



EMPLOYMENT TRIBUNALS

Claimants: (1) Ms Sonica Sharma
(2) Ms Esther Izundu
(3) Mr Agni Singh

Respondent: Competition and Markets Authority

Heard at: East London Hearing Centre

On: 5 September 2022

Before: Employment Judge Gardiner

Representation

Claimant: Mr C Adjei, counsel

Respondent: Mr T Wilkinson, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

- (1) Each of the three Claimants has properly issued proceedings against the Respondent.
- (2) Each of the Claimant's claims was presented outside the three-month period starting with the date of the act to which the complaint relates.
- (3) Each of the Claimant's claims was presented within such other period as the Tribunal thinks just and equitable.

REASONS

Introduction

1. In early 2021, the Respondent, the Competition and Markets Authority, announced a Performance Related Pay award for staff. It was decided that the award should be based on the performance ratings that they had received for the 2019/20

performance year. Employees who had been graded in the top two grades, namely “Consistently Exceeding” or “Partially Exceeding” would receive Performance Related Pay awards. Those whose performance was assessed as falling in the remaining three grades would receive no award. Each of the three claimants were graded in the remaining three grades. As a result, they did not receive a Performance Related Pay award. All three claimants are BAME.

2. Their case in these proceedings is that the failure to pay them such an award amounts to an act of indirect race discrimination. They argue that the provision, criterion or practice (PCP) of linking the Performance Related Pay award to the performance grading allocated for 2019/20 and restricting awards to those in the top two grades is discriminatory. The PCP, it is argued, puts BAME employees at a particular disadvantage, and the Respondent cannot show it to be a proportionate means of achieving a legitimate aim.
3. This is a Preliminary Hearing to decide whether the complaints were presented in time. It was listed by Employment Judge Fowell at an earlier Preliminary Hearing held on 29 July 2022. Since then, an additional issue was added to the issues to be decided at this hearing.
4. This was whether two of the claimants, Ms Esther Izundu and Mr Agni Singh had presented claims to the Employment Tribunal. The Respondent’s solicitor raised this in an email to the Tribunal on 16 August 2022. On 23 August 2022, Employment Judge Burgher directed that this issue should be considered at this Preliminary Hearing.
5. At this hearing, Mr Cyril Adjei, counsel has represented each of the Claimants. Mr Tim Wilkinson, counsel, has represented the Respondent. Both had prepared helpful Skeleton Arguments which were handed to the Tribunal at the start of the hearing. There was an agreed bundle of documents comprising 228 pages. Four witnesses were called on behalf of the Claimants. These were the three Claimants and Tom Sheehan, who was Chair of the Public and Commercial Services Union (PCS). Each cross examined by Mr Wilkinson. No witnesses were called by the Respondent. At the conclusion of the evidence, there were closing submissions from each counsel. Given that there was another case also listed before me in the afternoon, I reserved my decision.

Have claims been presented by each of the Claimants?

6. I first deal with the jurisdictional argument as to whether claims have been presented by each of the Claimants. The argument arises because it appears that there is only one Claimant named on the ET1 Claim Form, namely Ms S Devi (which was the maiden name of Ms S Sharma). There is no reference to the other two Claimants, although the Details of Complaint attached to the Claim Form lists all three Claimants in the title.

7. The bundle of documents includes an undated digital form including the details of two additional claimants under the heading "Group Claim". These are Ms Esther Izundu and Mr Agni Singh. The Claimants argue, and I accept, that these two additional names were entered against Claimant 2 and Claimant 3. For whatever reason, these names did not appear in the version of the ET1 form which was sent to the Respondent. It is clear from the last two emails in the bundle that at the time this was a more general problem with the online form which was raised with one of the Regional Employment Judges at a User Group Meeting.
8. Most significantly, notwithstanding the absence of the other two claimant's full names from the ET1 form, their full names appear to have come to the Tribunal's attention, given that the Tribunal consolidated all three claims in an order dated 3 December 2021. This information could only have come from the information provided when the claim form was presented.
9. Therefore, I find that each of the Claimants has properly brought an employment tribunal claim.

Were the claims presented in time?

10. At the start of the Preliminary Hearing, I took the time to discuss the time issues with the parties. It was agreed that there were the following three issues when it came to the application of time limits to the Claimants cases:
 - (1) What was the date of the act of discrimination alleged in these proceedings? Was it on 27 January 2021 (as the Respondent contends in relation to all of them) or 17 February 2021 (in the case of Sharma) or 22 February 2021 (C2 and C3) on 26 February 2021 as the Claimant contends?
 - (2) If it was 27 January 2021, was there a continuing course of conduct ending with 26 February 2021?
 - (3) If not, then would it be just and equitable to extend time?
11. I clarified with the parties that the issue of time limits had been listed for final determination as a preliminary issue. Although the Respondent had indicated in its Response that it would be making an application for the claims to be struck out, that application had never been made. The Tribunal is to make a final determination on the time limit issue unless, as EJ Fowell directed at paragraph 7 of his case management orders, it considered it appropriate to defer a final decision on whether it was just and equitable to extend time
12. As a result, it is necessary to make the necessary findings of fact in relation to the factual matters relevant to time limit issues.

Factual findings

13. Pay negotiations in respect of the 2020-21 pay offer started in September 2020. In December 2020, the Respondent shared a document with the union headed “Review of BAME Performance Ratings for the period 1 April 2019 to 31 March 2020. This was shared on a confidential basis. It contained statistical analysis of the performance ratings for BAME staff. On one reading of the statistics, it appeared that BAME staff were not awarded the top two grades in the proportions that would be expected given their composition within the workforce.
14. In writing on 5 January 2020 and again at a meeting on 6 January 2020, PCS union asked the respondent whether it would publish this document to its staff. The Respondent refused.
15. A document titled “CMA Pay Settlement 2020 – 2021 (AO to G6)” was posted on the Respondent’s intranet. Although it is not dated, the parties agree that it was posted on 27 January 2021. This document noted that following pay negotiations from late October to mid-January, the Respondent had made a Pay Offer on 15 January 2021. It noted that this pay offer was rejected or at least not accepted by the recognised unions. It went on to say as follows:

“Therefore, management will reluctantly impose the CMA Pay Settlement for 2020 – 2021 to ensure that staff are paid at the end of February 2021.”

16. It went on to summarise the key features of the Pay Settlement. The third bullet point was worded as follows:

“Flat rate performance-related payments differentiated by grade and whether staff members were awarded “Consistently Exceeding” or “Partially Exceeding” performance ratings in the 2019 – 2020 performance year”

17. It concluded by saying that “individual letters summarising the changes to staff salaries plus any performance related payments will be sent in late February”.
18. Read as a whole, there did not appear to be any basis for further negotiation.
19. On 8 February 2021, Mr Sheehan wrote to Mr Coscelli, the Respondent’s Chief Executive in the following terms:

“I am writing to formally ask that the decision of the CMA to link non-consolidated pay with clearly evidenced detrimental performance outcomes to groups of staff with protected characteristics is raised with the Cabinet Office under the Civil Service Management Code (CSMC)”

20. It concluded by saying that “you still have the opportunity to suspend the imposition of the non-consolidated pay proposals for further consideration and would urge you to do so”. Mr Coscelli sent a holding email on 12 February and then a further email

on 15 February. He refused to suspend the imposition of the 2019 -20 pay settlement as it relates to the provision of non-consolidated pay. He pointed out that the CSMC obliged the parties to attempt to resolve questions of potential detriment locally before being referred to the Cabinet Office. It was in the context of the structure of the CSMC that he said “My aim is to resolve these issues locally with you”. In his response on 16 February 2021 Mr Sheehan again asked Mr Coscelli to suspend the imposition of the non-consolidated pay proposals pending further discussions. Mr Coscelli said that he still held the view that the Respondent should implement the pay settlement, as is, at the end of February. He offered a meeting with Erik Wilson in the following week. He ended his email by saying that “he will also advise me after the meeting if there is anything from that discussion which means we should not implement our pay deal at the end of February 2020”.

21. I find that Ms Coscelli was seeking to apply the relevant procedure, namely that there should be a local discussion to attempt to resolve a particular dispute before the matter was referred to the Cabinet Office. Whilst he was indicating, as he ought, that that such a local discussion was not a formality and might conceivably lead to a different approach, he maintained that the Respondent should stick to its published pay settlement. The email exchange was expressly not agreeing to suspend the imposition of the non-consolidated pay proposals.
22. As promised in the intranet notification, individual letters were sent to each of the claimants explaining the consequence for them of the decision in relation to performance related pay. Ms Sharma was sent a letter on 17 February 2021. Mr Singh and Ms Izundu received the same information in emails sent on 22 February 2021.
23. The letters noted that “your backdated base pay increase and any performance pay owing to you will be paid on 26 February 2021”. Because none of the claimants had been graded in the top two performance grades for 2019/20, none of the claimants received a performance related pay award on 26 February 2020. This was the date on which those with the top two performance grades did receive their pay awards.
24. On 9 March 2021, PCS wrote to the Cabinet Office complaining about the disproportionate impact of the performance related pay decision. That complaint was subsequently rejected.
25. Mr Singh could not recall exactly when he realised he would not be receiving an award of performance related pay. He accepted that he had access to the intranet although would not be checking it on a daily basis. Although he does not have a record of receiving an email notifying him of his pay award and that he would not be receiving performance related pay, on the balance of probabilities I find that he was sent the email dated 22 February 2021.
26. Ms Sharma was on maternity leave from 2 November 2020 to 8 November 2021. As a result, during that period, she had no access to the Respondent’s intranet and her work email address was not in use. She did read personal emails but not as

regularly as she would have checked work emails whilst at work. Her priority was caring for her new child. She was sent an email notifying her that she would not be receiving any performance related pay, but she is not clear on when she would have read that email. In her witness statement, she says she did not see this email until August 2022. I find it is likely that she realised that she would not be receiving performance related pay at an earlier point, not least because she started early conciliation in May 2021 and presented an ET1 Claim Form complaining about this decision in July 2021. It is unclear when she first realised that she had not been given performance related pay.

27. Ms Izunda had long been dissatisfied with the outcome of her grading for 2019/2020. She had unsuccessfully raised a grievance. A subsequent attempt to get a better grading on appeal had been rejected. She was told the outcome of the appeal in an email on 21 January 2021. She felt that the outcomes of the grading process and her subsequent grievance may be discriminatory but did not have any statistics to back this up at the time.
28. As already stated, as part of the pay negotiations, the Respondent had shared information with the recognised unions as to racial impact of the decision in relation to performance related pay. This was shared with the union on a confidential basis, namely that it could be used as part of negotiations but could not be communicated to members.
29. On 31 March 2021, the union made a freedom of information request in an attempt to force the Respondent to publish the documents to staff. The deadline for responding was 30 April 2021. It was only on this date that the racial impact data was disclosed to the unions in a format that enabled them to share this information with its members. I accept the evidence of Mr Sheehan that the Respondent had been reluctant to share this information with its employees as a whole and delayed in doing so until the end of April.
30. This data confirmed that fewer BAME staff had attained the top two grades during 2019/20 than would be expected given their proportion of the overall cohort eligible for performance related pay. As a result, fewer BAME staff had received performance related pay.
31. On receipt of this data, the union wrote to its members indicating that it was considering supporting members in bringing a legal challenge based on the data.
32. The claimants had considered from anecdotal evidence that the basis on which performance related pay had been calculated may have disproportionately impacted on BAME staff before they had received the data on 30 April 2021. It was at this point that they thought, for the first time, that they may have an arguable claim for indirect race discrimination.
33. Ms Sharma and Ms Izundu instigated the Early Conciliation Process on 20 May 2021. Mr Singh did this on 25 May 2021. They all assisted in doing so by their

union, the PCS union. The union was under the impression that the last date for limitation purposes on which to issue proceedings was 25 May 2021, just inside the three-month period from the date on which performance related pay awards were made. Having issued proceedings at that point, the union considered that it had a month from the date of the early conciliation certificate to present the ET1.

34. In the case of the first two Claimants the Early Conciliation Certificate was issued on 1 July 2021 and this date was 6 July 2021 in relation to the Third Claimant (Mr Singh). Therefore, the last day for presenting the ET1 was 31 July 2021 in relation for the first two claimants and 5 August 2021 for the third claimant.
35. The ET1 was presented on 30 July 2021 for all claimants. The Details of Complaint was expressed in the following terms:
 - a. It referred to the Pay Offer made on 15 January 2021;
 - b. It stated that “with effect from 26 February 2021, despite the concerns raised by the unions (referred to below) the Respondent implemented the Pay Offer”.
 - c. It referred to the implementation of the Pay Offer as a PCP which puts BAME staff at a particular disadvantage, because it was not a proportionate means of achieving a legitimate aim.
 - d. It ended by saying that “as a result of the Respondent’s implementation of the PCP, the Claimants have suffered financial loss, disappointment and injury to feelings”.

Relevant legal principles

36. Section 19 Equality Act 2020 states:
 - (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s.
 - (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant characteristic of B’s if –
 - a. A applies, or would apply, it to persons with whom B does not share the characteristic;
 - b. It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it;
 - c. It puts, or would put, B at that disadvantage; and

- d. A cannot show it to be a proportionate means of achieving a legitimate aim.

37. Section 123 of the Equality Act 2010 is worded as follows:

“(1) Proceedings on a complaint brought within Section 120 may not be brought after the end of –

- (a) The period of 3 months starting with the date of the act to which the complaint relates; or
- (b) Such other period as the employment tribunal thinks just and equitable

....

(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;
- (b) Failure to do something is to be treated as occurring when the person in question decided on it.”

38. Under Section 123 of the Equality Act 2010, proceedings on a complaint may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates. Time starts to run from the point at which the alleged discrimination takes place, not when the Claimant becomes aware of it – Viridi v Commissioner of Police of the Metropolis [2007] IRLR 24.

39. The three-month time for bringing Tribunal proceedings is paused during early conciliation such that the period starting with the day after early conciliation is initiated and ending with the day of the early conciliation certificate does not count (Section 140B(3), Equality Act 2010). If the time limit would have expired during early conciliation or within a month of its end, then the time limit is extended so that it expires one month after early conciliation ends (Section 140B(4), Equality Act 2010).

40. Conduct extending over a period is to be treated as done at the end of the period (Section 123(3) Equality Act 2010). There is conduct extending over a period if there is a continuing discriminatory state of affairs as opposed to a succession of unconnected or isolated specific acts. If so, then the three-month time period for bringing a claim only runs from the date on which the state of affairs ends (Metropolitan Police Commissioner v Hendricks [2003] ICR 530).

41. If the claim has been brought outside the primary limitation period, then the Tribunal has jurisdiction to consider the claim if it was brought within such other period as the Tribunal considers just and equitable. Considering a claim brought outside the three-month time limit (as extended by the early conciliation provisions) is the exception rather than the norm. Time limits are exercised strictly in employment

and industrial cases. The onus is on the Claimant to establish that it is just and equitable for time to be extended (paragraph 25 of Robertson v Bexley Community Centre (t/a Leisure Link) [2003] IRLR 434, CA).

42. Factors which are almost always relevant to an exercise of the discretion are the length of and the reasons for the delay, and whether the delay has prejudiced the Respondent (Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194 at paragraph 19). However:

“There is no ... requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard” (Abertawe at para 25)

43. It is not necessary for a Tribunal to consider the checklist of factors set out in Section 33 of the Limitation Act 1980, given that that Section is worded differently from Section 123 of the Equality Act 2010, so long as it does not leave a significant factor out of account.

44. It will frequently be fair to hold Claimants bound by time limits which they could, had they taken reasonable steps, have discovered. If the delay in issuing proceedings has been caused by the fault of an adviser, this is a potentially relevant factor that potentially excuses a failure to issue proceedings in time, or a delay in issuing proceedings thereafter (Hunwicks v Royal Mail Group plc EAT 0003/07; 20 March 2007 per Underhill J at paragraphs 9 and 13). However, to be a relevant factor, the bad advice must have been the reason for the delay.

45. I was also referred to the following authorities:

- a. McKinney v LB of Newham UKEAT/0501/13/LA
- b. Wells Cathedral School Limited v Souter EAT-2020-000801-JOJ
- c. Dziedziak v Future Electronics Limited UKEAT 207/11
- d. Hawkins v Ball [1996] IRLR 258
- e. British Coal Corporation v Keeble [1997] IRLR 366

Date of act of discrimination

46. If the act of discrimination took place before 21 February 2021 (in the case of Ms Sharma and Ms Izundu) or before 26 February 2021 (in the case of Mr Singh), then this is potentially out of time. Therefore, if the relevant date is 26 February 2021, as the Claimants contend, when the performance related payments were made to the others but not to the Claimants, then their claims are within time. If the relevant date is 27 January 2021 (as the Respondent contends), when the basis for determining entitlement to performance related pay was imposed, then the claims have been brought outside the primary statutory time period.

47. Mr Adjei argues that the cause of action in a claim for indirect discrimination is not complete until all of the elements have been satisfied. As a result, given the way in which the claim has been pleaded, he argues that those elements were not satisfied until 26 February 2021. He argues that the Claimants chose to bring their complaints based on what actually happened to them as a result of the actual application to them of the PCP. This is the point at which the performance related pay was implemented, causing both group disadvantage and individual disadvantage at the point at which financial loss was suffered. He argues that they could have chosen to put forward a case based on the same PCP based on the anticipated application of the PCP and the anticipated group and individual particular disadvantage. Thus, he argues, there are two different limitation periods in relation to the impact of the same PCP on the same claimants.
48. Mr Wilkinson argues that the implementation of the pay offer is the discriminatory act; and the fact of not being paid performance related pay is merely the consequence of the implementation of the pay settlement. In any event, even if there was an omission to pay the Claimants on 26 February 2021, the relevant date in relation to that omission is the date on which it was decided not to pay the claimants, which was the date of implementation of the pay decision.
49. My decision is that the three-month time limit starts to run from 27 January 2021. This is the date on which negotiations ended with the rejection of the pay offer and the pay settlement was “imposed”. It is therefore the date on which a decision not to pay performance related pay to the claimants was implemented, albeit that the financial consequences of that decision would not have been experienced until 26 February 2021. This is the date on which the Respondent “applied to the Claimants a provision, criterion or practice which is discriminatory” (Section 19(1) Equality Act 2010). Subsection 19(2) explains that a PCP “is discriminatory” if four conditions are satisfied. The group disadvantage condition (Section 19(2)(b)) does not require that the particular disadvantage has actually been suffered. It is sufficient, given the wording, that the PCP “would put persons with whom B shares the characteristic at a particular disadvantage”. In the same way, the individual disadvantage condition is satisfied if the PCP “would put B at that disadvantage” (Section 19(2)(c)). In any event, it is not necessary that the disadvantage is a financial disadvantage. In one sense, the announcement that the claimants will not be getting an award of performance related pay does already put them at a disadvantage. It signifies that their past performance is not considered sufficiently worthy of additional recognition as part of the pay structure.
50. In so deciding, I am not departing from the way in which the Claimants have chosen to plead their case. I do not accept the argument advanced by Mr Adjei, counsel for the Claimants, that a complaint about the same PCP can raise different causes of action in indirect discrimination, and therefore different limitation start dates, depending on how it is formulated. He has advanced no authority to support such a proposition. If it were to be the case, it would create uncertainty. Such a result is not required by the wording of the legislation.

51. If I am wrong as to the date on which the Respondent applied a provision criterion or practice to the Claimants, then this PCP was applied to Ms Sharma on 17 February 2021 when she was sent the pay award letter, and on 22 February 2021 when individual letters were sent to the other two claimants. In this event, the claim instigated by Ms Sharma would still be outside the primary limitation period, given that ACAS Early Conciliation was not started until 20 May 2021 in her case. The claim brought by Mr Singh would also have been brought outside the primary limitation period in that ACAS Early Conciliation was not initiated until 25 May 2021.
52. As I have not heard full argument on whether the failure to pay a performance related pay award on 26 February 2021 was a discriminatory omission under Section 123(4), and as the point does not arise for decision given my primary conclusions, I do not reach a conclusion on that point.

Was there a continuing act after 27 January 2021?

53. Mr Adjei argues that, in the alternative, there was conduct extending over a period, and time started to run from the end of the period. The period, he says, is from 27 January until 26 February 2021 in that there was a continuing state of affairs in which the PCP continued to be applied, the PCP would have put BAME staff at a particular disadvantage at some point in the future and the Claimants suffered this disadvantage when they did not receive the performance related pay.
54. My decision is that there was not a continuing act after 27 January 2021. Rather there was an act which imposed a formula for computing performance related pay awards, with a deferred consequence, in that the date on which the award would or would not be paid was on 26 February 2021, one month later. I do not accept the Claimants' argument that the dialogue between Mr Sheehan and Mr Coscelli is evidence that a final decision was still awaited, or that a further decision was made to confirm the decision communicated on 27 January 2021. The email exchanges show an unsuccessful attempt by the PCS union to get the decision suspended whilst further discussions take place. They also show the application of a particular process within the Civil Service Management Code (CSMC) whereby local dialogue needs to precede a formal complaint to the Cabinet Office.

Consequences

55. Therefore, the three-month time period for bringing proceedings started on 27 January 2021. ACAS Early Conciliation ought to have been instigated by 26 April 2021. When ACAS Early Conciliation was initiated on 20 May or 25 May 2021, this was over three weeks late. Whilst the limitation period is paused during Early Conciliation, there was no month-long extension after the end of the period of Early Conciliation. This is because the relevant time limit had already expired by 20 May 2021. As a result, there is a further four-week delay (in the case of the first and second Claimants) and a three-and-a-half-week delay (in the case of the third Claimant) before the ET1 was presented.

Would it be just and equitable to allow the claim to proceed, notwithstanding the primary limitation period?

56. In circumstances where proceedings were brought around seven or eight weeks outside the required time period, I have to decide whether the proceedings were still brought “within such other period as the Tribunal considers just and equitable”. In so deciding, I have to have regard to all the circumstances, including the extent of the delay and the reason for the delay. I have to focus in particular on the balance of hardship between the parties if the claims were dismissed on the grounds that they are time-barred or if the claims are allowed to proceed.
57. I consider it is appropriate to decide this issue at this hearing, rather than defer it to the Final Hearing. I do so, notwithstanding the difficulty in assessing the merits of the Claimants’ claims at a preliminary hearing before full disclosure and hearing full evidence on all matters. Whilst I have considered each of the claims individually, the common factors applicable to all Claimants means that it is appropriate to express the reasons compendiously.
58. In each case, my decision is that it would be just and equitable to allow the Claimant’s claim to proceed, for the following reasons:
- a. The picture painted by the statistics of potential disparate impact was of sufficient concern to the union that it made a freedom of information request so that the content could be seen by its members. Statistics are an important aspect of an indirect discrimination claim in showing group disadvantage. That statistical foundation potentially exists to support the Claimants’ indirect discrimination claims. I do not make any comment on the potential merit of the indirect discrimination claim as a whole.
 - b. The statistical information was only provided to the Claimants on 30 April 2021, after the three-month primary limitation period had already expired. The Claimants were therefore not in an informed position to assess whether they had an arguable case of indirect discrimination until after the primary limitation period had expired. Nor was the Claimants’ trade union in a position to provide informed advice as to whether there was merit in such a claim until that point.
 - c. The Respondent was responsible for the delay in providing this information to the Claimants and therefore the delay in assessing whether there was a sufficient basis to bring an indirect discrimination claim.
 - d. There is no evidence that there is any prejudice to the Respondent in dealing with the claims on their merits. It is clear on the evidence before the Tribunal at this Preliminary Hearing that there had been an ongoing dialogue between the PCS Union and the Respondent for several months before 27 January 2021 as to whether the process which had been used to award performance gradings and the consequent performance related pay had a disproportionate impact on

those of BAME ethnicity. It therefore ought to have all relevant information available to be able to respond to the arguments that the Claimants are advancing in these proceedings.

- e. None of the Claimants were aware of the statutory time limits for bringing proceedings in employment tribunals. They were reliant on advice on this topic from their trade union. The PCS had wrongly assumed that the relevant date for limitation purposes was 25 May 2021, being three months after the 26 February 2021. Therefore, part of the reason for the delay in bringing the proceedings is an incorrect assessment by the trade union as to the applicable date for limitation purposes.
 - f. If as the Claimants assert, the impact of performance related pay award criteria adopted by the Respondent in January 2021 was indirectly discriminatory, then there is a wider public interest in this being established and addressed in the future. It may have implications for the criteria adopted in the future for assessing performance related pay.
59. The combination of these features means that this is an exceptional case where it would be just and equitable to allow the claims to be determined on their merits.
60. For all these reasons, the Claimants' indirect discrimination complaints should be determined on their merits at the Final Hearing. Employment Judge Fowell has already given directions for the necessary preparatory steps to be taken and the case is already listed for a Final Hearing for four days starting on 20 February 2024. The parties agree that no further directions are necessary.

Employment Judge Gardiner
Dated: 7 September 2022