EMPLOYMENT TRIBUNALS

Claimant: Mrs Patricia Jalel

Respondent: Zotefoams plc

Heard at: London South Employment Tribunal (by CVP)
On: 22 June 2023 and 11 July 2023

Before: Employment Judge Abbott

Representation
Claimant: Mr Ian Wright, counsel
Respondent: Mr Greg Burgess, solicitor, of DMH Stallard LLP

RESERVED JUDGMENT FOLLOWING PRELIMINARY HEARING

The decision of the Tribunal is that the complaints were brought within such period as the Tribunal thinks just and equitable within the terms of section 123(1)(b) Equality Act 2010. The Tribunal therefore has jurisdiction to hear them.

REASONS

Introduction

1. This is my judgment following a Preliminary Hearing held by video on 22 June 2023 and 11 July 2023, further to a direction made by Employment Judge Martin and sent to the parties on 30 January 2023. The purpose of the hearing was to determine jurisdiction.

2. The jurisdictional issue concerns whether the complaints that comprise the claim were brought within the time limit in section 123 of the Equality Act 2010 ("**the Act**"). This issue was identified by Employment Judge Sage at an earlier Preliminary Hearing on 4 May 2021 in the following terms:

"1. Time limits

1.1 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Respondent stated that the Claimant has been off sick since the 15 January 2019 and it is not alleged that there is a continuing act. The Tribunal will decide:

1.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
1.1.2 If not, was there conduct extending over a period?
1.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
1.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
1.1.4.1 Why were the complaints not made to the Tribunal in time?
1.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?"

3. In the event, as set out further below, it was common ground that the complaints were not brought within three months (plus early conciliation extension) of the final act complained of. Therefore, the focus of the hearing was on sub-issue 1.1.4, *i.e.* whether it was just and equitable to extend time.

4. I heard oral evidence from the Claimant, Mrs Jalel, and from Mrs Cheryl Reid on behalf of the Respondent. I also had the benefit of written and oral submissions from both representatives, and a bundle of documents running to 468 pages.

5. The hearing was listed for one day, on 22 June 2023. Unfortunately, following the lunch break that day and partway through her oral evidence, Mrs Jalel was unable to continue due to severe pain. In the circumstances it was necessary to adjourn part-heard, and the hearing resumed on 11 July 2023 for a further half-day. It was not possible within that time to deliver an oral judgment and I therefore reserved my decision.

Relevant law

6. Section 123(1) of the Act provides, insofar as relevant, that a complaint under the Act 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.

7. Under section 123(3)(a) of the Act, conduct extending over a period is to be treated as done at the end of the period.

8. The Act itself does not provide further guidance on how to apply the 'just and equitable' test, but there are various authorities which have laid out useful principles and points of guidance. There is a helpful distillation of relevant points in paragraph 10 of the decision of Elisabeth Laing J (as she then was) in *Miller & Others v The Ministry of Justice & Ors* [2016] UKEAT 0003_15_1503. Those points are as follows:

"i. The discretion to extend time is a wide one: *Robertson v Bexley Community Centre* [2003] EWCA Civ 576; [2003] IRLR 434, paragraphs 23 and 24.

ii. Time limits are to be observed strictly in ETs. There is no presumption that time will be extended unless it cannot be justified; quite the reverse. The exercise of that discretion is the exception rather than the rule (ibid, paragraph 25). In *Chief Constable of Lincolnshire v Caston* [2010] EWCA Civ 1298; [2010] IRLR 327 Wall LJ (with whom Longmore LJ agreed), at paragraph 25, put a gloss on that passage in *Robertson*, but did not, in my judgment, overrule it. It follows that I reject Mr Allen's submission that, in *Caston*, the Court of Appeal "corrected" paragraph 25 of *Robertson*. Be that as it may, the EJ in any event directed himself, in the first appeal, in accordance with Sedley LJ's gloss (at paragraph 31 of *Caston*), which is more favourable to the Claimants than the gloss by the majority.

iii. If an ET directs itself correctly in law, the EAT can only interfere if the decision is, in the technical sense, "perverse", that is, if no reasonable ET properly directing itself in law could have reached it, or the ET failed to take into account relevant factors, or took into account irrelevant factors, or made a decision which was not based on the evidence. No authority is needed for that proposition.

iv. What factors are relevant to the exercise of the discretion, and how they should be balanced, are for the ET *(DCA v Jones* [2007] EWCA Civ 894; [2007] IRLR 128). The prejudice which a Respondent will suffer from facing a claim which would otherwise be time barred is "customarily" relevant in such cases (ibid, paragraph 44).

v. The ET may find the checklist of factors in section 33 of the Limitation Act 1980 ("the 1980 Act") helpful (*British Coal Corporation v Keeble* [1997] IRLR 336 EAT; the EAT (presided over by Holland J) on an earlier appeal in that case had suggested this, and Smith J (as she then was) recorded, at paragraph 8 of her Judgment, that nobody had suggested that this was wrong. This is not a requirement, however, and an ET will only err in law if it omits something significant: *Afolabi v Southwark London Borough Council* [2003] ICR 800; [2003] EWCA Civ 15, at paragraph 33."

9. This summary was cited, with approval, by HHJ Auerbach in *Wells Cathedral School Ltd & Anor v Souter & Anor* [2021] UKEAT 2020-000801. In that decision, HHJ Auerbach also noted at paragraph 30 that the point made about *Keeble* has since been restated by the Court of Appeal in *Abertawe Bro Morgannwg University Health Board v Morgan* [2018] ICR 1194 and in *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, and goes on to explain that what factors are relevant in the given case is case-sensitive, and so must be identified by the tribunal, case by case.

10. As stated by Leggatt LJ (as he then was) in *Morgan* at paragraph 19, 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).

11. When considering prejudice to the respondent resulting from a decision to extend the time limit, it is necessary to take account of the full delay between the matters complained of and their determination by the Tribunal, even where there are delays in the Tribunal process that are not the fault of either party (*Secretary of State for Justice v Johnson* [2022] EAT 1).

12. In cases where medical reasons are relied on by a claimant as part of the reason why proceedings were not brought within the time limit, the question is not whether the claimant was prevented from bringing proceedings by the medical condition, but whether, in the round, it is just and equitable to extend time in the light of the claimant's medical difficulties, even if they were not such as actually to prevent the claimant commencing proceedings (*Watkins v HSBC Bank Plc* [2018] IRLR 1015).

The Claimant's allegations & the primary time limit

13. Mr Wright provided a helpful summary of the Claimant's contentions in paragraph 8 of his written submissions. They can be divided (as Mr Burgess did in his written closing submissions) into two main groups of allegations:

    (1) That between 1 May 2018 and 16 December 2018, the Claimant was pressurised by her new manager, Naveed Khan, into using a splitter machine and performing compression set testing. During that period Mr Khan also made racially offensive remarks to her.

    (2) That between 8 January 2019 and 8 March 2019 the Claimant was pressurised by Cheryl Fergus and Gerri Herbert in the Respondent's HR team to return to work, including to use the splitter and compression set test machines.

14. Mr Burgess sought to persuade me that I should make findings in relation to the allegations against Ms Fergus and Ms Herbert based on the evidence I have heard and seen in the documents. I do not accept I am in a position to do so. Whilst I was shown documentary evidence that would support the Respondent's position, the Claimant gave oral evidence of undocumented discussions that support her case. Absent a complete evidential picture, I cannot make findings either way on the merits of the allegations. Subject to the jurisdictional point, this is a matter for determination at a Final Hearing.

15. I am also not in a position to make findings as to whether the specific allegations within, and between, each group of allegations amounts to a continuing act – those are matters that can only be determined at a Final Hearing having heard all the evidence. I would say, however, that it seems arguable based on the materials I have seen and evidence I have heard that (if the individual allegations are made out at the Final Hearing) they would be regarded a continuing act. However, on any view, the last act was on 8 March 2019, which is the material point for present purposes.

16. Although the certificate was not in the bundle, there was unchallenged evidence from the Claimant that she obtained an ACAS Early Conciliation certificate on 24 May 2019. I was told by Mr Wright, and accept, that the Claimant commenced Early Conciliation on 24 April 2019. Accordingly, the latest date on which the complaints should have been presented was 7 July

2019. There was a later ACAS Early Conciliation certificate, but this is not relevant for present purposes, as Mr Wright conceded in oral submissions. Mr Wright also accepted orally that he could not be assisted for time calculation purposes by arguing a continuing act through to the outcome of the Claimant's grievance on 23 August 2019 as he had initially argued in writing.

17. The claim was presented on 4 September 2020. Accordingly, on the view most favourable to the Claimant, the claim was presented around 14 months out of time. If the alleged acts are not found to be a single continuing act, the claim was presented between 14 and 25 months out of time. On either view, section 123(1)(a) of the Act is not satisfied.

18. It is therefore necessary to consider whether to exercise the discretion to extend time under section 123(1)(b) of the Act, applying the principles set out above.

Relevant findings of fact

19. The facts relevant to this issue are, I find, as follows. In making these findings I have taken account of the oral evidence given by the Claimant and Mrs Reid, as well as the pages of the hearing bundle that were referred to during the hearing.

20. The Claimant had been employed by the Respondent since 1997. From then until she was signed off work sick in January 2019, she had an unblemished work record.

21. As part of her role, the Claimant was originally required to use a splitter machine (which splits sheets of foam and cuts them into smaller pieces) and perform a laboratory test called a compression set test.

22. From around 2005, the Claimant began to develop back pain.

23. From around 2010, on the recommendation of an Occupational Health specialist, the Claimant was no longer required by the Respondent to use the splitter machine or perform the compression set test.

24. Between 2010 and 2017 the Claimant had only limited sickness absences from work. In respect of her back problems, the Claimant was absent for 15 days in October-November 2015 and then 23 days in February-March 2018.

25. In May 2018, Naveed Khan became the Claimant's line manager. I have outlined above the allegations that the Claimant makes about the actions of Mr Khan in the period from May-December 2018, but make no factual findings in respect of those. Mr Khan remains employed by the Respondent, albeit now in a different role.

26. In October 2018, an Occupational Health Referral Form was completed in respect of the Claimant, in the name of Sheryl Fergus (Senior HR Advisor). This form cited the Claimant's absences in February-March 2018 and included the following under "Reasons for Referral":

"Pat initially has Sciatica and a scan revealed she had two Bulging Discs in her lower spine. 8 years ago, she said she was told by a Company (onsite) doctor that she could not use a particular machine (the Splitter machine).

She also has Scoliosis in her mid-back (from a lot of twisting when using the equipment). She was also off this year with nerve damage. She has all the paperwork to support the above.

Her job requires that she uses the Splitter machine. We would like to know if the advice given 8 years ago by the company doctor (who I believe came from Maitland) is still relevant or whether she can in-fact use the Splitter machine without causing further injury to herself. This is a key part of her job (she is likely to be on a shift by herself) and where the work requires her to be able to use the machine, and where there are no other light duties that she can do during that shift."

27. The Claimant received a copy of this form on 8 January 2019. Having sight of this form had a serious and immediate adverse effect on the Claimant's mental health. She did not attend work on 9 January 2019. She reported in a telephone call to her GP on 9 January 2019 that she was feeling very stressed, extremely anxious and physically panicky. The Claimant had no prior history of mental health issues. She was prescribed propranolol (a beta blocker that can help with the physical signs of anxiety) and promethazine (an antihistamine used to help with sleep).

28. Although, in that first call with her GP, the Claimant had anticipated that the situation would be resolved within a couple of days, the medical notes demonstrate, and I find, that her anxiety and depression continued up to the presentation of the claim and beyond. Fit notes were regularly issued by the GP throughout the period indicating the Claimant was not fit to work and she regularly passed these on to the Respondent (usually via her Union representative, Gary Stanley). She had counselling at various points. I draw out in the chronology below further points from the medical notes that I consider provide a detailed picture of the state of the Claimant's mental health over the period of interest. For the avoidance of doubt, I accept that the GP notes accurately record what the Claimant was reporting, and that those reports were a true indication of the Claimant's state of mind at the relevant times.

29. I have outlined above the allegations that the Claimant makes about the actions of Ms Fergus and Ms Herbert in the period from January-March 2019, but make no factual findings in respect of those.

30. On 29 January 2019 the Claimant was admitted to hospital with palpitations. The hospital recommended she be started on an anti-depressant (sertraline 50mg).

31. On 22 March 2019 the Claimant was again admitted to hospital after having had palpitations whilst driving. Her sertraline dose was subsequently increased to 100mg.

32. By 27 March 2019 the Claimant was considering bringing proceedings against the Respondent, as is evidenced by a reference to going "to court" in an email to Mr Stanley on that date.

33. On 9 April 2019 the Claimant submitted an 8-page narrative grievance letter to the Respondent. She was supported in the preparation of this letter by Mr Stanley and members of her family.

34. On 24 April 2019 the Claimant commenced ACAS Early Conciliation in respect of her complaints.

35. On 30 April 2019 the Claimant was invited to two hearings: one regarding her grievance and one a disciplinary hearing regarding her absence from work.

36. On 30 April 2019 the Claimant was reviewed by her GP. She reported having suicidal thoughts.

37. On 3 May 2019 the Claimant spoke to her GP regarding her upcoming hearings. She was prescribed a short course of diazepam 5mg (an anxiolytic) to help with her anxiety.

38. On 9 May 2019 both the grievance meeting and disciplinary meeting took place. The former was chaired by Maurice Kozlowski (Plant Engineering Manager) and the latter by Mark Leaver (Manufacturing Manager) with Lukasz Czarnomski (HR) taking notes for each meeting. The Claimant was accompanied by Mr Stanley and her sister for support.

39. On 24 May 2019 the ACAS Early Conciliation certificate was issued.

40. In the course of May 2019 or thereabouts, the Claimant took advice from the GMB Union line who advised her to contact ACAS and, later, that if she wanted to bring proceedings she needed to complete an ET1 form. It was the Claimant's evidence (which I accept) that, with the assistance of family, friends and the Citizens Advice Bureau (but not Mr Stanley, who could assist only with internal procedures), she did complete an ET1 form at this time. She did not, however, present it to the Tribunal. I find that she did not do so because she was prioritising her mental health. I also find that, on the balance of probabilities, she was advised by her Union and/or the Citizens Advice Bureau that there was a 3-month time limit applicable to her claim at this time.

41. On 22 July 2019 the Claimant was provided with Mr Kozlowski's grievance outcome. He did not uphold the Claimant's grievance.

42. On 22 July 2019 the Claimant attended A&E at Eastbourne Hospital because of a suicidal frame of mind and was seen in the mental health clinic.

43. In a GP follow-up appointment on 25 July 2019 the Claimant discussed the ongoing stress problems with work, that she feels low from time-to-time, that she has had suicidal thoughts (but did not have them on this day) and sought a letter to support a request for an extension of time to appeal her grievance outcome. The letter provided by the Claimant's GP advised she should be given 3 weeks to prepare her appeal.

44. The Claimant's entitlement to Statutory Sick Pay, which she had been receiving since 24 May 2019 (having received discretionary company sick

pay at varying levels prior to that), expired on 27 July 2019.

45. On 5 August 2019 the Claimant spoke to her GP and was again tearful.

46. In August 2019 the Claimant submitted two lengthy documents to the Respondent in respect of her appeal: first a 10-page commentary on the accuracy of the grievance meeting notes and second, on 13 August 2019, a 17-page letter of appeal. She was assisted in preparing these documents by Mr Stanley and members of her family.

47. The grievance appeal meeting took place on 20 August 2019, chaired by Benito Sala (Managing Director, Europe), accompanied by Gerri Herbert (Head of HR) with Radi Kimonova taking notes. The Claimant was accompanied by Mr Stanley and her sister for support.

48. The grievance appeal outcome letter was issued on 23 August 2019. The appeal was not upheld.

49. On 17 September 2019 Ms Fergus left her employment with the Respondent and was replaced as Senior HR Advisor by Cheryl Reid.

50. In early October 2019 the Claimant was in Ireland with her family for support.

51. On 24 October 2019 the Claimant was reviewed by her GP. It was recorded that she was feeling more stressed as a result of ongoing grievances and work and money worries. She was suffering thinning hair. She reported occasional fleeting suicidal ideations. Her sertraline dose was again increased to 150mg.

52. On 31 October 2019 the Claimant was again reviewed by her GP. The increased sertraline dose combined with a visit from her sister appeared to have stabilised the Claimant's mood.

53. On 23 December 2019 the Claimant was again reviewed by her GP. She referred to stress associated with having to fill in forms, which triggers her anxiety. She reported that she had delayed filling in "the form for tribunal" (which I find is a reference to the Claimant recognising that she had missed the primary time limit to bring her claim to the Employment Tribunal) and requested a letter to explain why. If such a letter was issued (and the medical notes indicate it may have been), it did not form part of the bundle.

54. In early January 2020 the Claimant was contacted by email and post by Mrs Reid to obtain consent for a referral to Occupational Health. The Claimant responded promptly with her consent on 9 January 2020.

55. An Occupational Health report was provided on 6 February 2020 and records that, during the telephone consultation, the Claimant was emotional through much of the conversation, and that she did not see any return to work in sight barring a dramatic improvement.

56. In a telephone consultation with her GP on 21 February 2020 the Claimant reported feeling low and having suicidal thoughts.

57. In a telephone consultation with her GP on 16 March 2020 the Claimant reported not having any suicidal or self-harming thoughts at that time and that her mood was “OK today”.

58. On 15 April 2020, Ms Herbert left her employment with the Respondent.

59. In conversations with Mr Stanley on 21 May 2020 in the context of seeking to arrange a capability meeting with the Respondent, the Claimant reported suicidal thoughts. She repeated the same in an email to Mr Stanley (for forwarding to the Respondent) on 22 May 2020.

60. In view of this information, the Respondent’s HR team considered it was important to make sure the Claimant was not at risk of immediate suicide. Mrs Reid called the Claimant and spoke to her briefly that afternoon. I make no findings as to what was discussed. However, the fact of the call (and that it came from an unknown number) had an adverse impact on the Claimant. She subsequently that day had a long telephone consultation with her GP. She reported feeling very low and panicked following the contact from Mrs Reid. She described that her mood had been low for the previous 3 weeks and she had spent much of that period in bed. She reported disturbing thoughts, fleeting suicidal thoughts and poor sleep. Her sertraline dose was again increased to 200mg.

61. In around June 2020 the Claimant identified and, having borrowed approximately £2,500 from members of her family, instructed a solicitor, Chris Kingham of Lawson Lewis Blakers Limited. Mr Kingham advised the Claimant to initiate (for a second time) ACAS Early Conciliation and this was done on 15 June 2020.

62. In a telephone consultation on 9 July 2020, the Claimant reported having had low mood the previous week, but currently no suicidal thoughts.

63. In a telephone consultation on 14 July 2020, she reported that she felt better on the increased sertraline dose and her mood was gradually improving.

64. On 15 July 2020 the second ACAS Early Conciliation certificate was issued.

65. On 4 September 2020 the ET1 form was presented to the Tribunal.

The Claimant’s submissions

66. Two main reasons for the delay were advanced on behalf of the Claimant. First, the Claimant’s ill health during the relevant period, and second, the Claimant’s inability to afford legal assistance until the summer of 2020. It was argued that there was a degree of interrelationship between these in that, because of her ill health, the Claimant did not feel able to commence her claim without legal assistance.

67. Mr Wright submitted that the medical records demonstrate from January 2019 onwards a continuing record of extreme ill health, with some occasions where the Claimant’s condition was so extreme that she entertained suicidal thoughts – including at around the time of the first ACAS Early Conciliation certificate in April-May 2019. He accepted that the nature of the Claimant’s

condition was fluctuating, that she would have some less bad times, but the medical evidence was stark and compelling that the Claimant was in extreme ill health throughout the relevant time.

68. Mr Wright further pointed to the Claimant's financial position, that she ceased being paid anything after July 2019 and it was only when she was in a position to borrow money from family, around £2,500 for an initial payment, that she was able to instruct a solicitor to progress and present the claim on her behalf.

69. As regards the balance of prejudice, Mr Wright argued that there was minimal prejudice to the Respondent.

    (1) He submitted that the allegations against Mr Khan are fairly straightforward – fundamentally being that over the course of several months he repeatedly pressurised the Claimant to use the splitter machine and perform compression set testing. The Respondent pleads a straightforward answer: that Mr Khan did not so pressurise the Claimant. These matters were raised, and addressed, as part of the Claimant's grievance. Mr Wright accepted that some of the specific details, like dates of conversations etc, has only more recently been provided, but that is of little relevance where the response is a blanket denial of the allegations. Mr Khan is still employed by the Respondent and is therefore available to give evidence, so there can be no suggestion that a fair trial is not possible.

    (2) In terms of the allegations against Ms Fergus and Ms Herbert, whilst both have now left their employment with the Respondent, it has not been suggested that it is impossible for them to give evidence. In any event, there is a detailed document trail dealing with the Claimant's absence and her management by the Respondent. So-called 'HR evidence' can be given by another HR member of staff (as Mrs Reid did at the current hearing) without the Respondent being prejudiced.

70. By contrast, there would be substantial prejudice to the Claimant if no extension is granted, as she will be denied the opportunity to have her claims decided at a final hearing after a thorough testing of the evidence.

71. As a further factor, Mr Wright argued it is relevant to take into account that the Claimant had a good performance and attendance record until May 2018 when Mr Khan took over her management, with no history of mental health issues. Therefore, is it highly likely that the Tribunal will find a link between the ill health that she has suffered since January 2019 (and which affected her ability to present the claim in time) and her treatment by the Respondent – this was the trigger.

The Respondent's submissions

72. Mr Burgess did not dispute that the Claimant has been unwell since January 2019, but submitted that she was not so unwell throughout that period that she was unable to submit her claim earlier. He pointed to the following:

(1) It was clear that the Claimant was on a pathway to proceedings as early as March 2019, having referred to "court" in an email to her Union representative.

(2) She was able to commence ACAS Early Conciliation in April 2019, and to submit a detailed 8-page grievance that same month.

(3) With support from friends, family, her Union and Citizens Advice, she actually completed an ET1 form in around May 2019.

(4) In August 2019 she was well enough to send a 10-page document seeking to correct the grievance meeting notes and a 17-page appeal against the grievance outcome.

(5) In December 2019 she spoke to her GP specifically about a Tribunal claim and sought a letter to explain her delay in presenting the claim.

(6) That the medical records are indicative of a fluctuating condition, with references at various times to "feeling low from time to time" and some entries suggesting that, at the time of consultations, her mood was stable or OK.

73. Mr Burgess submitted that there was no necessity for the Claimant to instruct solicitors before she could present the claim. She had adequate support from friends, family, her Union and from the Citizens Advice Bureau. She was aware of the time limit, was taking advice on the process, but nevertheless chose not to submit the claim.

74. As regards prejudice, Mr Burgess argued that the Respondent would suffer significant prejudice.

(1) By the time of the Final Hearing in January-February 2024, the allegations against Mr Khan will be between 5 and 6 years old. It will self-evidently be difficult for Mr Khan to remember specific incidents going back that far. The issue is compounded by some of the details emerging only much more recently (in Further Information provided in January 2023) and not as part of the Claimant's earlier grievance. Three other witnesses who were spoken to as part of that grievance process have now left the employment of the Respondent, although contact has been made with Mr Kozlowski who handled the grievance.

(2) Ms Fergus and Ms Herbert have left the employment of the Respondent and it is unlikely they will be contactable. Had the claim been presented in time, they would still have been in post when it was commenced.

Conclusions

75. I must first of all identify the factors that I consider are relevant to the exercise of discretion in this case. I find that the following are relevant.

76. First, the length of the delay. Whichever view if taken on continuing acts, the claim is at a minimum 14 months out of time. This is a very considerable

delay which demands explanation. However, in view of the reasons (see below) the length of the delay in itself is a factor that should be afforded, in my judgement, little weight in this case. I address the effect of the delay under the balance of prejudice.

77. Second, the Claimant's ill health. I accept Mr Wright's submission that the Claimant was in extreme ill health throughout the period from January 2019 through to the summer of 2020. I have made detailed factual findings above as to how the Claimant was presenting to medical professionals during that period. I accept that there was a degree of fluctuation – for example she was not having suicidal thoughts constantly throughout the period. However, it is plain that the Claimant's state of mental health was mostly bad during that time, albeit with some times where it was less bad. I have particular regard to the fact that the Claimant's dose of sertraline (anti-depressant) gradually had to be increased from 50mg (January 2019) to 100mg (March 2019) to 150mg (October 2019) to 200mg (May 2020) over the period in question in order to try to sustainably stabilise the Claimant's mood. Nevertheless, there were regular reports of the Claimant having suicidal thoughts, e.g. in April 2019, July 2019, October 2019, February 2020 and May 2020. Notably, these episodes often coincided with times that the Claimant had to interact with the Respondent, e.g. in advance of her grievance and disciplinary meetings, upon receipt of her grievance outcome letter, and when being contacted in May 2020.

78. Third, the Claimant's lack of access to legal representation. I accept the submission that the Claimant's ill health made obtaining legal representation more important than it ordinarily would be for a Tribunal claim. Whereas the Claimant had the support of Mr Stanley as Union representative for internal processes, he could not assist with a Tribunal claim. The Claimant did have other support from family, friends and Citizens Advice, which got her to the point of having a completed ET1 form in May 2019. However, she did not take the next step of presenting the claim. I find that her ill health was the main factor in this – she had found the internal processes difficult enough (and triggering of more serious mental health episodes as summarised above) even with the buffer of Mr Stanley as representative, but in the Tribunal he would not be there. Rather than presenting the claim, she prioritised her mental health until such a time as she could get legal representation – which, due to financial issues, was not until summer 2020.

79. Fourth, what the Claimant was able to do, and her knowledge of the time limit, during the relevant period. As stated above, when considering the Claimant's ill health as a factor, it is wrong as a matter of law to question whether the claimant was prevented from bringing proceedings by the medical condition. Nevertheless, the Claimant's ill health did not prevent her from preparing a grievance, commenting on the grievance meeting notes and appealing the grievance, all of which involved preparation of lengthy submissions. It is right to take account of the fact the Claimant did these things. However, they are all 'internal' matters, leading to processes in which the Claimant would have the support of Mr Stanley. A Tribunal claim is, as noted above, different. It is also right to take account of the fact that the Claimant had knowledge of the three-month time limit to bring her claim as long ago as May 2019. However, as already said, the Claimant felt she

had to prioritise her mental health even though she knew that would risk being out of time. I consider, in my judgement, these facts should be afforded less weight than the overall state of the Claimant's health.

80. Fifth, the possibility that the state of the Claimant's health is linked to the alleged treatment. As I have already said, I cannot make findings in relation to the merits of the allegations. It is however, based on what I have seen, arguable that it is treatment by the Respondent that led to the Claimant's ill health. I take note of the fact that, before January 2019, the Claimant had no history of mental health problems, and the medical notes consistently refer to stress at work as being causative of the Claimant's mental health issues. This is therefore a relevant factor but, absent factual findings on the merits, one that I can give only little weight to.

81. Finally, the balance of prejudice. I accept there will be some prejudice to the Respondent if time is extended, and I take account of that. The allegations against Mr Khan are between 5 and 6 years old by the time of the Final Hearing, and this will pose some difficulties of recollection. However, the core of the complaints against Mr Khan were addressed as part of the grievance process in 2019 - Mr Khan was able to deny them at that time and can presumably do so again now. Mr Khan remains in the employment of the Respondent. I see no reason why there cannot be a fair trial of these allegations, with the Claimant and Mr Khan giving their respective sides of the story as best they can recollect. As regards the allegations against Ms Fergus and Ms Herbert, I do not accept that the document trail provides a complete answer to whether there is prejudice, because it is part of the Claimant's case that there were undocumented conversations as well which contradict the documents. It does lessen the degree of any prejudice, however. I have regard to the fact that Ms Fergus and Ms Herbert are no longer employed by the Respondent, but there was no evidence before me to suggest that it is impossible for them to give evidence or even that they had been contacted and had refused to cooperate – it was simply said in submissions that they were "unlikely to be contactable to give evidence". The most I can say is that there may be some prejudice to the Respondent, over and above the passage of time, if Ms Fergus and/or Ms Herbert cannot give evidence, and I give some weight to that possibility. Although other individuals interviewed as part of the grievance have left the employment of the Respondent, I see very little prejudice that this will cause to the Respondent, especially given notes of those interviews form part of the grievance outcome, and it appears Mr Kozlowski (who dealt with the grievance) is prepared to give evidence. Overall, I conclude that whilst there would be some prejudice to the Respondent, the degree of prejudice is not, in my judgement, as great as Mr Burgess sought to argue. A fair trial is still possible.

82. I have weighed up all of the factors identified in the preceding paragraphs. On balance, I am persuaded that it is 'just and equitable' to extend the period for all of the complaints raised in the claim. The state of the Claimant's mental health during the relevant period is, in my judgement, the most critical factor in this case, and outweighs the countervailing factors, including the prejudice caused to the Respondent as a consequence of extending time. I therefore find that the Tribunal has jurisdiction to hear the

complaints.

83. In the event of this outcome, the parties invited me to issue directions through to the Final Hearing – I have done so in a separate Order.

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Employment Judge Abbott

Date: 14 July 2023