



EMPLOYMENT TRIBUNALS

Claimant: Mr A Ibrahim

Respondents: (1) Wilson James Ltd
(2) Facebook (UK) LTD

Heard at: London Central remotely
& 1 February 2022

On: 7 December 2021 & in
Chambers 25 January 2022

Before Judge: Mrs A Isaacson

Representation

Claimant: Mr J Neckles, union representative

First Respondent: Mr P Chadwick, solicitor

Second Respondent: Mr Kibling, counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is as follows:

1. The claimant's claim against the first respondent is in time.
2. The claimant's claim against the second respondent is out of time. The Tribunal exercises its discretion to extend time on the basis it is just and equitable to do so.
3. The claimant does have legal standing to bring his claims against the second respondent.

REASONS

Background

1. On 7 December 2021 there was an open preliminary hearing to decide: whether the claimant's claims were in time, and if not, whether it would be

just and equitable to extend time; whether the claimant had legal standing to bring his claim against the second respondent and case management if appropriate.

2. At the start of the hearing the claimant's representative, Mr Neckles explained that he was in Grenada, following the death of his sister, and had in the last 3 hours started to suffer double vision from Fourth Nerve Palsy. He sought an adjournment as he was unable to read any of the documentation.
3. Mr Neckles confirmed that he would not be arguing or producing any witness evidence regarding the Tribunal exercising its discretion to extend time on the basis it was just and equitable to do so as he believed the claims were all in time.
4. The respondents' representatives took instructions and confirmed they would agree to an adjournment on the basis that all parties sent in written submissions within a short time frame and I decided the preliminary issues without a further hearing. Mr Neckles agreed to send in written submissions but needed at least 3 weeks as the eye condition could take that amount of time to settle.
5. The hearing was adjourned, and the parties were ordered to send to the Tribunal by 4pm on 7 January 2022 written submissions and the claimant was ordered to send a schedule of loss by 23 December 2021. The claimant was also to send to the respondents by 7 January 2022 his comments on the respondents' agenda.
6. The respondents sent submissions to the Tribunal by 4pm and the claimant sent his submission just before midnight on 7 January 2022 and sent an amended submission late on 9 January 2022, together with a schedule of loss. The claimant attached a copy of the cases of **Hale** and **Hendricks** referred to below, and a copy of the Council Directive 2000/43/EC of June 2000. The claimant also sent an email on 7 January 2022 providing further and better particulars of the first respondent's alleged discrimination.
7. Whilst preparing the Judgment and Reasons I decided that I needed to refer to the cases of **Virdi**, **Aniagwu** and **Mckinney** (referred to below). None of these cases had been referenced in the parties' submissions or skeletons. I therefore decided to write to the parties putting them on notice that I would be referring to these cases and asking the parties to provide submissions on the cases and that they would have an opportunity to address me on the cases at the case management preliminary hearing that was already listed for 1 February 2022.
8. All parties sent in further written submissions and the second respondent referred to the case of **Gisada Cyf v Barratt** [2010] IRLR 1073.

Evidence before the Tribunal

9. The claimant has not produced any evidence regarding why the Tribunal should exercise its discretion to extend time on the basis that it is just and equitable to do so; there is no witness statement from the claimant or his representative. However Mr Neckles did have an opportunity to address me on the just and equitable extension at the case management hearing on 1 February 2022. I had the benefit of the three parties' submissions and the cases referred to in the submissions, skeleton arguments provided at the hearing in December, a bundle of 229 pages containing the pleadings and relevant correspondence between the parties and an additional bundle of 6 pages.
10. Since this is a preliminary hearing at which no oral evidence has been presented, I have only made findings of fact where there appears to be no dispute and it appears clear from the documents.
11. I generally refer to the parties in this Judgment rather than referring to their representatives by name.

The law

Time limits

12. Section 123 of the Equality Act 2010 ("EqA") provides that a claim may not be brought after the end of 3 months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable.
13. Where there is conduct extending over a period, the time limit runs from the end of that period; and failure to do something is to be treated as occurring when the person in question decided on it (s 123(3)(a) and (b)).
14. In **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 (Hendricks)** in the Court of Appeal, LJ Mummery stated at paragraphs 51 and 52:

51. "In my judgment, the approach of both the Employment Tribunal and the Appeal Tribunal to the language of the authorities on "continuing acts" was too literal. They concentrated on whether the concepts of a policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken, fitted the facts of this case: see **Owusu v. London Fire & Civil Defence Authority** [1995] IRLR 574 at paragraphs 21-23; **Rovenska v. General Medical Council** [1998] ICR 85 at p.96; **Cast v. Croydon College** [1998] ICR 500 at p. 509. (cf the approach of the Appeal Tribunal in **Derby Specialist Fabrication Ltd v. Burton** [2001] ICR 833 at p. 841 where there was an "accumulation of events over a period of time" and a finding of a "climate of racial abuse" of which the employers were aware, but had done nothing. That was treated as "continuing conduct" and a "continuing failure" on the part of the

employers to prevent racial abuse and discrimination, and as amounting to "other detriment" within section 4 (2) (c) of the 1976 Act).

52. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period." I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is "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."

15. In the case of **Hale v Brighton & Sussex University Hospital NHS Trust** UKEAT/0342/16/LA (Hale) Mr Justice Choudhry held:

"41. It was not suggested by the Claimant, in this case, that there was some policy, rule, practice, scheme or regime in place as a result of which he was subjected to less favourable treatment. Instead, it was said that there was an ongoing state of affairs; namely being subjected to disciplinary procedures, which culminated in dismissal. The question is whether there was, as the Tribunal found, a one-off act which had continuing consequences; namely being subjected to further stages in the disciplinary process, or whether this was part of an act extending over a period.

42. By taking the decision to instigate disciplinary procedures, it seems to me that the Respondent created a state of affairs that would continue until the conclusion of the disciplinary process. This is not merely a one-off act with continuing consequences. That much is evident from the fact that once the process is initiated, the Respondent would subject the Claimant to further steps under it from time to time. Alternatively, it may be said that each of the steps taken in accordance with the procedures is such that it cannot be said that those steps comprise "a succession of unconnected or isolated specific acts" as per the decision in **Hendricks**, paragraph 52.

43. In my judgment, the Tribunal erred in treating the first stage of the process as a one-off act. Mr Kibling submits that this is a clear finding of fact and notes that the decision is not challenged on the basis of perversity. However, the Tribunal here, for reasons already set out, lost sight of the substance of the complaint as defined by the agreed issue. Having done so, it then incorrectly treated the subdivided issue as a one-off, when it undoubtedly formed part of an ongoing state of affairs created by the initial decision.

44. That outcome avoids a multiplicity of claims. If an employee is not permitted to rely upon an ongoing state of affairs in situations such as this, then time would begin to run as soon as each step is taken under the procedure. Disciplinary procedures in some employment contexts - including the medical profession - can take many months, if not years, to complete. In such contexts, in order to avoid losing the right to claim in respect of an act of discrimination at an earlier stage, the employee would have to lodge a claim after each stage unless he could be confident that time would be extended on just and equitable grounds. It seems to me that that would impose an unnecessary burden on claimants when they could rely upon the act extending over a period provision. It seems to me that that provision can encompass situations such as the one in question.'

16. In considering whether separate incidents form part of an act extending over a period, a relevant but not conclusive factor is whether the same or different individuals were involved in those incidents – **Aziz v FDA** [2010] EWCA Civ 304.
17. Where the act complained of is the refusal by employers to redress a grievance, time begins to run from the date on which the decision was made, and not the date when it was communicated to the claimant - **Virdi v Commissioner of Police of the Metropolis (Virdi)** [2007] IRLR 24, EAT (Elias J) disapproving the decision to the contrary in **Aniagwu v London Borough of Hackney** ([1999] IRLR 303, EAT. In the case of **Mckinney v Newham London Borough Council** [2015] ICR 495 the EAT held that time begins to run against a claimant from the date of the detriment, whether or not the claimant is aware of it. Therefore, reaffirming the decision in **Virdi**.
18. In **Mckinney** HH Peter Clark provided guidance as to the law, at paragraph 15 of his judgment. In sub paragraphs (6) and (7) of paragraph 15 he stated:

'(6) It seems to me that the current state of the authorities is less than satisfactory. Nevertheless, a clear thread is now emerging (see Mensah; Virdi; Garry; Warrior Square) which points towards the counter-intuitive position that time begins to run against the Claimant relying on a detriment, both under the Employment Rights Act and the Equality Act whether or not he is aware that a detriment has been suffered. I agree that the wording of section 48(3) Employment Rights Act is focussed on the employer's action (or omission) and that a detriment may be suffered without the Claimant being aware of it. For example, a difference in treatment which may be on the grounds of race (see Garry). Indeed section 48(4)(b) provides that a deliberate failure to act shall be treated as done when it was decided on, not, I would add, when the Claimant learned of the omission. That is consistent with the Mensah line of authorities in relation to the employer's act. Whilst the need for knowledge is reinforced by the Supreme Court in Barratt when considering the effective date

of termination I accept that section 97(1)(b) Employment Rights Act raises a different question from section 48(3). The Claimant is entitled to know that he is dismissed before the dismissal takes place. He may suffer a detriment without that knowledge.

(7) In these circumstances, and being unimpressed by Mr O'Dempsey's public policy argument, I am driven, without enthusiasm, to accept Ms Balmer's submissions as a matter of construction and authority. The Employment Judge was right to treat time as running from the date of the Respondent's grievance decision, 8 October. By way of analogy, time runs for bringing an appeal to this Tribunal from the date the Employment Tribunal Judgment is sent to the parties, not when it is received by them. Thus, the section 47B complaint was out of time.'

19. The Tribunal has wide discretion in determining whether it is just and equitable to extend time and it is a wider discretion than for unfair dismissal. It should consider everything that it thinks is relevant.
20. However, time limits should be strictly applied, and the exercise of the discretion is the exception rather than the rule. There is no presumption that the Tribunal should exercise its discretion.
21. The Tribunal is not legally required to but may consider the check list set out in section 33 of the Limitation Act 1980 in considering whether to exercise its discretion:
 - (a) the length and reason for the delay;
 - (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 sued had cooperated with any requests for information;
 - (d) the promptness which the claimant acted once he knew the facts giving rise to the cause of action; and
 - (e) the steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking action.
22. 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'.*
23. 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)."*

24. 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
25. In **Virdi** it was also held that if it is the claimant's solicitor who is at fault in presenting the claim late, then such fault cannot be laid at the door of the claimant. The mere fact of a potential claim against the legal advisor would not justify the refusal of an extension of time.
26. A Tribunal should not strike out any claim where there is a core of disputed facts and that discrimination issues "*should as a general rule, be decided only after hearing the evidence*" – **Anyanwu v South Bank Students Union and Anor** (2001) ICR 391.
27. For example, in **Izsias v North Glamorgan NHS Trust** (2007) ICR 1126 '*An example might be where the facts ought to be established by the Claimant were totally or inexplicably inconsistent with the undisputed contemporaneous documentation*'.

Liability of employers and principals

28. Section 109 of EqA provides:
- '(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.*
 - (2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.*
 - (3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.*
 - (4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—*
 - (a) from doing that thing, or*
 - (b) from doing anything of that description.*
 - (5) This section does not apply to offences under this Act (other than offences under Part 12 (disabled persons: transport))'.*

29. In **Kemeh v Ministry of Defence** [2014] EWCA Civ 91 Elias LJ in the Court of Appeal held that liability for an agent's discriminatory acts is governed by common law principles. In utilising the term "agency" in anti-discrimination legislation, Parliament must have intended that it would have its ordinary common law meaning, rather than being susceptible to some wider interpretation. In **Kemeh**, it was held that the racist comments by a third party employee did not come within section 109 EqA;

'Whatever the precise scope of the legal concept of agency, and whatever difficulties there may be of applying it in marginal cases, I am satisfied that no question of agency

arises in this case. In my view, it cannot be appropriate to describe as an agent someone who is employed by a contractor simply on the grounds that he or she performs work for the benefit of a third party employer. She is no more acting on behalf of the employer than his own employees are, and they would not typically be treated as agent'

30. In **Unite the Union v Nailard** [2018] EWCA Civ 1203 the Court of Appeal agreed with LJ Elias in **Kemeh** that the EqA would only apply where '*the agent discriminates in the course of carrying out the functions he is authorised to do*'.
30. The Court of Appeal decided that elected branch officials could be agents of a trade union for the purposes of establishing liability under the EqA. Lord Justice Underhill, giving the only judgment, agreed with the claimant that it was enough that the lay officials did the acts in question in the course of performing their roles as union representatives in relation to its members and third parties, even if the discriminatory acts were done towards someone who was not themselves a relevant third party.

31. The key question, therefore, is whether the agent discriminates in the course of carrying out the functions he is authorised to do.

Legal Submissions in summary **Claimant – in relation to the first respondent**

32. The claimant's submissions set out the less favourable treatment relied upon by the claimant against the first respondent and argues there is a continuing act extending over a period from 27 May 2018 until 6 March 2019. It is more efficient for me to repeat what the claimant has set out in his submissions rather than summarise it:

'The First Respondent Robert Scanlan executed and acquiesced with the removal of the Claimant from the second Respondent's sight on 01/05/2018, 10/10/2018 or 15/05/2018 without subjecting the Claimant to its disciplinary procedures;

On the 1st May 2018, the First Respondent's Robert Scanlan (Security Manager) threatened the Claimant that if he complained to the Second Respondent about his alleged discriminatory treatment, he could face disciplinary action;

On 29th May 2018 Robert Scanlan interfered and prevented a fair and impartial outcome of the Claimant's grievance lodged with the Second Respondent dated 27th May 2018;

Failed to accept objective evidence which established the Claimant's innocence in regard to his appearance and performance;

First Respondent's Peter Griffin failed to uphold Claimant's Grievance Complaint on 29th October 2018;

First Respondent's Peter Ely failed to uphold Claimant's Grievance Appeal on 6th February 2019;

Failed to postpone a Grievance Hearing in accordance with the Claimant's right to be accompanied either on the 13th December 2018 or 7th January 2019 [Refer p.20 – 21 para no. 14 for totality of pleaded less favourable treatments being relied upon].'

33. The claimant sets out his factual chronology regarding the first respondent:

'On 24th April 2018, disparaging comments made by Chris Jones [Refer p.89 – 90 para no.1 – 2];

On 25th April 2018. Despairing demeanour carried out by Chris Jones [Refer p.90 para no.4];

On the 01/0105/2018 the first Respondent (Robert Scanlan) acquiesced with the removal of the Claimant from the 2nd Respondent's site [Refer p.30 para no.8];

On the 1st May 2018, the First Respondent's Robert Scanlan (Security Manager) threatened the Claimant that If he complained to the Second Respondent about his alleged discriminatory treatment, he could face disciplinary action;

On 15/05/2018 removal from the assigned Facebook sight was re-communicated to the Claimant by the 1st Respondent's Security Manager Robert Scanlan and Kurt Noriega at a meeting held with the Claimant [Refer p.###];

On 27th May 2018, Claimant submitted a Grievance Complaint against Kurt Noriega complaining about his removal from the Facebook assigned post/sight and the issues surrounding his hair, demeanour, appearance, performance and not greeting Christ Jones [Refer p128 - 140];

On 29th May 2018, Robert Scanlan interfered and prevented a fair and impartial outcome of the Claimant's grievance lodged with the Second Respondent on 27th May 2018 [Refer p.112 -113];

On 11th & 26th September 2018, Grievance Investigation in regard to the Claimant's Grievance Complaint against Kurt Noriega of the 1st Respondent was held [Refer p. 178 - 186];

On 11/12th September 2018 at the Grievance Investigation Meeting conducted by Peter Griffin of the 1st Respondent, the Claimant attempted to raise a grievance against Robert Scanlan which was denied by Peter Griffin [Refer p.178 - 179];

On the 3rd October 2018, Claimant's submits Grievance Complaint against Robert Scanlan [Refer p. 171 - 173];

On 29th October 2018 the First Respondent's Grievance Investigation Officer Peter Griffin failed to accept objective evidence which established

the Claimant's alleged innocence regarding his removal from post, his demeanour, appearance and performance [Refer p.174 – 177];

On 29 October 2018, the First Respondent's Grievance Investigation Officer Peter Griffin failed to uphold the Claimant's submitted grievance of the 27th May 2018 made against Kurt Noriega [Refer p.174 – 177 & 194 - 199];

On 31st October 2018, Grievance Notice of Appeal was submitted against the First Respondent's Grievance Investigation Officer Peter Griffin regarding Kurt Noriega was submitted by the Claimant [Refer p.187- 188];

On 2nd November 2018, a second Grievance Notice of Appeal against the First Respondent's Grievance Investigation Officer Peter Griffin regarding Kurt Noriega was submitted by the Claimant [Refer p. 189 - 191];

On 21st November 2018, Claimant was invited to Grievance Hearing by the 1st Respondent's HR Advisor Aderoleola Adeosun in regard to his submitted grievance against Robert Scanlan which was submitted on and resubmitted on [Refer p. 232];

On 27th November 2018, Grievance Hearing pertaining to the submitted Grievance Complaint against Robert Scanlan was scheduled for commencement [Refer 193 & 232];

On 10th December 2018, the Respondent's Grievance Appeal Officer Peter Ely conducts a Grievance Appeal Hearing in regard to the Claimant's appeals against Kurt Noriega pertaining to the issues relating to Facebook [Refer p. 210 - 216];

On 13th December 2018, Claimant notifies the 1st Respondent of his non-attendance at his Grievance Meeting pertaining to his Grievance Complaint submitted against Robert Scanlan [Refer p.];

On 19th December 2018, Claimant submits alternative dates for commencement of his Grievance Complaint lodged against Robert Scanlan [Refer p.].

On 21st December 2018, Claimant sought a response with regards to his rescheduled Grievance Meeting with David Gregory [Refer p.];

On 21st December 2018, the 1st Respondent notifies the Claimant that they do not have a hearing date as yet and will notify him when the hearing date is scheduled [Refer p.];

On 15th January 2019 the First Respondent's Grievance Investigation Officer Peter Griffin failed to accept objective evidence which established the Claimant's alleged innocence regarding his removal from post, his appearance and performance by failing to allow the Claimant the opportunity to present his grievance complaint at a formal hearing [Refer p.200 - 202];

On 15th January 2019 the 1st Respondent's Grievance Officer David Gregory discharged his outcome in regard to the Claimant's submitted grievance against Robert Scanlan submitted on 3rd October 2018 [Refer p. 200 - 202].

On 22nd January 2019, Claimant submits a Grievance Appeal against the grievance outcome of Mr David Gregory pertaining to his grievance against Robert Scanlan, which was rendered on the 15th January 2019 **[Refer p.203 - 205];**

On the 6th February 2019, the First Respondent's Peter Ely failed to uphold the Claimant's Grievance Appeal against Kurt Noriega discharged by Peter Griffin **[Refer p.208 – 209];**

On the 6th February the First Respondent's Peter Ely failed to accept objective evidence which established the Claimant's innocence in regard to his appearance, demeanour, performance and not greeting Chris Jones of Facebook **[Refer p.206 - 209];**

On 6th March 2019, the 1st Grievance Appeal Officer Gasper Hladnik discharges his appeal outcome against the Claimant's submitted Notice of Appeal against the outcome of Grievance Officer David Gregory pertaining to the grievances against Robert Scanlan **[Refer p.217 - 229];**

On the 6th March 2019 the First Respondent's Gasper Hladnik failed to accept objective evidence which established the Claimant's innocence in regard to his submitted grounds of appeal pertaining to his Grievance Outcome discharged by David Gregory on the 15th January 2019**[Refer p.217 – 229];**

On the Claimant was invited to a Grievance Hearing by the First Respondent to commence on the 13th December 2018 **[Refer p.];**

On the , the Claimant made and submitted a postponement application to have his Grievance Hearing of the 13th December 2018 be postponed in accordance with S.10 (4) & 95) Employment Relations Act 1999 **[Refer p.];**

On 13th December 2018 or 7th January 2019, the First Respondent failed/refused to postpone the Claimant's grievance hearing of the 13th December 2018 in accordance with the Claimant's right to be accompanied; either on 13th December 2018 or 7th January 2019 **[Refer p.113];**

Claims registered with ACAS on 10/04/2019 **[Refer p.6]**

ACAS Conciliation Certificate discharged on the 10/05/2019 **[Refer p.6]'**

Claimant – in relation to the second respondent

34. In relation to the second respondent the claimant alleges continuing acts extending over a period from 25 April 2018 until 13 January 2019:

'Subjecting the Claimant to humiliation by the Respondent on the 24th April 2018, 25th May 2018 or thereabouts where disparaging remarks about the claimant's appearance was on 24 April 2018 made by the second respondent's Chris Jones (Global Security Services, EMEA) to the first respondent's Kurt Noriega (Security Site Manager) and Robin Mark Asafo (Team Leader), specifically: "It's like he woke up out of bed and I have lots of black friends with Afros and their hair isn't like that";

Removal of the Claimant from the 2nd Respondent's sight where on 1 May 2018 the second respondent's Bradley Kelly made a client removal request in relation to the claimant which was re-communicated to the claimant by the first respondent's Robert Scanlan (Security Manager) on the same date and this request was executed by the second respondent on 10/15 May 2018 which resulted in the claimant's removal and redeployment to another site;

Alleging on 1st 11th & 14th May 2018 by the second respondents Chris Jones and Bradley Kelly, and by the first respondent's Kurt Noriega, Robert Scanlan that the claimant's performance was below par;

Subjecting the Claimant to humiliation on or around 25 April 2018 where Chris Jones give the claimant a long hard piercing look for around 3-5 seconds which concluded in rolling up his eyes and raising his head at the same time in an

Subjecting the Claimant to humiliation on or around 25 May 2018 by Chris Jones when the first respondent's employee Jamal Johnson (Team Leader) repeated the alleged disparaging comment made to him by him on 24 April 2018 by Chris Jones;

*Rejection of the Claimant's grievance dated 27 May 2018 by the second respondent where the outcome was communicated to the Claimant on the 11th January 2019 as well as the 2nd Respondent's failure to take actions against those involved employees concerned **[Refer p.47 para no.3 & p.98 – 99 para no. 11 (6) – (7) for totality of pleaded less favourable treatments being relied upon].***

Upward disapproval motion towards the ceiling whilst the claimant walked past in the second respondent's reception area in public view;'

35.The claimant sets out the following chronology of events in relation to the second respondent:

*'On 24th April 2018, disparaging comments made by Chris Jones **[Refer p.89 – 90 para no.1 – 2];***

*On 25th April 2018. Despairing demeanour carried out by Chris Jones **[Refer p.90 para no.4];***

*On 27th May 2018 Claimant raised various grievances with the 2nd Respondent regarding his pleaded less favourable treatments **[Refer p. 57 para no.11, 128 – 138, 142 - 145];***

*On 21st December 2019 2nd Respondent confirms Grievance Complaint investigation (not decision) concluded but cannot share details of the outcome **[Refer p. 157];***

*On 11th January 2019, Grievance Outcome sent to the Claimant via email by the 2nd Respondent (Rodrigo Salinas Torreblanca which was seen by the Claimant on the 13th January 2019 **[Refer p.156];***

Claims registered with ACAS on 10/04/2019 [Refer p.34]

ACAS Conciliation Certificate discharged on the 10/05/2019 [Refer p.34]

Claimant's ET1 Claims submitted on 09/06/2019 [Refer p.35]

36. The claimant alleges that the claim against the first respondent is in time as all the above incidents amount to a continuing act extending over a period from 27 May 2018 to 6 March 2019. He refers to the cases of **Hendricks** and **Hale**.

37. In relation to the claim against the second respondent the claimant alleges that the claim is in time because the last act was on 11 January 2019 and:

"It is correct under contract and law that he should pursue the internal grievance to its conclusion, before embarking upon a claim/Court proceeding."

38. It is also argued *"that the claimant pursuing his internal grievance to its conclusion is a compelling factor the Tribunal should consider when exercising its discretion whether to extend time"*.

39. At the case management preliminary hearing on 1 February 2022 Mr Neckles explained that he was unaware of the **Virdi** and **Mckinney** case law on time. Had he been aware of it he would have presented the claim within 3 months from the date the decision was made by the second respondent on the grievance. He is not a qualified legal representative. He asked the Tribunal to exercise its discretion to extend time on the basis it was just and equitable to do so. The claimant should not be punished for his genuine ignorance of the case law.

40. The claimant also argues that strike out is a draconian measure that should not be used at such an early stage of the proceedings before the full extent of the evidence is known and that the burden of proof would likely shift to the respondents on hearing all the evidence as clear racial prejudice underpins the acts/actions/omissions complained of.

Legal standing

41. In relation to the question of legal standing the claimant relies on sections 41, 109, 140B, 142 & 145 of EqA and argues s41 and s109 should be read together:

"The Claimant avers that he is employed by the 1st Respondent, whom in turn assigned or contracted him to work for the 2nd Respondent. Accordingly, the arrangements both contractual and legal obligations, necessitate or mandate that the provisions of the S. 41 and S. 109 is engaged and must therefore apply. Accordingly, the claims brought by the Claimant is / are lawfully pursued against the 2nd Respondent, despite its obstinate protestations. The Claimant will further rely upon the requirements to give purposive interpretations to the provisions of the Article 14 of the enabling EU Race Directive 2000/43/EC {Directive attached}."

First respondent's submission

42. The first respondent argues that the claims are not in time against the first respondent on the basis that the claimant's grievance appeal dated 31 October 2018 and determined on 6 February 2019 related to the conduct of the grievance and not to the substance of his grievance and involved an entirely new person, Peter Griffin, whereas the previous allegation had been primarily raised against Robert Scanlan.

43. The first respondent summarises the list of the allegations of direct discrimination, including, that Robert Scanlan interfered and prevented a fair and impartial outcome of the claimant's grievance lodged with the second respondent dated 27 May 2018.

44. The first respondent alleges that the last date for an "in time" act of discrimination is 10 January 2019, based on ACAS early conciliation being between 10 April 2019 and 10 May 2019 and the claim form being presented on 9 June 2019.

45. The first respondent accepts that allegations from 1 May 2018 to 29 October 2018 (a-e an alleged threat on 1 May 2018 to Peter Griffin failing to uphold the claimant's grievance on 29 October 2018) are continuing acts and that the grievance relates to those allegations a-d.

46. In relation to the allegation that Mr Ely failed to uphold his grievance on 6 February 2019, the first respondent argues the alleged discrimination relates to an entirely separate issue, namely the conduct of Mr Griffin, the grievance officer. The first respondent argues that these allegations are not continuing allegations which formed the basis of the claimant's original complaint. Mr Ely was not investigating the complaints of discrimination but the allegations as to how Mr Griffin conducted the appeal. Mr Ely was not investigating the same or similar matters that the claimant had previously raised his grievances about. It was an entirely new complaint.

47. In relation to the allegation that the first respondent failed to postpone a grievance hearing in accordance with the claimant's right to be accompanied on 13 December 2018 and 7 January 2019, the first respondent argues this is an entirely separate issue and is out of time. It relates to a decision taken by Employee relations and the hearing had been rescheduled twice due to the claimant's representative not being available, section 10 ERA 1999 does not apply and could not have been breached.

48. In summary the first respondent argues all the claims apart from the allegation that Mr Ely failed to uphold his grievance appeal are out of time. The Tribunal should not exercise its discretion to extend time because the delay is up to 5 months and there is no explanation for the delay and the claimant has been represented throughout by his trade union representative. It has already been 43 months since the first allegation and will be sometime before the case is heard and the cogency of any evidence is likely to be adversely affected.

Second respondent's submission

49. The second respondent argues there are four discrete allegations of discrimination made in the ET1;

(1) an incident on 24 April or May 2018;

(2) the removal of the claimant from the second respondent's premises on 1 May 2018;

(3) the refusal to uphold the claimant's complaint on 11 January 2019 (the second respondent argues the correct date is 21 December 2018 on the basis that not being provided with a written summary on 21 December 2018 is not said to be an act of discrimination relied on); and

(4) that no action was taken against employees said to be involved on 21 December 2018.

50. That the claimant only indicated that he was relying on s109 EqA when EJ Khan had identified both section 41 and Part 8 as being potentially in play. Therefore, he has to establish the principal is the second respondent and the first respondent is the agent. This could only possibly be argued in respect of allegations (1) and (2) above and not (3) and (4) as the first respondent had no involvement in the complaint outcome. It is argued that it is common ground that the first respondent took no part in any matter or did anything on behalf of the second respondent after 1 May 2018.

51. The complaints are more than 7 months out of time and the claimant was represented throughout. The two incidents may have continuing consequences, but they are not continuing acts. It would not be just and equitable to extend time as no evidence has been adduced.

52. There is no employment related grievance in respect of the second respondent, but a letter of harassment and discrimination invoking the grievance procedure. It is alleged there is not a grievance procedure for non-employees provided by the second respondent. The incidents are put as isolated incidents.

Findings of fact

53. It is accepted by the parties that the claimant was employed or engaged under a contract by the first respondent as a security officer in January 2017. The claimant has never been an employee of the second respondent.

54. The first respondent provides security services at the respondent's various London sites under a Master Services agreement dated 15 September 2014.

55. The claimant is of black African origin and of Somalian nationality.

56. The claimant alleges he suffered racial discrimination/harassment by Mr Jones, a manager for the second respondent, on the second respondent's site around 24th and 25th April 2018. On 1 May 2018 the claimant was informed by Mr Scanlan of the first respondent that the second respondent had requested that he be removed from their site. The claimant alleges that

Mr Scanlan threatened the claimant that if he complained to the second respondent about his alleged discriminatory treatment, he could face disciplinary action. The claimant was removed from the site on 10 May 2018. This was confirmed in a meeting on 15 May 2018. The claimant was subsequently redeployed to a Google site.

57. The claimant alleges that on the 1st, 11 and 14 May 2018 Mr Jones and Mr Kelly of the second respondent and Mr Noriega and Mr Scanlan of the first respondent discriminated against the claimant when they alleged that the claimant's performance was below par.

58. The claimant raised a grievance against Mr Jones of the second respondent on 27 May 2018 for bullying and harassment under the Equality Act 2010. Although the claimant was not an employee of the second respondent they did deal with the grievance and despite a considerable delay, eventually produced a summary of the outcome to the claimant's grievance, as set out below. I find the second respondent dealt with the claimant's grievance as a grievance, whether or not there was a policy in place.

59. The claimant raised a further grievance alleging harassment and bullying and misrepresentation against the first respondent's Facebook management team and Mr Noriega, the first respondent's security site manager on the 27 May 2018.

60. Mr Scanlan from the first respondent sent an email to the second respondent on 29 May 2018. The claimant alleges Mr Scanlan interfered and prevented a fair and impartial outcome of the claimant's grievance with the second respondent by advancing disparaging remarks:

“Although I have yet to experience an officer raising a direct grievance against a client, is it extremely common for staff to react in this way when facing disciplinary action. This is often I an attempt to frustrate and delay any remedial action, or in some cases to block an investigating manager from uncovering the truth.

I do not believe that any of the observations you have brought to my attention in relation to Abdi Ibrahim are racially motivated or anything other than wishing us to correct Abdi Ibrahim's poor attitude towards his job, his below standard attire and Abdi's general unacceptable demeanour.’

61. Although I do not have enough information before me to conclude whether Mr Scanlan interfered and prevented a fair outcome to the claimant's grievance, there was correspondence between the first and second respondent relating to the claimant and his grievances.

62. The claimant attended a grievance hearing on 12 September 2018 with the first respondent regarding his grievance against the Facebook team and Mr Noriega. It appears from the minutes of that meeting that the claimant was informed that if he wished to raise a grievance regarding Mr Scanlan, he would have to raise a separate grievance.

63. The claimant raised a separate grievance against Mr Scanlan with the first respondent on 3 October 2018 for bullying and harassment.

64. The claimant's grievance against the Facebook team and Mr Noriega was investigated by Mr P Griffin who notified the claimant on 29 October 2018 in writing that his grievance was not upheld.

65. The claimant appealed against Mr Griffin's decision on 31 October 2018. The grounds of appeal start by stating:

- "1. That the Grievance Officer failed to carry out a full and proper objective investigation in regards to the complaints advanced by the Appellant.*
- 2. That the Grievance Officer failed to take into account relevant information and further took into account irrelevant information, which if same had been observed correctly, the decision reached would have been manifestly different.*
- 3. That the Grievance Officer chose to ignore the available evidence and that had he remained objective and impartial the Appellant's Grievance Complaint would have been upheld in full."*

66. The above appeal grounds appear to be standard paragraphs used by the claimant's union representative as he uses the same paragraphs in later grounds of appeal. The claimant goes on to set out further details regarding his grounds for appeal and clarifies his appeal at an appeal hearing on 10 December 2018. I am not going to summarise all the grounds of appeal but set out some of them.

67. One ground was that Mr Griffin had failed to contact the claimant for more evidence and failed to acknowledge the gravity of the allegation of work place bias. Another ground of appeal was that Mr Griffin never investigated the allegation that Mr Noreiga had said the claimant was fat and spilling out of his uniform. In the minutes of the meeting the response to this allegation was *"Because it's hearsay"*.

68. The claimant alleges Mr Griffin was closed and biased when conducting his investigations. There was no reference to any evidence being collected from witnesses. He alleges the issue of the claimant's hair and the photos of his hair were not properly investigated. In addition the issue of disparity of treatment was not dealt with. The claimant also alleges that Mr Griffin considered information which was irrelevant and not seen by the claimant, and was referred to in the outcome letter. It is not clear to me what irrelevant evidence is being referred to by the claimant/ Mr Neckles.

69. I do not agree with the first respondent that this appeal related only to the conduct of the grievance and not to the substance of the grievance; it appears from the various grounds of appeal set out above to have related to both-being closed and bias, missing out issues alleged, not carrying out a proper investigation and considering irrelevant information.

70. The claimant was invited to attend a grievance hearing in relation to his grievance against Mr Scanlan on 27 November 2018. The claimant was unable to attend 3 dates set for his grievance hearing in relation to Mr Scanlan and Mr Gregory, who was hearing the grievance, decided he would not reschedule a fourth time.

71. The claimant chased the second respondent for a response to his grievance submitted on 27 May 2018 on several occasions. The grievance was investigated by Mr RS Torreblanca.

72. The claimant did not attend an interview with the second respondent about his grievance. The claimant said in correspondence he did not attend an interview because he did not want to attend a meeting where Mr Jones was present. Mr Torreblanca says in correspondence that the claimant would not attend because they required a representative from his employer at a meeting. The claimant did provide written answers to questions raised. It is clear from the summary of the outcome to the grievance that the security supervisor and team lead from the first respondent was interviewed by Mr Torreblanca and another security officer and a further manager from the first respondent.

73. It is alleged that the grievance investigation was concluded on 4 December 2018 but I have not seen any evidence to confirm that. On the 21 December 2018 Mr Torreblanca sent an email to the claimant stating:

"I am writing to let you know we have concluded our investigation into the concerns that you raised regarding Chris Jones. We have completed a thorough investigation and have taken appropriate action to address any concerns that we identified as a result of our review. Whilst I am not in a position to share details of any outcome (i.e. in terms of actions that we have been taken) with you, due to privacy considerations, you can be assured that it has been addressed appropriately. However, I am able to provide you with some further details regarding the factual findings of the investigation. If you wish, I can schedule a meeting after the Holiday break with us, together with a representative from Wilson James to discuss this further. However, I understand that you have been reluctant to attend a meeting with a representative from Wilson James present and, if this is still the case, I can send you a summary of our findings in writing instead."

74. This email confirms that Mr Torreblanca had concluded his investigation into the claimant's grievance against Mr Jones from the second respondent by 21 December 2018 but does not provide the outcome. It confirms that a summary of details could be provided in writing but no details of the outcome are provided at this stage.

75. The claimant replied to Mr Torreblanca on 24 December 2018 asking to see *"the conclusion report and reasons for it"*. He chased on 4 January 2019. Mr Torreblanca confirmed by reply that the claimant would receive a summary report.

76. A written summary report by Mr Torreblanca was sent to the claimant on 11 January 2019. It is a detailed report and sets out in relation to each allegation the evidence it heard and its conclusions. Mr Torreblanca did not uphold any of the claimant's allegations.

77. The claimant sent an email to Mr Torreblanca on 18 January 2019 complaining about the outcome and the investigation. Mr Torreblanca responded on 25 January 2019 stating the investigation had been conducted in an impartial and independent manner.

78. The claimant received the outcome to his grievance against Mr Scanlan on 15 January 2019 by Mr Gregory. His grievance was not upheld.

79. The claimant appealed against the decision of Mr Gregory on 22 January 2019. In summary his grounds of appeal were that the grievance officer failed to carry out a full and proper investigation, took into account irrelevant information and chose to ignore available evidence. The claimant did not attend an appeal hearing.

80. On 6 February 2019 the claimant was sent a letter by the appeal officer Mr Ely setting out the outcome to his appeal against Mr Griffith's decision regarding his grievance against the Facebook management team and Mr Noreiga. His appeal was unsuccessful.

81. Mr Ely confirmed in his letter that he had conducted his own investigation into the claimant's allegations against Mr Noreiga and Mr Rehal. The letter dealt with each of the points raised by the claimant and his representative in his appeal. The fact that Mr Ely carried out his own investigation into some of the allegations against Mr Noreiga and Mr Rehal demonstrate that the appeal did not just relate to the conduct of the grievance but also to the substance of the claimant's grievance.

82. On 6 March 2019 Mr Hladnik sent a letter to the claimant setting out the outcome to his appeal against the outcome letter to his grievance against Mr Scanlan from Mr Gregory. The appeal was not upheld. In contrast to Mr Ely's letter the outcome letter stated that the appeal process was not an opportunity for the grievance to be reheard or reinvestigated and therefore a number of points raised by the claimant on appeal were deemed to be not valid grounds of appeal if they were not contained within the grievance.

83. The claimant started the early conciliation process for both respondents on 10 April 2019 and the certificates were issued by ACAS on 10 May 2019.

84. The claimant presented his claim form on 9 June 2019.

85. I find that Mr Neckles genuinely was unaware of the **Virdi** and **McKinney** case law during the primary limitation period and only became aware of it when I wrote to the parties in January 2022.

Applying the law to the facts

First respondent

86. The first respondent disputes that the claim against the first respondent was presented in time on the basis that the claimant's grievance appeal dated 31 October 2018, and determined on 6 February 2019, related to the conduct of the grievance, and not the substance of his grievance and involved an entirely new person, Mr Griffin, whereas the previous allegation had been primarily raised against Mr Scanlan. It is argued that the appeal was very specific, containing allegations of direct discrimination against Mr Griffin, the manner he conducted the grievance hearing and these are not continuing allegations which form the basis of his original complaint.

87. Having read the original appeal email, the minutes of the appeal and the outcome to the appeal letter by Mr Ely dated 6 February 2019 I do not find

that the appeal is limited to just allegations against Mr Griffin as suggested by the first respondent. It is more complex, including an allegation of irrelevant information being considered and a reconsideration of allegations previously raised in his grievance.

88. The first respondent argues that Mr Ely was not investigating the complaints of discrimination but the allegations as to how Mr Griffin conducted the appeal. However, Mr Ely specifically confirmed in his outcome letter that he had conducted his own investigation into some of the claimant's allegations against Mr Noreiga and Mr Rehal.

89. I do not find that the appeal can be viewed as a totally separate, unconnected alleged act but was part of an act extending over a period. I take account of the guidance set out in the cases of **Hendricks** and **Hale**. Mr Ely was investigating the same or similar matters that the claimant had previously raised in his grievance.

90. I therefore find that the claimant's claim against the first respondent is in time. The allegation that the outcome to the appeal by Mr Ely was discriminatory is another alleged act extending over a period of time from the first alleged act on 1 May 2018.

Second respondent

Time

91. The second respondent argues that the refusal to uphold the claimant's grievance took place on 21 December 2018 when the decision was made. The allegation that no action was taken against employees involved was also on 21 December 2018. These two incidents are not continuing acts with the allegations in April and May 2018. There is no claim premised on the outcome not being put in writing on 21 December 2018. Therefore, the claim against the second respondent is out of time.

92. The decision to not uphold the claimant's appeal was made on 21 December 2018 but only communicated to the claimant on 11 January 2019. Based on the cases of **Virdi** and **Mckinney** set out above the last act of alleged discrimination is the appeal decision which was made on the 21 December 2018, even though the content of that decision was not communicated to the claimant. Although this may seem counter - intuitive I have to follow the precedent set by the higher courts. Therefore, without enthusiasm I find that the last alleged act of discrimination was on the 21 December 2018. Since the claimant's claim form was presented on 9 June 2019 the claimant's claim against the second respondent is out of time.

93. I find that the original allegations against Mr Jones dated in April and May 2018, the grievance raised against the second respondent in May 2018, the grievance process and the final grievance decision is an act extending over a period rather than a succession of unconnected or isolated specific acts. The grievance relates to the incidents in April/May. Employees from both respondents are involved in the incidents and the chronology of events which lead to the grievance being raised. Employees from both respondents take part in the grievance investigation. The earlier events and the grievance are connected.

94. The claim is, therefore, only out of time by a few days.

Legal standing

95. The respondent argues that the claimant may have legal standing in relation to the incidents in April/ May under s109 EqA “*anything done by an agent for a principal must be treated as also being done by the principal*” but cannot apply to the allegations on 21 December 2018 as the first respondent had no involvement in the complaint outcome.

96. I do not agree with the second respondent’s argument that the first respondent had no involvement with the complaint outcome and that there is a distinction between the first two incidents and the grievance. The key question is whether ‘*the agent discriminates in the course of carrying out the functions he is authorised to do.*’

97. Mr Jones appeared to be acting in the course of carrying out his functions as a manager for the second respondent, which he was authorised to do regarding the incidents in April/May 2018.

98. The claimant raised a grievance regarding these incidents in May 2018. Even if there was no official grievance procedure for non-employees the second respondent acknowledged the grievance and went on to investigate it and reach a conclusion on it.

99. It appears that Mr Scanlan emailed the second respondent, and it is alleged this interference prevented a fair and impartial outcome to the grievance. I do not have enough evidence before me to make a finding on whether there was interference. However, there is evidence from the outcome report summary that witnesses from the first respondent did communicate with and were interviewed by the second respondent during the grievance investigation. Therefore, there was some involvement. The grievance was conducted with the authority of the second respondent.

100. I therefore find that the claimant does have legal standing in relation to all the allegations against the second respondent under s109 EqA, including the grievance.

Just and equitable extension

101. The second respondent argues that it is not just and equitable to extend time as no evidence has been brought by the claimant and he has been represented throughout by Mr Neckles who has a law degree. Mr Neckles does have law degree but is not a qualified lawyer.

102. The claimant and his representative had not produced any witness statement to explain why the claim form was presented out of time. Mr Neckles has set out in his submission that it would have been absolutely unconscionable for the claimant to have brought his claim while his internal grievance complaint was ongoing. However, the claimant could have presented his claim in time after the conclusion of the grievance but within three months of when the decision was made.

103. Mr Neckles was on notice of the second respondent’s arguments that the claim was out of time from their first skeleton but made it clear at the hearing

in December 2021 and in his amended submissions in January 2022 that he was not relying on the just and equitable extension as he believed the claim was presented in time.

104. In his amended submission and his submission regarding the cases of **Viridi** and **Mckinney** Mr Neckles argued that since the second respondent undertook to respect the grievance process, waiting until receiving the outcome to the delayed grievance process constitutes a proper basis for a just and equitable extension of time. I do not find that this is a proper ground for me to exercise my discretion to extend time. The matters I should consider when exercising my discretion should be:

- (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.

105. Mr Neckles also argued: *“It is correct under contract and law that he should pursue the internal grievance to its conclusion, before embarking upon a claim/Court proceeding.”*

106. I disagree with Mr Neckles. There is established case law that parties should not wait until the conclusion of an internal grievance before presenting a claim. The three months’ time limit commences from the last alleged act, whether or not you are still undergoing an internal process.

107. The claimant also argues that strike out is a draconian measure that should not be used at such an early stage of the proceedings before the full extent of the evidence is known and that the burden of proof would likely shift to the respondents on hearing all the evidence as clear racial prejudice underpins the acts/actions/omissions complained of.

108. The Tribunal has wide discretion in determining whether or not it is just and equitable to extend time and it is a wider discretion than for unfair dismissal. It should consider everything that it thinks is relevant. However, time limits should be strictly applied, and the exercise of the discretion is the exception rather than the rule. There is no presumption that the Tribunal should exercise its discretion.

109. It was clear from hearing Mr Neckles submission today that he was genuinely unaware of the **Viridi** and **Mckinney** case law on time. The decisions in those cases is counter intuitive. Mr Neckles is not a qualified lawyer and none of the previous submissions referred to the case law. I accept that had Mr Neckles been aware of the case law he would have presented the claim in time.

110. The reason for the delay was Mr Neckles and the claimant’s ignorance that the time limit started from when the second respondent made the decision in relation to the grievance, rather than from when the claimant was told the actual outcome. I can appreciate why he was unaware of this.

111. In **Viridi** it was also held that if it is the claimant’s solicitor who is at fault in presenting the claim late, then such fault cannot be laid at the door of the claimant. The mere fact of a potential claim against the legal advisor would

not justify the refusal of an extension of time. In this case it was the claimant's trade union representative.

112. The claim form was only delayed by a few days. Therefore the cogency of the evidence will not have been affected by this delay. Other delays in the litigation are not relevant to me exercising my discretion. There is no real prejudice to the respondents by a few days delay. The prejudice to the claimant of not allowing the extension far outweighs any prejudice to the respondents of allowing the extension.

113. In conclusion I find it is just and equitable to extend time to allow the claim against the second respondent to proceed on the basis it is just and equitable to do so.

Employment Judge A Isaacson
1 February 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON
03/02/2022.

FOR THE TRIBUNAL OFFICE