EMPLOYMENT TRIBUNALS

BETWEEN

Ms J Blake		**(1) Costain Group Plc** **(2) Costain Group Limited**
Claimant	**AND**	***Respondents***

OPEN PRELIMINARY HEARING VIA CLOUD VIDEO PLATFORM

HELD AT: London Central **ON:** 4 November 2020

EMPLOYMENT JUDGE: H Clark
Representation:
For Claimant: In person
For Respondent: Ms Meenan - Counsel

JUDGMENT

1. The Tribunal has no jurisdiction to hear the Claimant's whistleblowing claims on the basis of her status. They are, therefore, struck out.
2. The Tribunal has no jurisdiction to hear the Claimant's discrimination claims as they were presented out of time and it would not be just and equitable to extend time.

_____
EMPLOYMENT JUDGE CLARK

London Central 20 November 2020
_____

20/11/2020_____
Date Sent to the Parties

_____
For Tribunal office

REASONS

1. This hearing was listed to consider two issues as set out in a case management discussion held on 18 June 2020 namely, whether the Tribunal has jurisdiction to hear the Claimant's claims on the basis of her status in relation to the Respondents and as to whether her claims have been brought in time.

2. For the purposes of this hearing, the Tribunal heard evidence from the Claimant and from Ms Carr, the Second Respondents Programme Director. The Tribunal also had the benefit of a joint bundle of documents running 233 pages.

3. The list of issues in this case is set out in the record of the case management discussion dated 18 June 2020 and relate to the Claimant's work as an electrician on the Crossrail project at Bond Street Station. She brings claims of whistleblowing detriment, sex and race discrimination/harassment.

4. By email dated 27 October 2020 the Claimant applied for a postponement of this hearing in order that this claim could be heard together with other proceedings she has commenced in the Croydon Employment Tribunal involving different Respondents (including the Company to whom she was contracted to work – LMOB Ltd). The Respondent objected to that application, which was refused by Regional Employment Judge Wade on 29 October 2020. It was explained that a discussion could be had about consolidation of the claims at the end of this hearing, if there was time. As was explained to the Claimant in the hearing, since neither this Tribunal, nor the Respondents to this claim have had sight of the Claim or Response Forms in the separate proceedings, it is not possible to make any decision as to whether the respective claims should be heard together.

5. In preparation for this hearing, the parties were ordered to exchange witness statements by 16 October 2020 "*containing all of the evidence they (and any witnesses) intend to give at the Open Preliminary Hearing related to the status and time limit issues only.*" The Claimant's witness statement was received the day before the hearing (3 November 2020) under cover of an email in which she stated, "*The witness statement might be more suited to a final hearing rather than a preliminary hearing. This is a rough draft*." The Claimant also informed the Tribunal that she would be joining the CVP hearing by telephone.

Conduct of the Hearing

6. At the start of the hearing, the Claimant explained that she was unable to download Google Chrome (which is the preferred browser for a CVP hearing) and was not able to join from the web browser she had. She, therefore, used

her mobile telephone. The Tribunal established with the Claimant that she could see and hear the proceedings and that she was not having to hold her phone in order for it to act as a camera and microphone. The Claimant confirmed in response to a direct question that she was comfortable to conduct the hearing in this manner. She had access to both a paper copy of the bundle and an electronic version, which was open on her computer next to her (accessing the bundle on a mobile phone screen would not have been conducive to a fair hearing, the Tribunal's view). On a couple of occasions during the hearing, the Claimant informed the Tribunal that she had momentarily lost her sound. When she did so, the question or statement which the Claimant had missed were repeated to her. Otherwise there were no technical problems with the hearing.

7. The hearing started at 10.36 and the Tribunal took two short morning breaks before breaking for lunch at 13.30, resuming at 14.30 for submissions. Following Ms Meenan's oral submissions, the Claimant said that she had struggled with the format of the hearing and that she would have preferred a face to face hearing. She said the technology felt very alien to her. Given the Claimant had struggled to focus on the issues in this hearing (as opposed to the full merits hearing) and it is acknowledged that a remote hearing is more tiring than a face to face hearing, the Tribunal permitted the Claimant to provide written closing submissions by 12 noon on Wednesday 10 November – later extended on application by the Claimant to 5pm. The Claimant was invited to follow the order of Ms Meenan's submissions in order to ensure that she addressed the legal issues which the Tribunal was determining in this preliminary hearing.

8. As the Claimant's witness statement largely did not provide evidence relevant to the issues for the Tribunal's decision, the Tribunal asked the Claimant a number of questions about the circumstances in which her relationship with the Respondent (and LMOB) was formed and as to how it worked in practice. The Claimant was also asked about the timing of her application and what information/advice she had been given concerning time limits. Had the Claimant been represented, her representative would have ensured that these matters were addressed in her evidence, so Ms Meenan, quite properly, did not object to these questions being asked prior to her cross-examination. The Tribunal also gave the Claimant a degree of assistance in formulating her questions for Ms Carr in cross-examination.

9. The Claimant provided written submissions and supplementary written submissions by email, which did address the legal issues for determination in the preliminary hearing. The submissions also introduced new evidential matters, which did not form part of the Claimant's evidence at the hearing. The Claimant was aware that her own witness statement did not deal directly with the jurisdictional issues for decision by the Tribunal and she had the benefit of Ms Carr's witness statement and Ms Meenan's skeleton argument before the

hearing if she had any doubt as to the scope of those issues or what might be relevant to them factually. The Tribunal also gave the Claimant the opportunity to supplement her evidence by asking a number of questions of her to elicit relevant evidence. In these circumstances, the Tribunal is satisfied that the Claimant had every opportunity to put her evidential case at the hearing. The Tribunal is unable to accept factual assertions made in closing submissions, which were not given in evidence. To do so would be unfair to the Respondents, who would be deprived of the opportunity to challenge the evidence, whether in cross-examination of the Claimant or by adducing evidence from Ms Carr. Further, the Claimant made assertions about the contents of one of the Response Forms in her other proceedings, but these have not been disclosed in the course of these proceedings, so the Tribunal can draw no conclusions in relation to them.

The Issues

10. It was clear from Ms Meenan's skeleton argument that the Respondents were proceeding on the basis that the only discrimination allegation directed at a member of the Respondents' staff was out of time. This allegation dated back to January 2019 and concerned Mr Owen who is said to have "*publicly criticised the Claimant in relation to the amount of work she had done that day. He said that "two fire liddings wasn't enough for a day's work and she should have done more*." *Further, he asked if he should just pay the Claimant in accordance with the number of fire liddings she had done*." All the Claimant's other allegations of sex or race discrimination/harassment concerned conduct by personnel employed by LMOB Ltd, for whom she was contracted to work.

11. The Tribunal pointed out that although there was only one allegation of discrimination for which the Respondents considered themselves to be vicariously liable, all the claims as formulated by the Claimant were (rightly or wrongly), directed at the Respondents. There were 9 allegations of discrimination identified in the list of issues, with the final (and most recent one) being the Claimant's dismissal on 6 September 2020. The Tribunal, therefore, invited the Respondent to address the Tribunal on that basis. The Claimant also makes whistleblowing allegations against the Respondents, the last of which is alleged to have occurred on or about 25 October 2019 (the withdrawal of a job offer with a third party), for which the Claim Form was in time. By email dated 11 November 2020, the Respondent confirmed that it does not accept vicarious liability for the alleged acts of employees of LMOB (ie, the balance of the Claimant's discrimination allegations).

The Law

Status for Whistleblowing Claim

12. A worker is defined under section 230(3) of the Employment Rights Act 1996 as "*an individual who has entered into or works under (or, where the employment has ceased, worked under):*

> *(a) a contract of employment, or*
>
> *(b) any other contract, whether express or implied and (if it is express)*
>
> *whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."*

Thus, in order for a worker status to be established, there must be a contract between the parties (express or implied).

13. In the context of a blacklisting case, *Smith v Carillion (JM) Ltd [2015] EWCA Civ 209,* the Court of Appeal set out the principles which should be applied in deciding whether a contract should be implied. The judgment drew on the judgment of Mummery LJ in *James v Greenwich London Borough Council* [2008] EWCA Civ 35. The principles derived from these cases is as follows:

- The burden lies on the Claimant to show that a contract should be implied;
- A contract should only be implied if it is "necessary" to do so. If the contracts in place reflect and explain the parties' relationships, there is no need to imply an additional contract.
- Just because an express contract exists, doesn't mean that a contract should not be implied as the former may not "*tell the whole story about the legal relationships affecting the work situation." (p*Per Mummery LJ in *James* at paragraph 52).

14. There is an extended definition of worker status for the purposes of the whistleblowing provisions of the ERA 1996 in section 43K(1) as follows:

"*(1) for the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who –*

(a) works or worked for a person in circumstances in which –

(i) he is or was introduced or supplied to do that work by a third person, and

(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked by the third person or both of them…"

An extended definition of "*employe*r" is set out in section 43(K)(2) to include:

"*in relation to a worker falling within paragraph (a) of subsection (1), the person who substantially determines or determined the terms on which he is or was engaged."*

15. "*Substantially"* in this context means, "*in large part" (Day v Lewisham NHS Trust and another* UKEAT/0250/15. The Tribunal was referred to guidance on the correct approach to section 43K from the EAT in *McTigue v University Hospital Bristol NHS Foundation Trust* UKEAT/0354/15, that if the terms on which an individual was engaged were substantially determined either by the person for whom the individual works, by a third person or by both of them the individual falls within section 43K(1)(a). The starting point is the contract or contracts whose terms are being considered (this could be between the individual and their agency, the individual and the end user and/or the agency and the end user. The relevant contracts need not be in writing and could be implied. It is perfectly possible for there to be to employers for the purposes of section 43K.

Time Limits

16. The substantive law concerning discrimination time limits is contained in section 123 of the Equality Act 2010. The relevant parts of the section provides that:

(1) *"Subject to sections 140(A) and 140B, proceedings on a complaint within section 120 may not be brought after the end of –*
   (a) the period of three months starting with the date of the act to which the complaint relates, or
   (b) such other period as the employment tribunal thinks just and equitable.
(2) *….*
(3) *For the purposes of this section –*
   (a) conduct extending over a period is to be treated as done at the end of the period;"

17. The "just and equitable" extension in section 123(1)(b) gives the Tribunal a broad discretion to extend time, albeit there is no presumption in favour of granting an extension (*Robertson v Bexley Community Centre t/a Leisure Link* [2003] IRLR 434. It falls to the Claimant to prove that there are grounds to extend. The factors set out in section 33 of the Limitation Act 1980 are likely to be relevant to the exercise of the Tribunal's discretion, but there may be other factors. The length and reason for the delay will clearly be relevant, as may be whether the Claimant

has had access to legal advice and what prejudice might be caused to either party by the grant or refusal of an extension.

18. In *Commissioner of Police of the Metropolis v Hendricks* [2003] ICR 530, the Court of Appeal cautioned against determining issues related to acts extending over a period at a preliminary hearing, with limited evidence.

Findings of Fact

19. The Claimant is an agency worker who was employed originally by Coyles and latterly by Site Operative Solutions Ltd (SOS Ltd), which are Employment Businesses. The Claimant was placed as an electrician to work on the Crossrail project at Bond Street in London. The client with which the Claimant was placed was LMOB Electrical Ltd (LMOB), which in turn, contracted with the Respondent to provide electrical services on site. The Claimant was not aware that she would be working for LMOB when she applied for the role online. The information simply stated what the job was and where. It was only when the Claimant attended the site for her induction did she know who the main contractor was and that she would be working for LMOB.

20. The second Respondent and Skanska Construction UK Limited were awarded the contract for the construction of New Bond Street Crossrail Station as an unincorporated joint venture, known as "CSJV". All the electrical works for the project were subcontracted to LMOB. The Respondents provided extracts of the commercial contract between CJSV and LMOB, which did not descend into the terms on which LMOB engaged their staff.

21. The Claimant was informed what her hours and pay would be by SOS Ltd. She had a written contract with SOS Limited, but no express contract with LMOB (or the Respondents). The written contractual documentation which governed the relationships between variously the Claimant, SOS Ltd, LMOB and CSJV were contained in the Tribunal bundle. The Claimant has a written contract of employment signed by her with SOS Ltd as a "PAYE worker". That contract defines the "client" as the person, firm or corporate body to whom the employee is supplied, which in this case was LMOB. The Claimant's salary payment arrangements were set out in this contract and involved LMOB's providing a signed timesheet indicating what hours the Claimant worked in order that SOS Ltd could pay her (paragraph 5.1). The Claimant's hours were recorded by her act of scanning in and out of the site. A pension was provided by SOS Ltd (paragraph 8).The Claimant was required to report to a manager of LOMB (paragraph 4.2) and the dates of her annual leave had to be arranged with LMOB (paragraph 7.6). The Claimant had to provide evidence of sickness to SOS Ltd. The Claimant's assignment to LMOB could be terminated by the Claimant, SOS Ltd or LMOB (paragraph 10.1). CSJV are neither party to, nor are they referred

to in this contract. The employment contract is expressed to be the "*entire agreement"* between the Claimant and SOS Ltd. In her oral evidence to the Tribunal, the Claimant agreed the terms of her contract were agreed between SOS Ltd and LMOB and that the Respondents did not contribute to these terms. The Claimant accepts that she was not a direct employee of the Respondents. In addition to her contract with SOS Ltd, there is a Notice of Assignment by SOS Ltd to LMOB ("the client").

22. In her Supplementary written Closing Submissions at paragraph 6, the Claimant stated, "*the Respondent has asserted in a misleading way that they did not determine the terms of Claimant's contract in any significant way. However, the Claimant's evidence at the Preliminary Hearing has been much more thorough and consequentially persuasive than that provided by Ms Carr after the Respondents"* This statement is contradicted by the evidence heard by the Tribunal. Ms Meena took the Claimant through the material provisions of her contract of employment with SOS Ltd in cross-examiniation, which the Claimant accepted set out all the terms that were necessary for her to do her work as an electrician and it did not mention the Respondents at all. The Tribunal's note suggests that at approximately 11.55am, Ms Meenan then put to the Claimant the following question:

> "*The Respondent did not contribute to the terms of your contract at all?"*

The Claimant's response was:

> "*I do agree with that".*

23. Generally, LMOB told the Claimant what to do and arranged any necessary training (for instance, confined spaces training), although her site pass had the CSJV logo on it. When the Claimant raised a grievance concerning sex discrimination on 7 August 2018 she initially emailed Mr Smith of the Respondents, because, (as she explained in her oral evidence) she knew Mr Smith from a previous employment so, "*felt comfortable reaching out to him*." Mr Smith advised the Claimant to contact her employer (which was then Coyles) as it was, in his words, for them to "*take ownership."* The complaint was subsequently investigated by an external HR consultancy engaged by LMOB. The Claimant confirmed that the Respondents have their own HR Department, but did not conduct the investigation. The Claimant credits Mr Smith and Ms Carr of the Respondents for the fact that LMOB conducted an investigation (albeit the Claimant was not satisfied with the outcome).

24. When the Claimant had another issue at work in January 2019 she made contact with SOS Ltd to ask "*who do I talk to when I am victimised by a manager at work*", this was dealt with by a member of staff at SOS Ltd. In June 2019, the Claimant raised an issue about the length of her lunchbreak to Mr Smith of CSJV, who advised her to raise the issue with her employer and ensured that LMOB were also aware. The Claimant was unhappy that Mr Smith had passed the Claimant's complaint to Ms Carr, who raised it with a senior member of LMOB staff, as the Claimant would have rather it had been dealt with at a lower level. Whilst the Respondents senior personnel assisted the Claimant to raise grievances to the right person, it is clear that the Claimant's grievances were not regarded by the Respondents as falling under their remit. The fact that LMOB then dealt with the grievances (albeit not to the Claimant's satisfaction) is consistent with that. When a timekeeping issue concerning the Claimant was raised with her in July 2019 it was SOS Ltd who wrote to the Claimant about it, following information provided by LMOB.

25. It is clear from an email dated 25 January 2019 provided to the Claimant following a subject access request, that one of the Respondents managers, Mr Owen, asked LMOB to remove the Claimant removed from the project. He suggested it was the first time he had found it necessary to ask a contractor to remove one of their workers from post in his career. Mr Owen had criticised the Claimant for working too slowly and considered her disruptive. Mr Owen's conduct forms part of the Claimant's complaint of sex and race discrimination and she regards him as setting in motion her eventual dismissal.

26. Ms Carr explained that the Respondents do not have the power to control who contractors hire and fire, except in very limited circumstances. The Respondents involved themselves in establishing whether personnel have the right to work in the UK and that they are medically fit to work on site, but the only circumstance in which they would direct a contractor to remove an agency worker would be for health and safety reasons. The Respondents are ultimately responsible to the HSE for health and safety on site (and are the "F10" Form holders). It is the Respondents' case that Mr Owen' request was not acted upon and that he had no power to make it.

27. CSJV has a supplier Code of Conduct (which the Claimant was first aware of through discovery in these proceedings), which seeks to promote good equality practice amongst the Respondents' sub-contractors. Ms Carr explained that the Code of Conduct did not apply directly to the Claimant but sets out the standards which the Respondents expect. If a contractor (or a member of their staff) does not comply with those standards and this is discovered on audit by the Respondents, a recovery plan would be requested by the Respondents and then the contractor would be a re-audited to check their compliance.

28. Extracts of the contractor agreement between the Second Respondent, Skanska and LMOB were provided in the bundle. With the exception of requirements around "key persons" and the need for the contractor to have a commitment to equality of opportunity and the elimination of discrimination, the Respondents agreement with LMOB did not include provisions as to the terms of employment or engagement of LMOB's staff.

29. The Claimant criticises the Respondents in her submission for omitting to disclose what their obligations were in relation to health and safety requirements, equal opportunities and dignity at work, in circumstances where the Claimant invites the Tribunal to infer that in order to win the contract with a public sector commissioning body (TFL), they must have committed themselves to "*ultimate responsibility for contractual and regulatory compliance."* This evidence was not led by the Claimant at the hearing or put to Ms Carr in cross-examination. The Respondents have disclosed to the Claimant their Supplier Code of Conduct and Ms Carr explained in evidence how that Code would be enforced and the fact that the Respondents are ultimately responsible for health and safety on the site. The Tribunal accepts her evidence.

30. When asked how the Claimant knew about claims to the Employment Tribunal and the time limits which applied, she said she was a member of a trade union and received advice from the Union. When asked why she waited until 23 January 2020 to contact ACAS, she explained that it was due to what she termed her "blacklisting" in October 2020. In the course of the case management hearing, the Tribunal explored with the Claimant what she meant by the term "blacklisting" (it being a phrase more commonly associated with being targeted for Trade Union membership). The Claimant explained that it related to her whistleblowing allegations.

Conclusions

Status

31. It is common ground that the Claimant did not have an express (written or verbal) contract with the Respondents regarding her work as an electrician on the Bond Street Crossrail site. The Tribunal accepts the Respondents' submissions, that the contractual documentation between their various actors in this case accurately reflected the reality. A Tribunal must be astute to ensure that what the Claimant termed the "labyrinth of [their] contractual agreements" do not obscure the true nature of the parties' relationship. The Claimant was clearly an employee of SOS Ltd. The Claimant was a paradigm agency worker assigned to LMOB ("the client") as an electrician. With limited exceptions (discussed later in this judgment), there are two primary actors in the frame for responsibility for the Claimant, SOS Ltd

and LMOB. Between them, as reflected in the contractual terms, they arranged her pay, hours, pension, sickness, holiday, training, the duration of her engagement and its termination, the determination of grievances and the direction of her day to day activities. There is no need to imply a contract between the Claimant and either of the Respondents in order to explain the business reality of the situation. The written agreement both describe and reflect the parties' interactions. Although the Claimant sometimes took direction or sought assistance from members of the Respondents' staff, as the Respondents were responsible for the site as a whole (as the lead contractor), this is consistent with the absence of a contract between the Claimant and Respondents. The Claimant was on site pursuant to LMOB's commercial contract with the Respondents and the latter was bound to have ultimate oversight of the works/progress. The lack of a contractual relationship between the Claimant and Respondents is fatal to any contention that the Claimant was a worker in relation to the Respondents for the purposes of section 230 of the ERA 1996.

32. Section 43K of the ERA 1996 extends the section 230 definition to ensure that agency (or other atypical) workers are protected in circumstances where they make protected disclosures. A purposive approach to interpretation should, therefore, be adopted. A Claimant might have more than one "employer" for these purposes, so it is conceivable that both LMOB and the Respondents could be liable to the Claimant. For that to be the case, however, the Tribunal would need to be satisfied that the terms on which the Claimant was engaged as an electrician were "*substantially determined*" by the Respondents or jointly by the Respondents and LMOB. The evidence strongly suggests that they were not. It was SOS Ltd and LMOB which determined the terms on which the Claimant was engaged. LMOB were contracted to the Respondents to provide electrical services, but it was a matter for LMOB how it staffed the fulfilment of that contract. In her oral evidence, the Claimant accepted that LMOB and SOS Ltd were responsible for setting her terms of engagement and she agreed with Ms Meenan that the Respondents did not contribute to them.

33. The Claimant relies on the Respondents' Supplier Code of Conduct to demonstrate that the latter had ultimate responsibility/control over her engagement, in particular regarding matters of discrimination. The fact that the Respondents seek to promote good diversity practice amongst their sub-contractors is qualitatively different from substantially determining the terms of engagement/employment of the staff of their subcontractors. An exhortation to comply with equality legislation is laudable, but does not amount to a determination of terms of employment. The Tribunal can find no basis in the evidence on which the Respondents could be said to have substantially determined the Claimant's terms of engagement, such that she can bring herself within the extended definition of a worker in relation to the Respondents for the purposes of the whistleblowing legislation. It would be unfortunate if organisations

such as the Respondents were discouraged from promoting good diversity practice by the risk of being fixed with liability for the acts of their sub-contractors if the latter failed to comply.

34. The Claimant invites the Tribunal to find that the Respondents "count as being within the client's [LMOB's] organisation" for the purposes of her employment contract with SOS Ltd and, therefore, being subject to the Respondents' control. This assertion contradicts the evidence that the Claimant gave to the Tribunal orally. In answer to the Tribunal's initial questions, the Claimant said, "*LMOB told me what to do*" and in cross-examination by Ms Meenan, the Claimant agreed that she was required to report to a manager of LMOB (paragraph 4.2 of her contract). Whilst it is clear that the Second Respondent's manager, Mr Owen, sought to exercise some control over the way the Claimant was performing, it is notable that he raised his complaints about her performance with LMOB. The fact that Mr Owen asked LMOB for the Claimant to be removed from the site in January 2019 is something he did not have the power to do. The Claimant is, understandably, upset about this. The Respondents submit that the fact that LMOB did not remove the Claimant from site in response to Mr Owen's request demonstrates that the Respondents did not have the power to do this. Whilst the Claimant suggests that LMOB were just biding their time and dismissed her eight months later, the Tribunal does not find it plausible that LMOB would delay this action for so long in order to conceal the reason for it.

35. Whether and to what extent the Respondents' had day to day control of the work the Claimant did is distinct from whether the Respondents substantially determined the terms on which she was engaged. The former might cause the Tribunal to critically examine the Respondent's evidence that they did not determine the terms on which sub-contractors engage their staff, but the Claimant accepted in her oral evidence that her work was directed by LMOB. In the circumstances, the Tribunal is not satisfied that the Claimant can bring herself within either sections 230 or section 43K in relation to the Respondents. As such, the Tribunal does not have jurisdiction to hear her whistleblowing claims.

Time Limits

36. The Claimant notified ACAS of her potential claim on 23 January 2020 and the early conciliation certificate was issued on 24 January 2020. A draft list of issues was formulated at the Case Management Hearing on 18 June 2020 and the record of the hearing indicated as follows: "*If there is any disagreement with the draft list of issues set out below from either party, they are to attempt to reach agreement on an amended list of issues with a view to providing that to the Tribunal at the Open Preliminary Hearing*." Neither party suggested that there was any disagreement with the draft list of issues, so the Tribunal has proceeded

on the basis that the parties agreed that it accurately reflected the Claimant's claims as set out in her Claim Form and explained by her at the case management hearing. The final alleged act of whistleblowing, therefore, occurred on or about 25 October 2020 and the final alleged act of discrimination occurred on 6 September 2020 (the Claimant's dismissal). The Claimant's whistleblowing claim was, therefore, presented in time, but early conciliation in relation to the discrimination claims should have been commenced by 5 December 2019. The Claimant's discrimination claims are, therefore, out of time.

37. The Claimant has put forward no reason for the delay in lodging her discrimination claims, but has suggested that "blacklisting" by the Respondents was the last in a chain of linked events, so that her claim was in time. The Claimant had advice from her Trade Union concerning the lodging of her claim, the applicable times limits and the need for early conciliation. As Ms Meenan set out in her written submissions, the lack of reason for a delay in presenting a claim is a relevant factor to the Tribunal's exercise of discretion, but certainly not a decisive one (*Abertawe Bro Morgannwy University Local Health Board v Morgan* [2018] EWCA Civ 640.

38. The Claimant's delay in lodging her discrimination claims was not a substantial one (7 weeks or so) assuming for the purposes of this hearing that her dismissal was the last act of alleged discrimination in a series. In her written submissions, she suggests it would be just and equitable to extend the time limit to avoid unfairness to her and avoid unduly favouring the Respondents.

39. In the alternative, the Claimant asserts that the time limit issue should be reserved for the full merits hearing when the Claimant suggests that her claims against LMOB and others lodged in the Croydon Tribunal would be combined. This was the basis of the Claimant's application to postpone this preliminary hearing, which was specifically rejected by Regional Judge Wade. The Claimant asserts that the claims are "*substantially interlinked,"* although the pleadings in the Croydon claims have not been provided. Assuming the Claimant has made the same or similar claims against LMOB that she has made against the Respondents in this case, with the exception of the claim of discrimination made against Mr Owen in January 2019, all the Claimant's other discrimination complaints relate to actions performed by employees of LMOB. As such, the Claimant has a potential remedy for her discrimination (and whistleblowing) claims against LMOB. The Tribunal is not aware whether there are any potential jurisdictional difficulties in relation to the Claimant's Croydon claims and clearly this Tribunal can make no determination of the Claimant's status in relation to LMOB in the absence of evidence from LMOB, but at face value, they seem a more obvious Respondent to these claims than the First and Second Respondents in this case.

40. Although the Respondents did not adduce evidence addressing the vicarious liability issue in relation to acts of discrimination carried out by employees of LMOB, Ms Meenan referred the Tribunal to *Kemeh v Ministry of Defence* [2014] EWCA 91 in support of the contention that the Respondents could not be held liable to the Claimant for the actions of LMOB's employees. In *Kemeh* it was held that someone who was employed by a contractor would not be an agent of a third party merely because they performed work for their benefit. In light of the Tribunal's findings in this hearing concerning the relationships between the actors in this case, the Claimant will need to address another jurisdictional hurdle posed to her discrimination claims by *Kemeh.*

41. In circumstances where there is no reason advanced for the Claimant's delay in bringing her discrimination claims and where she has had access to advice from her Trade Union, the Tribunal considers that the balance of prejudice between the parties has determinative weight in this case. The Claimant makes 9 allegations of discrimination, 8 of these allegations concern employees of LMOB, against whom she has potential remedy. In her evidence, the Claimant credited the Respondents in this case for ensuring that LMOB caused her discrimination grievance to be investigated. Refusing an extension of time will only cause the Claimant material prejudice in relation the allegation of discrimination concerning Mr Owen, for whose acts the Respondents accept liability in principle (albeit discrimination is denied). This relates to his criticism of the Claimant's work rate in January 2019 and is, therefore, substantially out of time. Allowing an extension will mean that the Respondents would face the cost of a multi-day full merits hearing where the majority of potential witnesses are not their employees in circumstances where there is a realistic prospect that they could only be held potentially liable for a single act of discrimination presented over 10 months out of time. For this reason, the balance of prejudice lies with refusing the Claimant's application to extend time.

_____