZA)**, and I will instead proceed to deal with the time-bar arguments, on the basis of the evidence led before me at this Preliminary Hearing, and having regard to parties' closing submissions.

81. It is well-recognised that there is a public interest in discrimination claims being allowed to proceed, and of the importance of not striking them out except in the most obvious cases, because they are generally fact-sensitive and require full examination of the facts to make a proper judicial determination.

82. The obvious prejudice to the claimant, if her claim is struck out, is that her whole claim against the respondents will be stopped in its tracks, and there

will be no evidentiary Final Hearing. Put simply, her claim will be at an end. The respondents will, in that event, also still have hanging over them, an allegation of age discrimination, which they deny, as also the other allegations of unfair dismissal, etc. I am not satisfied that it is in the interests of justice to strike out the claim, without hearing evidence.

83. Further, it seems to me to be not in the interests of justice, and thus inconsistent with Tribunal's overriding objective to deal with the case fairly and justly, that this case is brought to an end, and brought to an end now, and that is why I have decided to refuse the respondents' application for strike out of the whole claim, and instead decided to list the case (insofar as not dismissed as being time-barred) for a full merits Hearing in due course.

84. I turn now to parties' competing arguments on time-bar in relation to the remaining 3 harassment claims. The claimant, in paragraph 3 of her written submissions, submits that, even though presented out of time, the Tribunal should grant an extension of time to the claimant on the basis that it is just and equitable to do so.

85. Ms Greig, at her paragraph 4, submits that, the **Section 26** harassment claims were not brought within the statutory time limit, and that it is not just and equitable to extend the time to bring those claims. As per her paragraph 82, she seeks to have those claims dismissed by the Tribunal.

86. In her written submissions for the respondents, Ms Greig quotes from the statutory test an extension of time in a discrimination complaint which is to be found in **Section 123 (1) of the Equality Act 2010** which provides that, subject to **Section 140B** (extension of time limits to facilitate conciliation before initiation of proceedings) proceedings before the Employment Tribunal 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.

87. The 3-month time limit therefore runs from the date of the act complained of. Whatever the date of the alleged harassment acts complained of, there is no

dispute that the claimant did not notify ACAS until after the expiry of the 3-month time limit. An extension of time to facilitate ACAS conciliation before instituting ET proceedings therefore does not arise: I refer in this respect to paragraph 23 in the EAT judgment of Her Honour Judge Eady QC in Mr **Ian Pearce v 1) Bank of America Merrill Lynch 2) Bank of America Merrill Lynch International Ltd 3) Merrill Lynch: [2019] UKEAT/0067/19/ LA.**

88. This statutory test is commonly known as the "***just and equitable***" test and applies to the claim for discrimination / harassment. It is broader than the "***reasonably practicable test***" found in the **Employment Rights Act 1996**. It is for the claimant to satisfy the Tribunal that it is just and equitable to extend the time limit and the Tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant. It is the exception rather that the rule – per **Robertson v Bexley Community Centre [2003] IRLR 434.**

89. There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. These are statutory time limits, which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the Tribunal of first instance which is empowered to answer it **: Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 per Sedley LJ at [31-32]**.

90. In considering whether it is just and equitable to extend time, the Tribunal should have regard to the fact that the time limits are relatively short. **Robertson v Bexley Community Centre (t/a Leisure Link) [2003] IRLR 434** is commonly cited as authority for the proposition that exercise of the discretion to apply a longer time limit than three months is the exception rather than the rule. At paragraph 25, Lord Justice Auld stated:

> *"25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable*

grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is
5 *the exception rather than the rule."*

91. In **Chief Constable of Lincolnshire Police v Caston** [**2010] IRLR 327** Lord Justice Wall noted that the comments in **Robertson** were not to be read as encouraging Tribunals to exercise their discretion in a liberal or restrictive manner. The Tribunal should take all relevant circumstances into account and
10 consider the balance of prejudice of allowing or refusing the extension. As succinctly stated by him, at paragraph 17:

> "…*the discretion under the Statute is at large. It falls to be exercised "in all the circumstances of the case" and the only qualification is that the EJ has to consider that it is "just and*
15 *equitable to exercise it in the claimant's favour."*

92. The Tribunal may have regard to the checklist in **Section 33 of the Limitation Act 1980** as modified by the EAT in **British Coal Corporation v Keeble and Ors 1997 IRLR 336, EAT:**

a. The length and reasons for the delay.

20 b. The extent to which the cogency of the evidence is likely to be affected by the delay.

c. The extent to which the party has cooperated with any requests for information.

d. The promptness with which the claimant acted once he knew
25 of the facts giving rise to the cause of action.

e. The steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

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

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

95. The Tribunal must therefore consider:

    (1) The length and reasons for the delay

    (2) The extent to which the cogency of the evidence is likely to be affected by the delay

    (3) The prejudice that each party would suffer as a result of the decision reached

96. I pause here to note and record that the **Limitation Act 1980** to which **Keeble** refers does not apply in Scotland, the equivalent legislation being the **Prescription and Limitation Scotland Act 1973**. However, the 1973 Act does not offer an equivalent codified list of factors to be considered, **Section 19 A** simply stating:

"19A Power of court to override time-limits etc.

(1) Where a person would be entitled, but for any of the provisions of section 17, 18, 18A or 18B of this Act, to bring an action, the

court may, if it seems to it equitable to do so, allow him to bring the action notwithstanding that provision."

97. **Section 123 of Equality Act 2010** does not make reference to either the **Limitation Act 1980** or the **1973 Act**. It does not seek to define itself by reference to either statutory model.

98. As the Employment Appeal Tribunal recognised in **Miller and others v Ministry of Justice [2016] UKEAT/003/15**, per Mrs Justice Elisabeth Laing DBE, at paragraph 12:

> "….*There are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses…"*

99. In the context of discrimination cases, the importance of recalling not only what is done but the thought processes involved make it all the more likely that memory fade will have an impact on the cogency of the evidence : **Redhead v London Borough of Hounslow UKEAT/0086/13/LA per Simler J at [70].**

100. Having carefully considered the evidence led at the Preliminary Hearing, and considered both parties' closing submissions, in private deliberation, I have decided that the harassment claims are time-barred, and that I should not grant an extension of time to the claimant. The claimant has not persuaded me that it is just and equitable to extend time.

101. In deciding whether or not to extend time, there are a number of factors which I have taken into account in the balancing exercise that I have required to carry out. I have had particular regard to the recent Court of Appeal case, cited by Ms Greig, at paragraph 49 of her written submissions for the respondents, being **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23.**

102. In particular, and as quoted by Ms Greig, at her paragraph 51, I have taken account of Lord Justice Underhill's' judgment, at paragraph 37 in **Adedeji**, where the learned Lord Justice (himself a former President of the EAT) warned against the mechanical working through of a checklist, and instead advised that : "***The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular… the length of, and the reasons for, the delay".***

103. Ms Greig, in her detailed written submissions for the respondents, helpfully set out her position at paragraphs 58 to 78, and it is of assistance to note and record here, exactly what she said there, as follows:

> *58. The respondent's submission is that the s26 claims for harassment are out of time, and that it would not be just and equitable to extend the time period.*
>
> *59. Taking the claimant's case at its highest, the last allegation of discrimination occurred in "mid-December 2020" (allegation 3 in the Claimant's email of 7 September 2021 Doc 9).*
>
> *60. The time limit for initiating proceedings would have expired in mid-March 2021. The claimant did not initiate the Early Conciliation process until 14 May 2021. The claims are out of time.*
>
> *61. It is not just and equitable to extend the time to bring the claims.*
>
> *62. The reason the claimant gives for not bringing her claims in time is that from September 2020 onwards she felt her employment was under threat, following a dispute in relation to a pay rise. (see the claimant's oral evidence and also her email Doc 11 page 30 "would*

you not rather have a job" and "I felt my job was threatened"). The respondent's submission is that this reason should be rejected as untrue, on the following grounds.

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63. The respondent's position is that Allegation 3, if it was an act of discrimination, occurred on 13 December 2019, which was the last occasion the claimant received a Botox treatment from Ms McLean (Doc 2 page 13).

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64. The respondent's evidence in support of this date is the oral evidence of Ms McLean, director of the respondent. Her oral evidence is supported by the medical records showing Botox treatments on 13 December 2019 (Doc 2 page 13) and 26 June 2020 (Doc 2 page 16, carried out by Laura Miller because Ms McLean was heavily pregnant). Ms McLean's evidence is that there were no staff treatments in December 2020 because of the pressure to prioritise client treatments during a short window between two periods of lockdown. (The claimant accepts the dates set out in the rota at Doc 3 page 17). The evidence of Ms McLean is that there are no medical records showing a Botox treatment for the claimant in December 2020, supporting her position that the claimant did not receive any treatments after June 2020.

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65. The claimant's response in cross examination to the conflicting accounts of dates, is that the treatment in December 2019 did not happen. Both parties recall the claimant receiving dental treatment shortly before 13 December 2019. The claimant gave evidence that she was attempting to obtain evidence of prescriptions to support her position. To date the claimant has not produced any evidence supporting her position.

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66. In all the circumstances the evidence of Ms McLean should be preferred.

67. If the Tribunal find that the last Botox treatment received by the claimant was December 2019 or June 2020, then this predates the reason given by the claimant (that she felt her employment would be threatened following a pay dispute in September 2020).

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68. Turning to allegations 1 and 2, if the reason given by the claimant is accepted in relation to allegations 1 and 2, this does not explain the delay after the claimant's employment ended. The claimant's position is that she contacted ACAS immediately, as soon as she was advised she was at risk of redundancy, on 16 March 2021. The first Early Conciliation notification occurred 8 weeks after this date. The second EC notification occurred 12 weeks after this date. The reason given for not raising the claims while in employment cannot explain the delay from March 2021 onwards.

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Length of the delay:-

a. Allegation 3 – December 2019 – 18 months delay. Primary limitation period expired March 2020.

b. Alternatively if June 2020 – 12 months' delay. Primary limitation period expired September 2020.

c. No reason is given by the claimant for this delay because this pre-dates the "threat to job" dated September 2020.

d. Alternatively, if prefer the claimant's evidence – "mid December 2020" - time limit expired mid- March 2021.

e. Allegation 1 – October 2020 "forgetting things" – time limit expired sometime in January 2021.

f. Allegation 2 – early November 2020 "stair lift" – time limit expired early February 2021.

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69. The complaints are substantially out of time.

70. In any event the respondent disputes the reason for the delay given by the claimant. The respondent's position is that the true reason for the delay is set out at Doc 12 page 38 of the Joint Bundle – WhatsApp message from claimant. "I'm keeping everything up my sleeve." The respondent's submission is that this is the true motivation for the claimant deciding not to raise claims within the time limit.

71. This is a contemporaneous record of the claimant's motivation. It does not say – "the reason I am not making a claim right now is because I am worried I might lose my job if I do." It says "I'm keeping everything up my sleeve coz I know sooner or later something's coming my way". In other words, "I am choosing not to raise this claim, and my motivation is to raise a claim only IF a certain set of circumstances arise." In my submission this is the real reason why the claimant took no action. It was her deliberate intention to delay raising any claim, because she wanted to keep the possibility of making a claim "up her sleeve," to be raised at a future time of her choosing. This is not a genuine claim. It is an inappropriate use of the tribunal process, verging on abuse of process.

72. From this WhatsApp message at page 38, it appears that if a redundancy situation had not arisen in March/April 2021, then the claimant would not have raised her age discrimination claim at all, because she was "keeping it up her sleeve" until something "came her way".

73. The claimant also gave evidence that she believed she was not permitted to go to ACAS or raise an employment tribunal while on furlough, believing that this was included in the prohibition on carrying out work for an employer while furloughed. Her evidence was that she believed going to ACAS or raising a claim was "work related" and so not permitted while on furlough. The respondent's submission is

that this evidence is not credible. It is contradicted by the claimant's own evidence that while still employed in March 2021, and on furlough, she immediately contacted ACAS when advised she was being put at risk of redundancy (oral evidence of claimant and Doc 11 page 30).

74. There were many opportunities for the claimant to raise concerns during employment. The claimant accepts she was aware of the existence of the bullying and harassment procedure. The claimant accepts she could contact Ms McLean directly during lockdown. Ms McLean gave evidence that staff could contact her external HR providers for assistance.

75. The respondent's submission is that the claimant made an informed decision to take no action within the time limit. She consciously resolved not to raise the matter. We can contrast this with the redundancy process, when the claimant immediately sought advice from ACAS, but she chose not to do so in relation to the harassment claims.

76. See also the claimant's WhatsApp messages pages 33 to 47 of the joint bundle, showing the claimant being aware of her claims but still not raising them until 31 May 2021/10 June 2021.

77. In addition, there is still no satisfactory reason given for the additional delay after employment ended on 7 April 2021 until the initiation of EC and lodging of the ET1 claim forms. The relevant dates are:-

Employment ended:	*7 April 2021*
First notification to start ACAS EC:	*14 May 2021*
First EC Certificate received:	*17 May 2021*
First ET1 claim form presented:	*31 May 2021*
Claim rejected by ET:	*6 June 2021*

Second EC Certificate issued: 9 June 2021
Second ET1 claim form presented: 10 June 2021

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78. From 7 April 2021 to 31 May 2021 the claimant's evidence appears to be that she delayed raising claims while she made informal contact with the respondent following advice from ACAS. Taking this evidence at its highest, this still amounts to a conscious decision to delay raising claims she intended to make (see WhatsApp message Doc 12 page 43, 5 April 2021 "I'm going down bullying, age discrimination and the woman from ACAS…")

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104. The matters with particular significance in the balancing exercise that I have undertaken were as follows:

The length of delay:

105. The delay was significant here, both during and after her employment with the respondents. It is substantially out of time. As regards allegation 3, the alleged incident predates the claimant's stated reason for delay, being that she felt under "***threat***" following a pay rise dispute.

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106. It was not just a matter of days or weeks late. It was measured in months, in some cases exceeding one year plus late. The reasons for the delay were of the claimant's own making. The reasons for delay after her employment ended have not been explained by her putting forward any good reason for the delay.

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The claimant's awareness of the relevant facts:

107. The claimant had actual knowledge of the factual matrix which supports her claims against the respondents. She was not ignorant of the facts that she now wishes to rely upon.

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Advice received:

108. The claimant had taken advice from ACAS, she had access to, but did not avail herself of any advice available from her trade union, GMB, and she was

aware that there was a 3-month time limit for going to the Employment Tribunal.

Prejudice:

109. The obvious prejudice to the claimant, if the remaining 3 alleged age harassment complaints are struck out, as time-barred, is that that part of her claim against the respondents will be stopped in its tracks, and there will be no evidentiary Final Hearing on those matters. Put simply, that part of her claim will be at an end. She will, however, still have the other parts of her claim, to pursue to a Final Hearing.

110. The respondents have submitted, at Ms Greig's paragraph 81(g), that the delay has prejudiced her clients. See my paragraph 51, earlier in these Reasons, where I reproduce the full text of Ms Greig's paragraphs 80 and 81. Specifically, Ms Greig submitted at that paragraph 81(g) that : "***There is an inevitable impact on the cogency of evidence given the historic nature of the claims. The delay has prevented or inhibited the respondent from investigating the claim while matters were fresh. The evidence of those events is likely to be less good than if the issue had been raised nearer the time. This is a s26 harassment claim, and so the exact words and context are important to meet the statutory test. It will turn on the precise words used.*** "

111. I agree with Ms Greig's submission in that regard. The exact words used may be extremely important in establishing whether the alleged statements, if made, were because of a protected characteristic, namely age. This is what is often described as "***forensic prejudice***" in the case law that I cited earlier in these Reasons, at my paragraph 98 above, namely in Mrs Justice Elisabeth Laing's EAT judgment in **Miller and others v Ministry of Justice [2016] UKEAT/003/15**.

112. In these circumstances, I consider that it would be unfair to exercise my discretion to allow the claimant an extension of time for these 3 alleged harassment complaints, when to do so will inevitably put the respondents to

further cost and expense of defending the harassment allegations in circumstances where, given evidence has not been led, tried and tested, it cannot be said that that part of the claimant's case has or does not have any merit.

5 113. I am satisfied that the cogency of evidence from the respondents is likely to be affected by the delay in bringing the harassment claims. Delay in bringing the harassment claim is a matter which will likewise impact on the claimant, and her ability to recall matters, but it is, in my view, likely to impact in a greater way on the respondents than it does on the claimant, as the delay has 10 prevented the respondents from investigating those allegations while matters were relatively fresh in the minds of those said to be involved. There is an inevitable impact on the cogency of evidence about alleged harassment where those allegations are historic, and not in the recent past.

Further Procedure

15 114. In these circumstances, I have decided that the Tribunal does not have jurisdiction to consider the claimant's complaint of alleged age harassment against her by the respondents, and the Tribunal accordingly dismisses that part of her claim against the respondents. The remaining parts of her claim are unaffected by this Judgment.

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115. The remaining parts of the claimant's claim against the respondents shall now proceed to be listed for a Final Hearing in person in due course before a full Tribunal for full disposal, including remedy, if appropriate, and the clerk to the Tribunal is instructed to issue date listing stencils to both parties.

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116. Case Management Orders for that Final Hearing are issued, under separate cover, along with this Judgment.

117. I have estimated that the case will require a 5-day Final Hearing, with 4 days 30 for evidence, and the 5th day for closing submissions. **If parties disagree with**

that time-estimate, then they should advise the Tribunal without delay, in writing, when returning their date listing stencils.

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Employment Judge:	**G. Ian McPherson**
Date of Judgment:	**25 May 2022**
Entered in register: and copied to parties	**27 May 2022**

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