EMPLOYMENT TRIBUNALS

Claimant: **Mrs C Buckby**

Respondent: **Cumberland Council**

Heard at: **Carlisle Combined Court**

On: **16 September 2024**

Before: **Employment Judge Cookson (sitting alone)**

Representatives
For the claimant: in person
For the Respondent: Mr Searle (counsel)

JUDGMENT ON A PRELIMINARY ISSUE

It is the judgment of the Tribunal that:

1. The Claimant has no reasonable prospect of establishing that alleged following alleged discriminatory acts of the Respondent were part of a course of conduct over a period that ended with the decision on the Claimant's appeal :

    a. Factual allegation 1: The Respondent did not provide a large screen to meet the needs of the Claimant's visual impairment for a period of about 8 months from October 2017 to about June 2018.

    b. Factual allegation 2: The Claimant was subjected to an absence management process in 2018.

c. Factual allegation 3: The Respondent failed to provide a minute taker for “looked after children” meetings from August 2018 to March 2019.

d. Factual allegation 4: The Claimant was subjected to an informal capability process in January 2019.

e. Factual allegation 8: The Claimant’s grievance being heard in her absence in March 2019, which the Claimant states occurred because she required an in-person hearing (rather than one by video link) and the Respondent was not able to accommodate such a hearing.

2. In consequence the following complaints under the Equality Act are struck out under Employment Tribunal Rule 37(1)(a):

a. Th factual allegation 1 was a failure to make reasonable adjustments;

b. That factual allegation 2 was an act discrimination because of something arising in consequence of disability and victimisation;

c. That factual allegation 3 was a failure of make a reasonable adjustment;

d. That factual allegation 4 was an act of victimisation;

e. That factual allegation 8 was an act of discrimination because of something arising in consequence of disability and a failure to make a reasonable adjustment.

3. The tribunal does not uphold the remaining grounds on which the Respondent sought to have the complaints under the Equality Act dismissed.

REASONS

4. This was a public preliminary hearing listed at the direction of Regional Employment Franey to consider the following grounds on which the Respondent sought to have complaints brought by the Claimant struck out under Rule 37 of the Equality Act

a. Equality Act time limits: whether those allegations identified in the first section of the List of Issues as items (1)-(4) and (6)-(9) should be struck out under rule 37(1)(a) on the basis that the Claimant has no reasonable prospect of success in showing either that they formed part of conduct extending over a period of time under section 123(3)(a) ending with the rejection of the Claimant's disciplinary appeal, or in the alternative that under section 123(1)(b) it would be just and equitable to allow the Claimant a longer period for presenting her complaint about these matters.

b. Fair hearing: In relation to all claims, whether the passage of time means that a fair hearing in October 2024 is no longer possible, so that the claims should be struck out under rule 37(1)(e).

5. At the outset of the hearing Mr Searle informed the Tribunal that strike out on ground (b) was not being pursued. That ground was not considered further.

6. In reaching my decision I considered the documents contained in a small bundle of documents provided by the Respondent and its written and oral submissions, oral submissions from the claimant, the pleadings and such information from the Tribunal file that was available to me in terms of case management orders.

Objections raised by the claimant

7. The Claimant objected to the strike out of her claims being considered at all and told me that she had not prepared for this issue to be considered. At one stage she told me that these matters have already been determined by Employment Judge Humble. She says that she is disadvantaged because she is disabled litigant in-person, and she does not have legal representation. She also objected to this hearing because it is so close to the final hearing and appeared to suggest she had not known that this application would be considered today. One of the difficulties I faced was that the Claimant's focus seemed to be on persuading me I should not consider these matters at all rather than addressing the issues which I was tasked with considering.

8. This hearing was listed by another judge, Regional Employment Judge (REJ) Franey. I am aware the Claimant has written to him at

various times about this hearing and other matters, but he has not decided to vary or set aside the listing of this hearing. I could not decide that is as not going to consider the application listed for this preliminary unless there was a material change in circumstances.

9. In terms of the timing of the hearing, one of the reasons why this hearing is so close to the final hearing is that the original hearing in June was postponed on the application of the claimant. However, one consequence of the timing of the hearing is that the parties have now exchanged witness statements. The Claimant has therefore prepared her evidence for the final hearing which must set out her evidence that she has been subject to discrimination which amounts to conduct extending over a period of time. I did not consider it to be unreasonable to expect the Claimant to be able to tell me in some meaningful way what evidence she has included in her witness statement which she intends to rely upon to show that the factual allegations are all part of a discriminatory act extending over time or the evidence and submissions she intends to give and make to show that it would be just and equitable to extend time.

10. In terms of the Claimant's lack of preparation for today's hearing, the Claimant was informed by the tribunal of the issue to be decided today in correspondence from REJ Franey and also in notices of hearing, for the originally listed hearing on 21 June 2024 and the notice of hearing for this postponed hearing. On 16 May 2024 REJ Franey wrote to the parties to explain on what basis the Respondent's application for strike out would be considered, as well as explaining how a case management issue would be decided.

11. In his reasons for listing this preliminary hearing in his letter of 16 May, REJ Franey had said this

"Insofar as the Respondent applies to strike out most of the factual allegations in the first part of the List of Issues on the basis that there is no reasonable prospect of the Claimant establishing a continuing act, the Claimant's observation that this application could have been made at an earlier stage is understood. However, it remains the case that there is an apparent disconnect between allegations which cover the period from October 2017 to 2019, and those allegations which concern the disciplinary procedure which began in March 2020 and which culminated in dismissal and the unsuccessful appeal. There is clearly an argument that the conduct of the appeal hearing forms part of a continuing act of discrimination, if discrimination is proven, with

the other allegations about the disciplinary process. The application will not be listed for a hearing on that point.

However, it will be listed for a hearing so that the Respondent can pursue its case that there is no reasonable prospect of the Claimant establishing that the allegations which are not part of the disciplinary process are part of a continuing course of conduct encompassing the disciplinary matters. That means that the allegations enumerated in the first section of the List of Issues which will be the subject of the application to strike out at the next preliminary hearing are the following: (1)-(4) and (6)- (9). It is noted that the protected disclosure detriment complaint and the unfair dismissal complaint relate to the disciplinary process, so in effect the purpose of this hearing will be to decide whether any matters other than those arising out of the disciplinary process can proceed, and whether there can be a fair hearing at all in October 2024 (noting that the final hearing was postponed in December 2022 on the application of the Respondent, and would have been listed in July 2024 had it not been for the unavailability of counsel for the Respondent).”

12. The fact that a strike out application would be considered at this hearing has also been referred to in subsequent correspondence from the tribunal and the Respondent and referred to by the Claimant herself. I was satisfied that the Claimant was aware that today’s hearing would consider the issue of strike out and that care had been taken to explain to her why the hearing was listed. I accept that she objects to it being considered but as already noted REJ Franey had not varied his decision that the preliminary hearing should proceed.

13. The Claimant has referred to her disability and the stress that she has been under, but I had no medical evidence before me to suggest the Claimant was unfit for this hearing or to prepare for it.

14. In terms of preparing for today, it is difficult to see what further could have been done to alert the Claimant to what would be considered at this hearing. I do not accept that the Claimant did not know that the strike out application would be considered as she appeared to seek to suggest. Instead it appears that the Claimant had chosen not to prepare for the hearing, perhaps in the belief that this would mean it could not proceed or she could persuade me not to consider the matter further for that reason.

15. I do not accept that the fact that the Claimant had chosen not to prepare for the hearing is a material change in circumstances which meant that it would be appropriate for me not to determine this preliminary issue in accordance with the orders of REJ Franey. To do so would allow parties to circumvent a judge's order about a hearing by choosing to ignore it and that cannot be in accordance with the overriding objective.

16. To deal with the issue in a proportionate way I allowed the Claimant time after the initial private case management discussion and then again after counsel for the Respondent had made his oral submissions, to allow her time to consider what submissions she wished to make.

17. In terms of the suggestion that I should not consider the strike out application at all because it had been determined by Employment Judge Humble, I explained to the Claimant at the time that I was not aware of her raising an objection to the listing of the preliminary hearing on this basis. I pointed out to the Claimant that if EJ Humble had decided there had been conduct over a period of time as the Claimant seemed to assert, the jurisdictional issue would not still be recorded in the list of issues. In fact EJ Humble ordered that jurisdictional time issues would be determined at the final hearing (his orders of 22 March 2022 refer). As already noted, in his letter of 16 May 2024, REJ Franey had explained to the Claimant that this hearing would not be deciding the jurisdictional time issue itself, but instead considering the strike out application to determine if the Claimant has no prospect of success of establishing that jurisdiction at the final hearing. I also sought to explain this to the claimant. I remain satisfied that it was, and is, proper for me to determine the strike out application.

What happened at the hearing

18. By the time the Claimant finished her submissions we had already overrun into the lunch break. I told the parties I would consider my decision over lunch. A little while later I was informed that by HMCTS staff that the Claimant was upset and had left the building, and I received an email confirming this and that she would not be returning.

19. I informed the Respondent of my decision in the very briefest of terms but recognised that the Claimant would need to see the reasons for my decision. I decided that the appropriate thing was to provide the

full reasons for my decision to the parties in writing as quickly as I could.

Background

20. The Claimant undertook ACAS early conciliation in accordance with the statutory process on three occasions which resulted in three early conciliation certificates being issued. First between 20 September and 20 October 2020, secondly between 26 November 2020 and 26 December 2020 and finally between 10 February 2021 and 11 February 2021. The claim form was issued on 25 February 2021. It is clear this has caused some confusion and indeed there may need to be further consideration of the jurisdictional implications of this at the final hearing. I note that EJ Humble took the second certificate into account when he allowed the amendment application to include the unfair dismissal and public interest disclosure claims when he reconsidered his earlier case management decision.

21. If the second certificate in relied upon, my preliminary but non-binding calculation, is that anything which happened before 27 October 2020 is potentially out of time unless it was part of conduct continuing over a period of time ending after that date or it is found to be just and equitable to extend time. If the third certificate is relied upon then only the complaint relating the appeal was brought in time.

22. Considerable time has been spent at previous preliminary hearings identifying the complaints contained in the Claimant's claim, including dealing with amendment applications. In consequence of those efforts a full and updated list of issues was prepared by REJ Franey in June 2023. At this hearing before me the Claimant told me that she was not satisfied with the list of issues and that in, her words, it just complicates matters. However, she did not tell me what is missing from the list or what is included that should not be. I have referred back to her narrative claim form which states her claims in brief terms. It does not identify or plead any legal claims as such. At the previous preliminary hearings, the judges have sought to identify and label the claims set out in the narrative. I cannot see any complaint set out in the claim form which is not included in the list of issues nor has the Claimant identified such complaint.

23. It was necessary for the Claimant's complaints to be identified in legal terms before I can consider striking out any part of her claim. In light of what the Claimant said to me about the list of issues I considered

whether I should go ahead and determined the strike out application in accordance with REJ Franey orders. In the absence of any application to amend her claim or specific explanation of what is incorrect about the list of issues I could not see how she is disadvantaged by me using the list of issues prepared by EJ Humble and subsequently updated by REJ Franey as the basis for my decision about certain specific complaints.

The Respondent's applications for strike out and the Claimant's answer to that application

24. In the written submissions from the Respondent, I am reminded of the relevant provisions in the Tribunal Rules of Procedure and relevant case law, including the helpful guidance on dealing with strike out set out in *Cox v Adecco [2021]* ICR 1307 and in *Mechkarov* [2016] ICR 1121, *Zeb* [2018] EWCA Civ 2137 and *Ahir v British Airways plc* [2017] EWCA Civ 1392. The Respondent's position is summarised briefly on each of the factual allegations making clear that the Respondent says they are discrete events which have been unconnected.

25. In his brief oral submissions Mr Searle conceded that striking out discrimination complaints is a draconian step but also suggested that such a step may help the Claimant concentrate on the main thread of her claim relating to her dismissal, although he also suggested that has little merit.

26. Mr Searle submitted that the Claimant has not suggested any sufficient nexus between the different complaints to suggest they show conduct existing over a period of time. He suggested that there is nothing to suggest conduct extending over time and highlighted that to deal with the allegations it was necessary for the Respondent to call a large number of witnesses because the various processes and procedures have involved different people. He argued that is inconsistent with a conduct extending over time.

27. He also argued that although the Claimant has submitted a lengthy witness statement she has not addressed at all the question whether it would be just and equitable to extend time.

28. In the alternative if I did not accept that the Claimant had no reasonable prosect of establishing that the factual allegations amount to conduct over time or that it would be just and equitable to extend

time, Mr Searle invited me to make a deposit order on the basis the Claimant has little reasonable prospect of successfully establishing that the tribunal has jurisdiction. These reasons however only deal with the strike out application.

29. In response to the application, the Claimant echoed that strike out is a draconian step. She submitted that strike out is not a step I should take when it would deny her access to justice. She also continued to complain about the timing of this application and pointed out that if the case had come to final hearing earlier this application would never have been considered. She also told that she continues to experience discrimination.

30. It was unfortunate that perhaps the Claimant was perhaps somewhat distracted by Mr Searles' comments about the merits of her complaints about dismissal, despite my attempts to reassure her that I was not concerned with that, and a suggestion that Mr Searle made that strike out might save the save the Claimant from herself which she clearly took exception to.

31. In terms of her case the Claimant she had been subject to continuing discriminatory treatment from Ms Clark, although her arguments seemed to be about the merits of the individual complaints rather than on what basis this was conduct which was an act of discrimination extending over time The Claimant argued that the reason for her dismissal was not genuine and that everything that had happened had been orchestrated by Ms Clark.

The law

Striking out

32. A claim or response (or part) can be struck out on the following grounds by an tribunal on a number of grounds including that it is scandalous or vexatious or has no reasonable prospect of success — rule 37(1)(a)

The exercise of the discretion to strike out.

33. Establishing one of the specified grounds on which a claim or response can be struck out is not of itself determinative of a strike-out application. Tribunals must take a two-stage approach. First the tribunal must first consider whether any of the grounds set out in rule

37(1)(a)–(e) have been established; and then, having identified any established grounds, it must decide whether to exercise its discretion to order strike-out.

34. Rule 37 allows an employment judge to strike out a claim where one of the five grounds is established, but it does not require a judge to strike out a claim in those circumstances. The Tribunal must still be satisfied that it should exercise its discretion.

35. In deciding whether to order strike-out, tribunals should have regard to the overriding objective of dealing with cases 'fairly and justly', set out in rule 2 of the Tribunal Rules. This includes, among other things, ensuring so far as practicable that the parties are on an equal footing, dealing with cases in ways that are proportionate to their complexity and importance, and avoiding delay. It has to be recognised that strike out is a severe sanction, given that fundamental rights and freedoms concerning access to justice are at stake.

36. In terms of striking out a claim (or a part of it) because it has no reasonable prospect of success, the test is not whether 'on the balance of probabilities' the claimant was unlikely to succeed in her claims. Instead, the question is the claimant has no reason prospect of success, in other words only a fanciful prospect of succeeding.

37. It is not for the tribunal to determine questions of fact in deciding a strike out application. The tribunal should take the claimant's case at its highest, unless contradicted by plainly inconsistent documents, and care must be taken assessing a case from a litigant in person which may be badly or inadequately pleaded. If the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike-out will be appropriate and a tribunal must carefully consider the claim as pleaded and as set out in relevant supporting documentation before concluding that there is nothing of substance behind it.

38. The strike out application in this instance relates not to an assertion that the claimant's complaints have no reasonable prospect of success on their merits as such, but rather on the ground that the claimant has no reasonable prospect of persuading the tribunal that the acts complained were part of conduct continuing over time such that her complaint was brought in time or that it would be just and equitable to extend time.

39. To establish whether a complaint of discrimination has been presented in time it is necessary to determine the date of the act complained of, as this sets the time limit running. Where the act complained of is a single act of discrimination, this will not usually give rise to any problems. However, the question of when the time limit starts to run is more difficult to determine where the complaint relates to a continuing act of discrimination, such as harassment, or to a discriminatory omission on the part of the employer, such as a failure to confer a benefit on the employee.

40. S.123(3) EqA makes special provision relating to the date of the act complained of in these situations. It states that:

    (a) conduct extending over a period is to be treated as done at the end of that period — S.123(3)(a)
    (b) failure to do something is to be treated as occurring when the person in question decided on it — S.123(3)(b).

The meaning of conduct extending over a period of time

41. The starting point in understanding what is conduct extending over time is the case of **Barclays Bank plc v Kapur and ors** 1991 ICR 208, HL, which drew a distinction between a continuing act and an act that has continuing consequences.

42. In **Commissioner of Police of the Metropolis v Hendricks** 2003 ICR 530, CA, the Court of Appeal made it clear that it is not appropriate for employment tribunals to take too literal an approach to the question of what amounts to 'continuing acts' by focusing on whether the concepts of 'policy, rule, scheme, regime or practice' fit the facts of the particular case. Those concepts are merely examples of when an act extends over a period and should not be treated as a complete and constricting statement of the indicating of 'an act extending over a period'. The focus should be on the substance of the allegations. The question was whether that was an act extending over a period, as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed. The correctness of this approach was confirmed by the Court of Appeal in **Lyfar v Brighton and Sussex University Hospitals Trust** 2006 EWCA Civ 1548, CA.

43. The Court of Appeal in **Aziz v FDA** 2010 EWCA Civ 304, CA found that in considering whether separate incidents form part of an act

extending over a period, 'one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents'.

44. In **Worcestershire Health and Care NHS Trust v Allen** 2024 EAT 40 the EAT observed that there is no requirement that the 'conduct' extending over a period for the purpose of S.123(3) must all relate to the same protected characteristic. The EAT could see nothing in the language of the relevant provisions that would prevent the entire course of the racist and sexist behaviour constituting conduct extending over a period for time limit purposes. There is also no reason why conduct extending over a period cannot involve a number of different types of prohibited conduct, such as a mixture of harassment and direct discrimination. It may be more difficult to establish that there has been discriminatory conduct extending over a period where the acts that are said to be linked relate to different protected characteristics and different types of prohibited conduct, but there was no absolute bar that prevents there being conduct extending over a period in such circumstances. However applying *Hendricks*, for there to be conduct extending over a period there must have been an ongoing situation or a continuing state of affairs that was discriminatory.

Preliminary hearings on time limits in discrimination cases

45. The principles which should be considered when jurisdictional time issues are considered by HHJ Ellenbogen J in **E v X, L & Z** UKEAT/0079/20/RN and UKEAT/0080/20/RN and previously by HHJ Auerbach in paragraphs 58-66 of **Caterham School Limited v Rose** [2019] UKEAT/0149/19. These paragraphs were quoted in paragraph 46 of **E v X**, albeit that Ellenbogen J disagreed with one point.

46. In essence there are two different types of public preliminary hearing about time limits. The first type is a determination of time limits as a preliminary issue under rule 53(1)(b). This will involve hearing evidence, making findings of fact and applying section 123 Equality Act 2010 to determine the issue once and for all. In general such a hearing may be appropriate where the only issue is whether the claimant should be granted a just and equitable extension of time, since the evidence required is unlikely to overlap with the substantive evidence needed at the final hearing. However, if it is reasonably arguable that there was an act extending over a period, the tribunal

must not determine that issue until it has heard all relevant evidence (**Aziz v. FDA** [2010] EWCA Civ 304). The evidence required to determine that is very likely to overlap with the evidence required at the final hearing.

47. The second type of hearing is consideration under rule 53(1)(c) of striking out under rule 37 on the basis that the claimant has no reasonable prospect of success in establishing that the claim (or relevant part of the claim) has been brought within time. Such consideration may be commonly combined with consideration of a deposit order under rule 39 as an alternative on the basis that the claimant's time limit contention has little reasonable prospect of success. This type of hearing is more likely to be appropriate for a continuing act argument than a just and equitable extension because rather than determine the issue the tribunal will consider is whether it is reasonably arguable that that the alleged discrimination formed part of an act extending over a period. If it is not, the relevant allegations can be struck out. If it is, the question of time limits and continuing acts is not definitively resolved but is deferred to the final hearing. Although such a hearing can sometimes be dealt with on the basis of the pleaded case alone or it may be appropriate in such strike out applications for the claimant to provide a witness statement and give oral evidence as part of demonstrating that he or she has a prima facie case on the point. It is unlikely, however, that evidence from the respondent will be needed.

Just and equitable extensions of time

48. In terms of deciding whether the claimant has a reasonable prospect of establishing that time should be extended it is essential to have regard to the case law on how that discretion must be exercised.

49. In **Abertawe Bro Morgannwg University Local Health v Morgan** [2018] EWCA CIV 640 Leggett LJ said this *"it is plain from the language used ("such other period as the Employment Tribunal thinks just and equitable") that Parliament has chosen to give the Employment Tribunal the widest possible discretion. Unlike Section 33 of the Limitation Act 1980, Section 123(1) of the Equality Act does not specify a list of factors to which the Tribunal is instructed to have regard, and they will be wrong in those circumstances to put a gloss on the words of the provision or to interpret it as if it contained such a list. Although it has been suggested that it may be useful for a Tribunal in exercising its discretion to consider the list of factors*

specified in Section 33(3) of the Limitation Act 1980 the Court of Appeal has made it clear that the Tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account. The position is …….. to that where a Court or Tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under Section 7(5) of the Human Rights Act 1998.

50. In **Adedeji v University Hospitals Birmingham NHS Foundation Trust** 2021 ICR D5, CA the Court of Appeal set out guidance on how to approach the application of the list of factors referred to in the **British Coal Corporation v Keeble** case. [1997] IRLR 336. In **Adedeji** the Court of Appeal cautioned that **Keeble** does no more than suggest that a comparison with S.33 might help 'illuminate' the task of the tribunal by setting out a checklist of potentially relevant factors; it certainly did not say that that list should be used as a framework for any decision. The Court of Appeal emphasised that the "Keeble" factors should not be taken as the starting point for tribunals' approach to 'just and equitable' extensions and that rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language. The best approach for a tribunal in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, these may well include factors considered in Keeble – for example the length of, and the reasons for, the delay is always likely to be a relevant consideration but ultimately the question is what is just and equitable.

51. This means the exercise of the discretion to extend time because it is just and equitable to do so involves a multi factual approach, taking into account all the circumstances of the case in which no single factor is determinative of the starting point. In addition to the length of the delay, the extent to which the weight of evidence is likely to be affected by the delay, the merits, and the balance of prejudice; other factors which may be relevant include the promptness with which a claimant acted once he or she knew factors giving rise to the course of action and the steps taken by the claimant to obtain the appropriate legal advice once the possibility of taking action is known.

52. In terms of relevant factors, as well as the length of delay and the reasons for it, other relevant factors will usually include the balance of prejudice between the claimant and the respondent. The prejudice

to a claimant is perhaps obvious. They are not able to pursue their complaint. In **Miller and ors v Ministry of Justice and ors and another** EAT 0003/15 Mrs Justice Elisabeth Laing set out five key points derived from case law on the 'just and equitable' discretion. In terms of the balance of prejudice, she explained that the prejudice that a respondent will suffer from facing a claim which would otherwise be time-barred is 'customarily' relevant. Elisabeth Laing J elaborated that there are two types of prejudice that a respondent may suffer if the limitation period is extended: (i) the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and (ii) the forensic prejudice that 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.

53. The EAT provided important further clarification on this issue in **Concentrix CVG Intelligent Contact Ltd v Obi** 2023 ICR 1, EAT. The employment tribunal found that the claimant had been sexually harassed by her line manager on three separate occasions. It went on to find that these three incidents amounted together to conduct extending over a period, and accordingly time for presenting a complaint to the tribunal in respect of all of them ran from the date of the last incident. Calculating limitation in that way, these complaints had been presented one day out of time. The tribunal decided it was just and equitable to extend time. The respondent appealed in respect of the decision to extend time. One of the grounds was that the tribunal had erred in its approach to the question of forensic prejudice to the respondent. This ground succeeded. The EAT found that the tribunal had erred by confining its consideration of that question to whether any such prejudice had been occasioned by the complaints being one day out of time, and by failing to take into account its own earlier findings about forensic prejudice when determining a complaint of racial harassment relating to one of the three incidents found to amount to sexual harassment (which was found to be a one off incident and the complaint about that had been submitted 4 months out of time).

54. The EAT in **Concentrix** also considered whether the tribunal's approach to extension of time must be 'all or nothing' in cases where a series of discrete discriminatory incidents are said to amount to conduct extending over a period, but which is still out of time,. HHJ Auerbach suggested that if the tribunal considers that issues of forensic prejudice render it not just and equitable to extend time in

relation to the whole compendious course of conduct, the tribunal may then need to give further consideration to whether it is alternatively just and equitable to extend time in relation to the most recent incident in its own right, standing alone, on the basis that the same forensic difficulties might not arise, or arise so severely, in relation to it. The EAT reasoned that, just as it is not an error to take 'real time' forensic prejudice into account, so, conversely, in a case where there may be an issue of such potential forensic prejudice if time were to be extended, the tribunal would err in principle if it failed to consider that aspect, as it would fail to take into account a relevant consideration.

55. It is well known that in the judgment of the Court of Appeal in **Robertson -v- Bexley Community Centre** it was said that in relation to the exercise of discretion, '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 the discretion is the exception rather than the rule.' However I have also reminded myself that that does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. In the same judgment Lord Justice Auld said "The Tribunal, when considering the exercise of its discretion, has a wide ambit within which to reach a decision". The law does not require exceptional circumstances, it simply requires, that an extension of time should be just and equitable – **Pathan -v- London South Islamic Centre** EAT 0312/13. The approach I adopt is that what Robertson reminds tribunals, is that if a party seeks the exercise of judicial discretion it is for them to show that the discretion should be exercised in their favour. In other words, the onus is on the claimant to convince the tribunal that it is just and equitable to extend the time limit and the extension must be justifiable.

DISCUSSION AND CONCLUSIONS

56. The Claimant's lack of any specific explanation about the evidence which she will offer in this case presented me with significant difficulties. I appreciate that the Claimant is disabled and that she is a litigant in person, but if the Claimant is to succeed in her case, which is now only a matters of weeks away, it is for her to persuade the tribunal at that final hearing that it has jurisdiction in relation to the

complaints based on evidence the Claimant has already provided to the Respondent. In particular in relation to whether there is conduct extending over a period of time, that requires her to show on the balance of probabilities that there was an act extending over a period, as distinct from a succession of unconnected or isolated specific acts. I did not (of course) expect the Claimant to prove her case to me at this hearing, but I did expect her to be able to explain to me what her case would be, not so I could decide a dispute of fact about whether there was conduct over a period time, but to determine if the Claimant is putting forward any evidence which could lead to finding of that because if she is not offering any evidence she can have no reasonable prospect of establishing jurisdiction in that regard and if that is the case I agree with Mr Searle it would be sensible for all concerned to concentrate on the issues relating to the disciplinary proceedings as set out by REJ Franey in his letter of 16 May 2024.

57. The Claimant told me she has been subject to continuing conduct by her manager Ms Clark and that she believes that it has been hostility from Ms Clark that has underpinned what has happened to her up to dismissal. She told this also relates to the failure to make reasonable adjustments, but she did not explain what evidence she intends to rely on to meet the burden of proof on her as set out in the Equality Act and she did not suggest any connection except that it is her belief that this is all tied to or connected towards her from Ms Clarke.

58. I considered the contents of the claim form to see if that could help me understand what the Claimant's case is on the issue of jurisdiction. A claim form does not need to plead the facts the Claimant intends to rely upon in this regard but in the absence of any explanation from the Claimant in her submissions I looked to see if this may clarify matters for me. The Claimant says this

"I believe that I was subjected to disciplinary processes in any attempt to get me to leave as I raised concerns about practice at the council which was part of my role but which the council chose to ignore.

My first disciplinary process commenced following illness caused by me not being provided [with] the appropriate reasonable adjustments. Occupational health and my consultant both told my employer that the way I was being managed resulted in workplace stress, I am now aware that a team manager at the council took her own life a few months before my employment started and that this was due to the

way in she was being managed, I believe that the organisational culture in the council is toxic for anyone who questions practice.

The grounds on which the LA relied in my dismissal are based upon false claims made against me by a barrister for the previous authority where we lived, The police have closed my case with no further action as have Social Work England who do not believe that my practice has been impaired.

Believe that I have been subject to direct discrimination and victimization for addressing discrimination against others."

59. I can see from this that the Claimant makes some connection between events over time but even taking that at its highest the bare facts as put forward by the Respondent in its submissions which the Claimant seemed not to disagree with, appear to be inconsistent with some sort of continuing effort to force the Claimant out.

60. Allegation (1) is that the Respondent did not provide a large screen to meet the needs of the Claimant's visual impairment for a period of about 8 months from October 2017 to about June 2018. This is alleged to be failure to make a reasonable adjustment and an act of victimisation related to an alleged protected act in December 2017.

61. The Respondent says that *"this situation was ongoing from on/slightly before 16 January 2018 (when the Claimant requested a bigger computer screen) until on/around 24 July 2018 (when the Claimant collected the bigger computer screen). It is undisputed that the complaint was resolved by the provision of the larger screen. It is entirely unrelated to any of the Claimant's other allegations and, even if it is regarded as an act continuing over an extended period of time, it came to an end on/around 24 July 2018, approximately 31 months before the Claimant lodged her ET1."*

62. In terms of protected acts, the protected acts are also the alleged protected disclosures referred to in the list of issues for child A and child B (although in relation to the protected act for child A the list of issues notes that it is not clear on what basis there is said to be an act of discrimination). The claims about protected disclosures note other concerns being raised but it appears those are not said to be protected acts under the Equality Act,

63. The Claimant has not suggested to me what evidence she intends to rely upon to show that this failure to provide a computer screen in a timely way is connected to the disciplinary proceedings or indeed to the concerns related to what happened to the children in the alleged protected acts and how that could be related to the reasons for dismissal. In terms of the protected acts and the provision of the computer screen clearly there is some overlap of time, although the Claimant's allegation about the start of the period of time when the reasonable adjustment should have been made (October 2017) predates the protected acts alleged to have occurred in December 2017 and January 2018. The Claimant did not explain how this is connected to the alleged failure to make a reasonable adjustment except in the very vaguest of terms through a connection with Ms Clarke. I do not accept what I was told suggests the Claimant has evidence to suggest conduct extending over time, simply because the Claimant refers in vague terms to her line manager, especially when on the face of the allegation the failure to make the adjustment was addressed by July 2018.

64. Allegation (2): the Claimant was subjected to an absence management process in 2018. This is said to be an act of discrimination because of something arising in consequence of disability and victimisation.

65. The Respondent in its submissions says *"that the Claimant attended a Positive Attendance Support Meeting on 24 July 2018. The outcome was delivered on 14 August 2018 and the process did not progress any further. The purpose of the absence management process was to discuss the Claimant's wellbeing and to look at how the Respondent could help and support her moving forward. She did not face any formal action or warnings. The process concluded in August 2018 and is entirely unrelated to any of the Claimant's other allegations."*

66. In terms of what the Client says her case will be about that, I understand it to be, at its highest, that Ms Clark was involved in some way because she was the line manager and that is the common thread which links this allegation to the others to mean it is conduct extending over time. In terms of the s15 complaints, the "something arising" set out in the list of issues did not help me understand the evidence the Claimant intends to offer. The Claimant did not suggest to me that she disputes the Respondent's description of what happened in terms of the factual background.

67. I do not accept what I was told suggests the Claimant has evidence to suggest that this was conduct extending over simply because the Claimant refers in vague terms to her line manager, especially when on the face of the allegation, the failure to make the adjustment was addressed by July 2018.

68. Allegation 3 is that the Respondent failed to provide a minute taker for "looked after children" meetings from August 2018 to March 2019. The Respondent's basis for strike out: is that *"so far as the Respondent is aware, the Claimant didn't ever raise this as an issue. Even if it had been raised, this alleged detriment does not form part of a continuing act extending beyond March 2019, almost two years before the Claimant lodged her ET1."* This is alleged to be a failure to make a reasonable adjustment. The Claimant has not explained to me what evidence she will rely on to show this was conduct extending over a period of time. Again her case to be that Ms Clark was involved in some way, but I do not accept that is enough to suggest that the Claimant has any reasonable prospect of stalking conduct extending over time which ended with the Claimant's dismissal such that it can be said the Claimant has a reasonable prosect of establishing that the tribunal has jurisdiction.

69. Allegation (4): the Claimant was subjected to an informal capability process in January 2019. The Respondent's basis for strike out is that *"the Claimant attended a Capability Meeting on 13 February 2019 and she was invited to attend a further meeting on 20 March 2019. The second meeting didn't take place and the process did not continue beyond 20 March 2019"*.

70. This is said to be an act of victimisation. In addition to the protected acts referred to above, the Claimant has referred additionally to a protected act in March 2019, that is her grievance. A grievance in March 2019 cannot be the reason for a protected act in February 2019 so the Claimant's case must be that the reason for this alleged detriment is the earlier protected acts, but what that case is unclear. More significantly in terms of the issue of jurisdiction, the Claimant has not explained what evidence she intends to rely upon to explain how a process which was not continued past March 2019 was an act of discrimination which continued over time though a connection to the later disciplinary case.

71. Allegation (8): the Claimant's grievance being heard in her absence in March 2019, which the Claimant states occurred because she required an in-person hearing (rather than one by video link) and the Respondent was not able to accommodate such a hearing. The Respondent's basis for strike out is that the Claimant submitted her grievance in March 2019 and the grievance hearing took place on 17 April 2019. Contrary to the Claimant's assertion, she attended in person, along with her Union representative. In any event, the grievance hearing took place in April 2019 and the alleged requirement for her to attend in person was a disputed one-off incident and does not form part of a continuing act. This allegation is said to be a complaint of an act of discrimination because of something arising in consequence of disability and a failure to make a reasonable adjustment.

72. I understand the Claimant's case at its highest to be that her allegation is evidence of underlying hostility towards her by Ms Clarke but as complaint about a failure to make a reasonable adjustment I do not see how it anything other than an allegation of a one-off failure and I do not accept that the Claimant has shown has any reasonable prospect of establishing that this was conduct extending over time.

73. In terms of the Claimant's allegations at (6) (7) and (9): Allegation (6): is that in about November 2020, the Respondent required that the Claimant have the same manager, Kim Clark (from whom the Claimant inherited her caseload), despite a recommendation from Occupational Health and a consultant to the effect that the Claimant's manager should be changed to reduce workplace stress.

74. I am unsure whether this is issue can be correctly fixed in time given that the Claimant was dismissed on 3 November 2020. The Respondent in its submissions suggest that at an Occupational Health Appointment on 27 November 2018, the Claimant made a request for her line manager to be changed. The reasoning for this request was discussed with the Claimant at length. At the Grievance Hearing on 17 April 2019, it was decided that Mark Casey would replace Kim Clark as the Claimant's line manager.

75. I found the Claimant's case about to be somewhat confusing. I understand her to dispute that version of events and her to assert that she was managed by Ms Clark throughout and I understand the Claimant's case to be Ms Clark's continued line management of her is connected to the disciplinary procedure in some way. I remain

uncertain how the recorded allegation is conduct linked to the disciplinary proceedings. However, given the apparent nexus to the decision to dismiss, at least in terms of the recorded allegation in the list of issues, I cannot reach a conclusion that this complaint has no reasonably prospect of success even given the limited explanation of her case offered to me by the claimant.

76. In preparing these reason is note that if the allegation made by the Claimant is correct in terms of date, if she is able to rely on the second early conciliation certificate it would not be out of time but I have not examined that legal issue because the parties had not had the opportunity to make submissions about that.

77. Allegation (7): the instruction to the Claimant, from Kim Clark on about 13 March 2019, to the effect that the Claimant was not to drive to work after the Claimant raised concerns about her eye condition and medication, until she could "prove she was fit to drive".

78. In explaining her case to me about that I understand the Claimant to say that this is essence hostile management which continued to her dismissal. I am not sure that explanation is consistent with the complaint identified, but at it highest this allegation does seem to suggestion there may be some connection or nexus to the disciplinary action which should be resolved through the tribunal such that it would be appropriate to conclude that there is no reasonable prospect of establishing conduct extending over a period of time.

79. Finally allegation 9 is that Allegation (9): the Respondent's Human Resources adviser made a safeguarding referral in respect of the Claimant and her son during 2019, and claimed that the Claimant had sent "numerous messages saying that [she] was going to end her life when there were in fact none". I found the Claimant's submissions somewhat hard to follow. I understand her to suggest there is connection between her son and safeguarding concerns and the disciplinary action which is said to be an act of unlawful harassment and victimisation. Whilst the relevance of that is not entirely clear to me, I decided that it would not be appropriate to conclude that the Claimant has no reasonable prospect of establishing jurisdiction in relation to this complaint.

80. In relation to 6, 7 and 9 I do have concerns about whether the Claimant has any meaningful case in support of her contention that

there was conduct extending over time, but I have taken a cautious approach.

81. In terms of the Claimant's prosects of persuading the tribunal to extend time for complaints which were not brought within the primary statutory time limit, the Claimant did not dispute that her witness statement contains no reference to why her claim was not presented in time or any evidence which might be relevant to the question of whether it is just and equitable to extend time. Although an individual does not to give a good reason for not submitting their claim, or indeed any reason or at all, it is almost always relevant to consider why a claim has not been presented in time and it is difficult to imagine a case where a tribunal could find it is just and equitable to extend time but without being to making a finding about why that has happened. The Claimant has not suggested to me that there is any evidence available to the tribunal about that nor she did suggest any submission she intends to make in that regard. It will be for the Claimant to persuade the tribunal to exercise its discretion in her favour. In the absence of any suggestion from her to me about how she would do that I conclude that she has not reasonable prospect of persuading the tribunal at the final hearing to exercise its discretion.

Employment Judge Cookson
DATE 22 September 2024

Judgment sent to the parties on:
23 September 2024
For the Tribunal:

Note
Reasons for the judgment were given orally at the hearing. Written reasons

will not be provided unless a party asked for them at the hearing or a party makes a written request within 14 days of the sending of this written record of the decision.

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/