



**Claimant**  
Mr N Tucker

**Respondent**  
v The Alternative Theatre Company Limited

**Heard at:** Central London Employment Tribunal by CVP      **On:** 8 March 2023  
**Before:** Employment Judge Norris, sitting alone

**Appearances**

For the Claimant: In person  
For the Respondent: Mr R McNerney, Counsel

## **RESERVED JUDGMENT – PRELIMINARY HEARING**

The Tribunal's decision is as follows:

1. The Claimant's claim of unlawful deductions from wages was submitted out of time. The Claimant has not shown that it was not reasonably practicable to present that claim within the primary time limit and it is struck out because the Tribunal does not have jurisdiction to hear it.
2. Save as set out below, the Claimant has not shown that they stand a reasonable prospect of success in persuading a Tribunal that it would be just and equitable to extend time in respect of the complaints of discrimination which were presented out of time.
3. The complaints of direct race and transgender identity discrimination (or, for complaint 4.3.4.2, race- or transgender identity-related harassment) by Ms Clancy as set out in EJ Stout's list of issues at sub-paragraphs 4.3.4.1 to 4.3.4.4 are either in time or arguably form part of a continuing course of conduct by Ms Clancy that is in time, and accordingly those complaints proceed to a Hearing.
4. The remainder of the claim (claims of disability, sex and sexual orientation discrimination, or harassment related to one or more of those protected characteristics) is struck out because the Tribunal does not have jurisdiction to hear it.

## **WRITTEN REASONS**

### **Background**

1. The brief background to this case is that the Claimant came to the UK from the USA and worked as an actor at the Respondent theatre company between 1 November 2021 and 22 January 2022. The Claimant entered ACAS Early

Conciliation (EC) between 14 April and 25 May 2022 and submitted a claim form to the Employment Tribunal on 9 July 2022. The Claimant, who asked me to address them as Mr Tucker and uses the pronouns they/their, brought claims for discrimination (direct/harassment) because of their trans identity, sexual orientation, race (that they were perceived to be black), disability (said to be scoliosis) and sex, and in relation to their wages.

### **The Preliminary Hearing**

2. A case summary and set of case management orders along with a list of issues was produced by Employment Judge Stout following a Preliminary Hearing (Case Management) (PHCM) on 7 November 2022. Then, as before me, the Claimant was in person (accompanied by their partner before me) and the Respondent was represented by Mr McNerney of counsel. It appears that EJ Stout's Summary was sent out the day after the PHCM and no issue was taken by either party with the accuracy of its comments.
3. On 19 January 2023, EJ Stout listed the case for a one-day open Preliminary Hearing (PH) to determine whether the Claimant stands a reasonable prospect of establishing that those matters relied on which are said to have occurred outside the primary time-limit constituted a continuing act and if not, whether it would be just and equitable to extend time for consideration of those claims; and whether the Claimant was an employee or worker so that the tribunal has jurisdiction to hear the complaints where employment status is in issue. The parties were notified that the Tribunal would decide whether to strike out and/or to make a deposit order on all or part of the claim.
4. EJ Stout had ordered the parties to liaise over and for the Respondent to prepare a file ("bundle") of documents for the hearing relating to the time point and employment status of the Claimant only, and further ordered that the Claimant was to file a witness statement setting out evidence relied on in relation to both those points only. The Respondent was given a further seven days to serve any evidence relied on in reply and then four days before the hearing, was to send the bundle and witness statements to the tribunal.
5. While it appears that the Respondent did produce the bundle as ordered (and the Claimant and I both had copies of it and of Mr McNerney's skeleton argument), the Claimant had not filed a witness statement in advance of the PH and told me that one had not in fact been prepared. Instead, the Claimant filed 12 pages of what they termed personal statements but what the Respondent has described in the bundle index as four sets of further and better particulars against named individuals. Accordingly, since the Claimant would otherwise have presented no evidence at all of the reasons for the delay in lodging the claim, I decided after the lunch break to hear from them in oral evidence, which was given on affirmation, first with me asking the Claimant questions and Mr McNerney having the opportunity to cross-examine them thereafter. At the end of the PH I then heard submissions from both parties and had to reserve my decision because there was

no prospect of me reaching conclusions and giving judgment in the remaining 20 or so minutes before the end of the court day. I have expedited these reasons because I am mindful there is a Judicial Mediation listed for 13 March and I agreed with the parties in advance that even if this decision meant (as it will) that the full merits Hearing can be reduced below five days, which is normally the minimum required, it seems to me that it may well be of assistance for the parties in the particular circumstances of this case to participate in that appointment if both sides are still willing and able to do so.

### **Issues at the PH**

6. We had begun the PH by going through the issues that EJ Stout had recorded as being the complaints the Claimant wishes to pursue. The Claimant said they did not recall having read the document EJ Stout had produced after the PHCM and we adjourned for them to do so. Save to the extent corrected during the PH, I have worked from the claim form and more particularly, the list of issues produced by EJ Stout, as there was no application to make (further) amendments to the claim.
7. Discussions continued until the lunch break, including taking a short adjournment when the Claimant became visibly distressed and a comfort break, and it was established that:
  - (i) the Respondent accepts that the Claimant was a worker of the Respondent and that they do not require status as an employee to bring either a claim for unlawful deductions or a discrimination complaint (or more than one) and hence the tribunal did not need to consider that status further; and
  - (ii) the complaints at paragraphs 4 and 5 of EJ Stout's summary relate to the same alleged conduct by the Respondent (and others) but on two different legal bases. The complaints in the subparagraphs of paragraph 4 contend that the alleged conduct amounts to harassment while the complaints in the subparagraphs of paragraph 5 contend that the same conduct amount to direct discrimination under the Equality Act 2010.
8. In discussing the complaints of harassment, I asked the Claimant what protected characteristic(s) were relied on. The Claimant told me that it was their trans identity and race, i.e. the Respondent's perception that they are black.
9. We then spent some time discussing the dates of the conduct alleged and how the complaints of harassment relate to either or both of those protected characteristics that the Claimant had identified. It seemed to me the Claimant had not appreciated that in a claim of harassment, for legal purposes there needs to be a relationship between the conduct alleged and the protected characteristics to which that conduct is said to be related. I gave examples to the Claimant taken from the EHRC Code of Practice and also read out and explained the statutory provisions in the Equality Act itself.

10. The Claimant, who expressed reservations about what they considered to be a lack of nuance in the Code of Practice, did nonetheless appear to accept that in light of the legal definition of harassment in the Equality Act, some of their complaints for harassment were unlikely to succeed. This was because although the conduct of which they complain is said to have been unwanted (which is part of the statutory definition) they agreed it could not be said to be “related to” either trans identity or perceptions of race, which is another necessary element of the definition. As I have said above however, they nonetheless rely on the same alleged conduct as direct discrimination.
11. So far as the dates are concerned:
  - (i) the alleged conduct by the playwright Ms Road as set out at paragraph 4.3.1 of the list of issues is said to have occurred between 26 October and 5 December 2021;
  - (ii) the alleged conduct by Ms Road at paragraph 4.3.2 of the list of issues was said to have occurred between late January and early April 2022. The Claimant said that EJ Stout appeared to have recorded incorrectly the allegation that appears at 4.3.2.1, in that it was not the Claimant’s personal email address that had been given to Ms Road’s agent, but details for a person whom the Claimant had considered appointing as their agent and had expressly told the Respondent to keep their details confidential. The Claimant does not know who at the Respondent passed on their putative agent’s email address to Ms Road’s agent nor exactly when they did so but believes it was sometime between February and April 2022.
  - (iii) The email in which the Claimant says Ms Road’s agent made allegations to their putative agent about their work as an actor and sought to pressurise the Claimant into accepting a percentage of the earnings from the script is dated 4 April 2022 (allegations 4.3.2.2 and 4.3.2.3). That email was not in the bundle before me.
  - (iv) The alleged conduct by Ms Greenberry of Intersex UK is said to have occurred in late November 2021 (allegations 4.3.3.1-4.3.3.2). Intersex UK is an NGO/charitable organisation whom the Claimant says were contracted to provide the Claimant with sponsorship and support but instead, the Claimant alleges, Ms Greenberry behaved in a racist and transphobic way towards her at a meeting in late November 2021. The last of their encounters was shortly after that meeting; the Claimant is said to have met Ms Clancy and Ms Linton, employees of the Respondent against whom separate complaints are made and to which I return below, and as a result Ms Greenberry came to see the show and told the Claimant to email her. When the Claimant did so, however, Ms Greenberry did not respond.

- (v) The conduct of Ms Clancy and Ms Linton about which the Claimant complains (allegation 4.3.4.1-4.3.4.4) is said to have taken place between November (or 5 December) 2021 to 14 April 2022. The alleged conduct is that Ms Clancy called the Claimant into meetings from November 2021 to February 2022<sup>1</sup>, refusing to allow the Claimant to raise a grievance, sent an allegedly racist and belittling email in late December 2021 and continued to email the Claimant after the Claimant asked her on 11 January 2022 not to do so, those emails continuing during February and again in April.
  - (vi) The conduct of Ms Dawson, Costume and Set Designer, is said to have taken place between 28 November and 5 December 2021 (allegations 4.3.5.1 and 4.3.5.2) and is that Ms Dawson allegedly made comments about the Claimant's body/anatomy and required the Claimant to find their own costume elements, which it is said Ms Dawson did not do for the Claimant's co-star Ms Beaumont.
12. Where the unwanted conduct is said to be "less favourable treatment" than that given to another person, i.e. direct discrimination, the Claimant relies on co-star Ms Beaumont, who is described as white and cis-gender. I observed that Ms Beaumont may not always be an appropriate comparator however, unless she is in not materially different circumstances to the Claimant (section 23(1) Equality Act 2010). It is unclear, for instance, if Ms Beaumont ever asked Ms Clancy not to email her but was emailed nonetheless, as the Claimant complains happened to them.
13. So far as the wages claim is concerned, the last payment was made to the Claimant on or before 22 January 2022.
14. Having carried out this exercise with the Claimant, it became apparent that contrary to the Respondent's submissions, there are potentially three elements of the claim that post-date 22 January 2022:
- (i) The meeting with Ms Clancy on 22 February 2022;
  - (ii) The email(s) from Ms Road's agent to the Claimant's prospective agent in April 2022; and
  - (iii) Ms Clancy emailing the Claimant in April 2022 despite the Claimant having asked her in January 2022 not to do so.

### **Evidence for the delay in lodging the claim**

15. Dealing first with the complaints that are on the face of it out of time and the Claimant's evidence on why the claim was submitted late, the Claimant said in oral evidence as follows:

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<sup>1</sup> This was corrected from January 2022, which is what EJ Stout had recorded in the list of issues

a) Health issues

- (i) While the Claimant was working for the Respondent (i.e. until 22 January 2022) they were experiencing bruxism, i.e. teeth-grinding, as a result of PTSD symptoms. That bruxism continued after the contract with the Respondent ended and progressed to headaches/migraines; and then from June to August 2022, the Claimant said they had pain down their right-hand side between jaw and shoulder, which was intermittently so severe that they at times became bed-bound.
- (ii) The Claimant was initially unable to access NHS healthcare services because they are not a British citizen, but with the assistance of an organisation whom the Claimant contacted in July, was advised how to do so without having an NHS number. The Claimant did not receive this information until August 2022 and they registered with the GP in October. Prior to that the Claimant was taking painkillers and trying to stretch to minimise their right-hand side pain.
- (iii) The Claimant said that their partner/spouse, who accompanied them to the UK and is also described as the Claimant's "caregiver", has her own disabilities and is consequently sometimes unable to use the internet even when she has access to a wi-fi connection. The Claimant confirmed their partner has also not had any medical assistance for her health while in the UK (or at least had not done so by the date the Claimant submitted the ET1. I did not ask about any later period because it was not relevant to this decision).

There were no medical records or reports, whether from the UK or the US, for either the Claimant or their partner in the bundle/file before the Tribunal.

b) Financial issues

- (i) The Claimant said they have not worked since the end of the contract in January 2022. However, in cross examination it was established that two webpages (on GoFundMe and on Instagram) have been set up in the Claimant's name, with their approval and on their behalf (even if not directly set up and/or managed by the Claimant) to raise money for the Claimant's living expenses. The Claimant said that these two pages have raised around \$3,000 in donations.
- (ii) The Claimant has also been busking in the street to earn money from January until sometime in Autumn 2022. The Claimant said that as a result of their pain, exacerbated by the heat, it was not possible to perform for more than a few hours in a day and then they would be bedbound for a few days after that. However the Claimant did accept that they were able to perform by singing in the street for money for a few days a month.
- (iii) I did not have any records of the Claimant's financial resources or the fundraising pages before me.

c) Housing and IT issues

- (i) The Claimant said that until January 2022, they were living in a flat near the theatre but moved out from there the day after the last show. The Claimant moved to a hotel where they stayed for a week or perhaps a little longer, and then to a different hotel until around the end of May. I understand from what the Claimant said in cross examination that these were Premier Inns or similar. The Claimant said they sometimes had internet connectivity problems, but there was generally access to wi-fi.
- (ii) The Claimant's evidence was vague as to the following period from June 2022 and as to their internet access by phone. They said they had been living rough, intermittently, from around the end of May 2022 up to the date of this hearing and did not have internet access. However, they also told me that on 9 July 2022 two people they met while busking offered them space to sleep, have a shower and use their wi-fi, though (the Claimant said) they had no gas or electricity. The Claimant took that opportunity to submit their claim.
- (iii) We eventually elicited that the Claimant has since their arrival in the UK also had a phone that can access the internet if there is a wi-fi connection. The Claimant used that phone to cast the internet to the TV screen at the hotels in which they stayed, or to access internet connections elsewhere where there is free wi-fi. They also have a phone which is only able to make and receive calls and texts but is not internet-enabled.
- (iv) On 24 June 2022 the Claimant was in the street accessing emails and the internet on their phone by using the free wi-fi from the premises outside which they were standing. The Claimant maintains that they had not received the EC certificate during the time they had this access, and indeed did not see it until 9 July. It was put to the Claimant in cross examination that the claim form says, "I had trouble getting in touch with my conciliator and did not receive my certificate until June 24 when I had to call the other number for ACAS because my conciliator was unreachable". The Claimant maintains that these two answers are not inconsistent.
- (v) The same paragraph in the claim form also says that the Claimant did not have "consistent access" to housing, wi-fi or phone service. The Respondent's representative observes that this is not the same as having "no access".
- (vi) The Respondent submitted that the Claimant could have used one of any number of sources of free wi-fi (hotel, other commercial premises, public library etc) to lodge their claim, or asked the person who set up and ran their funding pages to do so, within the time limit. The Claimant said that the person who set up the funding pages is not based in the UK but in the US

and would not have been able to access the portal from overseas, although accepting that as a matter of fact, this had not been something they had considered.

d) Knowledge of time limits

- (i) The Claimant said that they were aware of a time limit for submitting the claim and were consequently checking emails before they moved out of the last hotel to see if the EC certificate had been received, because they knew they could not submit the claim form to the Employment Tribunal without the certificate number.
- (ii) Additionally, the Claimant said they were put in touch with Equity, Citizens Advice and ACAS. It was the Claimant's co-star in the show who suggested the Claimant contact Equity, so I infer that this was prior to the show ending or very shortly thereafter. It was very unclear when the Claimant contacted Citizens Advice, though they told me that when they called the branch near the hotel, they were redirected to one closer to the theatre, which however told the Claimant they no longer had any employment advisers; consequently, the Claimant did not in the end secure any advice from Citizens Advice and relied instead on other advisers and people they knew who had brought claims themselves. Again I infer that this interaction with Citizens Advice will have been during or shortly after the show run.
- (iii) The Claimant had been unclear what Equity was and believed them to be akin to ACAS or a kind of mediation service because, the Claimant said, Equity told them it would contact the Respondent to see if a settlement could be reached. Equity having failed to secure a response, the Claimant was told to talk to ACAS. The Claimant estimated this as being shortly before EC began, which would be around the beginning of April. The Claimant denied any intention to make a claim at the point of contacting ACAS, instead being hopeful that entering EC would lead to a resolution. The Claimant accepted however that they had had felt harassed and discriminated against at the point the contract ended, and that they told both ACAS and Equity about these feelings.

**The Law**

16. The law on time limits and their potential extension is different, depending on the type of claim being pursued.

a) Time limits – unlawful deductions

- (i) In relation to the complaint of unlawful deductions from wages, a Claimant has a time limit of three months to commence Early Conciliation ("EC"). This period is referred to as the "primary time limit" leading up to the "limitation date".
- (ii) If EC is commenced within the primary time limit, the rules underlying the requirement to participate in EC then provide for an extension of the time within which a prospective Claimant has to lodge their claim. The



rules differ depending on the period of time remaining before the primary time limit expires.

- (iii) In a wages claim, where there has been a failure to comply with the time limit, the prospective Claimant must show why they did not present their complaint in time and that it was not reasonably practicable for them to do so. If they can show that it was not reasonably practicable to bring the claim in time, the tribunal must be satisfied that it was presented within a reasonable period thereafter.
- (iv) In the case of *Asda Stores v Kauser*<sup>2</sup>, Lady Smith said this (in the context of late-issued unfair dismissal claims) at paragraph 12:

*“An Employment Tribunal is not vested with the power to allow a claim to proceed though late whenever it considers it just and equitable to do so”.* There is reference by contrast to discrimination cases and she continues: *“The power to disapply the statutory time limit is, as was commented by Judge LJ in London Underground Limited v Noel ‘very restricted. In particular it is not to be exercised, for example, “in all the circumstances”, nor even when it is “just and reasonable”, nor even where the Tribunal “considers there is a good reason for doing so”’. As Brown-Wilkinson J observed, “the statutory test remains one of practicability”. The statutory test is not satisfied just because it was reasonable not to do what could be done”.*

- (v) In paragraph 13, Smith LJ continued by noting it was not a question of considering what was reasonable, but of considering what was reasonably practicable. Referring to the decision in *Walls Meat Company Limited v Khan*<sup>3</sup>, she identified that:

*“The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents or interferes with or inhibits such performance. The impediment may be physical... or the impediment may be mental, namely, the state of mind of the complainant, in the form of ignorance or mistaken belief with regard to essential matters. Such states of mind can however only be regarded as impediments making it reasonably practicable to present the complaint within the period of three months if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such enquiries as (s)he should reasonably in all the circumstances have made...”.*

b) Time limits – discrimination

- (i) The Equality Act 2010 (“EqA”) requires complaints to be lodged with the Tribunal (in reality, again, for a prospective Claimant to enter EC) within three months of the act complained of or, where there has been continuing discriminatory conduct, within three months of that conduct ceasing.

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<sup>2</sup> UKEAT/0165/07/RN

<sup>3</sup> 1979 ICR 52

- (ii) The EqA provides a broad “just and equitable” discretion to a Tribunal when considering whether to extend time in discrimination cases compared to those such as unfair dismissal which are subject to the “not reasonably practicable” formula. Notwithstanding this, the authorities confirm that there is no presumption that a Tribunal should extend time by using its discretion; the exercise of discretion indeed remains the exception rather than the rule and the onus is on the Claimant to convince the Tribunal that it should be exercised<sup>4</sup>.
- (iv) There is no principle of law dictating how generously or sparingly the discretion should be exercised<sup>5</sup>. However, in *Abertawe Bro Morgannwg University Local Health Board v Morgan*<sup>6</sup>, Langstaff J noted that a litigant can hardly hope to satisfy the burden unless they provide an answer to two questions: why the primary time-limit has not been met and, in so far as it is distinct, the reason why after the expiry of the primary time-limit, the claim was not brought sooner than it was. In other words, it is crucial for the Tribunal to identify the cause of the Claimant’s failure to bring a claim in time. It is entitled to consider any material before it which will enable it to form a proper conclusion, including an explanation for the failure to present a claim in time, and such material may include statements in pleadings or correspondence, medical records or certificates or inferences to be drawn from undisputed facts or contemporary documents.
- (v) It is also often suggested that the Tribunal should consider the factors under section 33 Limitation Act 1980, as confirmed in *British Coal Corporation v Keeble*<sup>7</sup> and others. It has been held that these factors form a useful checklist although there is no legal requirement for the Tribunal to go through the list in each case, save that no significant factor should be left out of account. These factors are:
- the length of and reasons for the delay;
  - the extent to which the cogency of the evidence is likely to be affected by the delay;
  - the extent to which the party sued had cooperated with any requests for information;
  - the promptness with which the Claimant acted once they knew of the facts giving rise to the cause of action and
  - the steps taken by the Claimant to obtain professional advice once they knew of the possibility of taking action.
- (vi) The Court of Appeal said in *J v K*<sup>8</sup> that mental ill-health will always be an important consideration in deciding whether an extension should be granted. Although this appeal was dealing with the relevance of mental ill-health on the late submission of an appeal to the EAT, I consider that

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<sup>4</sup> *Robertson v Bexley Community Centre* [2003] IRLR 434; *Department of Constitutional Affairs v Jones* [2008] IRLR 128; both Court of Appeal authorities

<sup>5</sup> *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 (CA)

<sup>6</sup> UKEAT/0305/13

<sup>7</sup> [1997] IRLR 336

<sup>8</sup> [2019] EWCA Civ 5

it is nonetheless helpful in this matter. Underhill LJ, giving the unanimous decision said at paragraph 39:

- “(1) *The starting-point in a case where an applicant claims that they failed to institute their appeal in time because of mental ill-health must be to decide whether the available evidence shows that he or she was indeed suffering from mental ill-health at the time in question. Such a conclusion cannot usually be safely reached simply on their say-so and will require independent support of some kind. That will preferably be in the form of a medical report directly addressing the question; but in a particular case it may be sufficiently established by less direct forms of evidence, e.g. that the applicant was receiving treatment at the appropriate time or medical reports produced for other purposes.*
- (2) *If that question is answered in the applicant's favour the next question is whether the condition in question explains or excuses (possibly in combination with other good reasons) the failure to institute the appeal in time. Mental ill-health is of many different kinds and degrees, and the fact that a person is suffering from a particular condition – say, stress or anxiety – does not necessarily mean that their ability to take and implement the relevant decisions is seriously impaired. The EAT in such cases often takes into account evidence that the applicant was able to take other effective action and decisions during the relevant period. That is in principle entirely acceptable, and was indeed the basis on which the applicant failed in O’Cathail (though it should always be borne in mind that an ability to function effectively in some areas does not necessarily demonstrate an ability to take and implement a decision to appeal). Medical evidence specifically addressing whether the condition in question impaired the applicant's ability to take and implement a decision of the kind in question will of course be helpful, but it is not essential. It is important, so far as possible, to prevent applications for an extension themselves becoming elaborate forensic exercises, and the EAT is well capable of assessing questions of this kind on the basis of the available material.*
- (3) *If the Tribunal finds that the failure to institute the appeal in time was indeed the result (wholly or in substantial part) of the applicant's mental ill-health, justice will usually require the grant of an extension. But there may be particular cases, especially where the delay has been long, where it does not: although applicants suffering from mental ill-health must be given all reasonable accommodations, they are not the only party whose interests have to be considered.”*

### **Findings on the preliminary issues**

16. For the Claimant’s claims which arose or were outstanding on termination (i.e. the claims of unlawful deductions and some of the claims of discrimination), the

primary time limit started to run on 22 January 2022. Hence the Claimant had until 21 April 2022 to commence their claim in relation to these matters, by entering the ACAS EC process, and they did so within time on 14 April 2022. The certificate was issued on 25 May 2022 and accordingly the Claimant benefited from the one-month extension of time under section 207B(4) Employment Rights Act 1996, so that their deadline was 25 June 2022. The claim was not lodged until 9 July 2022, 14 days late.

17. Nonetheless, some of the unlawful conduct of which the Claimant complains (against Ms Road, Ms Greenberry and Ms Dawson) had ended well before the contract ended. There is no conduct by Ms Road herself or by Ms Dawson of which the Claimant complains that is said to have occurred after 5 December 2021; and for Ms Greenberry it is even earlier, ending in late November 2021. Unless any proven conduct by them could be shown to be part of a continuing act or state of affairs by the Respondent (or by those for whom the Respondent is liable) that ended on or after 15 January 2022, since the Claimant did not enter EC within three months of that conduct, they hence cannot benefit from the extension of time at all.
18. Further, not only does the Respondent assert that the Claimant did not start EC within three months of any of this alleged conduct, it also asserts that none of these individuals is employed by the Respondent and thus the Respondent cannot be vicariously liable for anything they may have done:
  - Ms Road is the playwright of the show in which the Claimant was performing; she has her own agent. This was not disputed by the Claimant and indeed one of the Claimant's complaints is about Ms Road's agent contacting the Claimant's potential agent, as I have indicated above.
  - Ms Greenberry is a consultant and co-founder of Intersex UK, which as I also have said above is a charity independent of the Respondent although, the Claimant says (and I accept, for the purposes of this judgment), the charity was advertised as working in partnership with the Respondent on the show in which the Claimant appeared.
  - Ms Dawson is a set and costume designer, also engaged by the Respondent for the purposes of the show.

All three individuals are said by the Respondent to be independent contractors and save for the reference to the Respondent working in partnership with Intersex UK, the Claimant does not contend otherwise. Having seen or heard no evidence to the contrary, I accept the Respondent's submission that Ms Road, Ms Greenberry and Ms Dawson are not employees or workers of the Respondent and are independent contractors engaged/contracted for this particular show.

19. As such, I find that each of the complaints against these three individuals is a discrete complaint which is not said to part of a continuing course of conduct by them or any of them, let alone by the Respondent. I consider it would be very likely that a Tribunal would find that would still be the case, even if the Respondent could be found liable for their actions, as to which no case has been made out or would appear to be sustainable on the papers before me.
20. Turning to the Claimant's claim about the meeting with Ms Clancy on 22 February 2022, the primary time limit did not expire until 21 May 2022. As such, rather than adding one month to the time limit, the "stop the clock" provisions of section 207B(3) are read sequentially with section 207B(4)<sup>9</sup> and the deadline for this allegation would have been 1 July 2022. The claim was still late, but by eight rather than 14 days. In addition, there is a further act alleged to have been done by Ms Clancy, which is sending an email (or more than one) to the Claimant after she had been asked not to do so, the last occasion being sometime in April 2022. The claim, so far as it relates to that email, is in time.
21. I have considered the impact of the factors on which the Claimant relied at the PH (health, money, housing/IT issues and knowledge of time limits) on their ability to bring the claim in time, looking at the period as a whole from the end of the contract until the date the claim was lodged.
22. Taking the last point first, I find, as the Claimant acknowledged, that they had the necessary knowledge throughout the relevant period. Indeed, the Claimant said that they were keeping a careful eye out for the ACAS certificate, knowing that they required the number it contains in order to lodge the claim and knowing both that there was a time limit and what it was. That speaks to a fairly sophisticated level of knowledge, despite the Claimant being unrepresented and not being a British citizen.
23. As to the Claimant's health, there were no medical records from the time or at all before me and the Claimant had not provided a witness statement despite EJ Stout's Order. Therefore, all I had was the Claimant's "say-so" in oral evidence as to the nature and effect of their mental and physical ill-health throughout the relevant period, and that evidence itself was vague as to dates and impact. That has made it difficult to reach conclusions.
24. I have taken into account that the Claimant on their own account did not make efforts to register with a GP until after the claim had been put in, and even once they had been told in August 2022 how to go about registering without an NHS number, did not do so until October 2022, well after the date of lodging the claim. Prior to that date, the evidence is that they were managing any pain themselves by taking what must have been non-prescription painkillers.

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<sup>9</sup> See for instance *Luton Borough Council v Haque* UKEAT/0180/17

25. Further, while I accept for the purposes of this PH that the Claimant experienced bruxism and that this may well have been an effect of the stress that they said they were feeling during and in the aftermath of the show's run, I find that this did not prevent the Claimant performing in public on several days a month once the show had ended and throughout the relevant period.
26. Thus I find that even if they were too tired to (and/or that there were side effects such that their physical health was such that they could not) perform on consecutive days or without taking a break potentially even of several days, there is no evidence that in between those performances the bruxism, or any other physical or mental medical condition, prevented the Claimant from drafting the claim. The particulars of claim are just 25 lines long and could have been done over a period if the Claimant was finding the drafting process very stressful. Their medical condition(s) and the other factors on which they rely did not prevent the Claimant from contacting Equity, Citizens Advice and ACAS.
27. It is also notable that the Claimant was, despite any ill-health, alert to the deadline and chased ACAS on 24 June, before the deadline expired, to ensure they received the EC certificate. I find that the Claimant did indeed, as they say in the ET1, receive it that day, because of the way this section is worded on the form and also because there was no reason advanced why the Claimant would chase for the certificate but then fail to lodge the claim once it was promptly re-sent. I consider the timing of the call or calls to ACAS to be significant, because had the Claimant submitted the claim when they received the certificate on 24 June, or the day after, it would have been in time.
28. The Claimant was also able to agree with somebody (not named at the PH) both before and after the relevant period that they would set up and manage fundraising pages on the internet and Instagram. This suggests that the Claimant and that person were in contact by phone at the very least. There is no explanation for why the Claimant did not ask that person, who does appear therefore to have had internet access throughout in order to run the web pages, to submit the claim on their behalf. It is not the case that a person based overseas would be necessarily be unable to use the online portal, though the Claimant acknowledged they had not asked them to try and cannot therefore rely on that as an argument.
29. The Claimant also has had throughout the relevant period the potential to ask their spouse to assist them in lodging the claim. Other than the essential details (which the spouse is likely to know, or they or anyone else could have been told by the Claimant), the particulars of claim are short at just 25 lines. That could have been drafted offline then cut and pasted onto the form, without great difficulty or technical expertise.
30. I accept that the Claimant has experienced financial challenges since leaving the show but do not consider them to be directly relevant to the time point.

Similarly, I do not consider the Claimant's housing situation, as to which the evidence was again very vague with dates most unclear, to be pertinent. At least for the first few months after the show ended, the Claimant was living in hotels where there was an internet connection even if it was occasionally patchy. Lodging a claim does not require internet access over a lengthy or sustained period and even after they left the last hotel, the Claimant did have (or could reasonably have found) free sources of wi-fi sufficient to go onto the internet, access the portal and complete the form. Alternatively, knowing the deadline was about to expire as they did, they could have delivered it by hand (or asked their spouse to do so) if they did not have internet access.

31. I have taken into account that the Claimant said, in terms, that the Respondent did not definitively withdraw from potential settlement negotiations until after the deadline had passed. I observe however that while such discussions would generally be privileged in their nature, the fact they remained ongoing prior to the expiry of the deadline suggests the Claimant was able to engage in them with the Respondent directly or via ACAS during the period between 25 May and 25 June, with the Respondent only closing the door to settlement after the deadline expired. That is not the same as the Respondent being obstructive or evasive for Limitation Act purposes and it therefore would not assist the Claimant in explaining why they did not submit the claim during that period in case any such discussions did not achieve an outcome.

### **Conclusions**

32. I conclude that the Claimant's claim of unlawful deductions was presented out of time. They have not shown that it was not reasonably practicable to present the claim in time. That complaint is therefore struck out.
33. Similarly the complaints of discrimination against Ms Road, Ms Greenberry and Ms Dawson were presented out of time and the Claimant has not given a satisfactory explanation for the delay between the deadline expiring and 9 July, when they knew the claim had to be submitted, to give them a reasonable prospect of persuading the Tribunal to extend time.
34. The Claimant also stands no reasonable prospect of success of showing that the alleged discrimination by Ms Road, Ms Greenberry and Ms Dawson was part of a continuing act or course of conduct by the Respondent ending on or after 15 January 2022. Those complaints of harassment (paragraphs 4.3.1, 4.3.3, 4.3.5 and their counterparts in the alternative based on the same facts but brought as complaints of direct discrimination under paragraph 5 of the list of issues in EJ Stout's Order) are accordingly struck out.
35. The complaints at subparagraphs 4.3.2.1-4.3.2.3 and their counterpart under paragraph 5 were amended at the PH before me. These complaints are now:

- a. that an unknown person at the Respondent passed the Claimant's agent's email address (not the Claimant's personal email address) to Ms Road's agent on an unknown date; and
  - b. that Ms Road's agent harassed or discriminated directly against the Claimant thereafter in an email dated 4 April to the Claimant's agent.
36. I have found for the purposes of this judgment that Ms Road, as the playwright, is a contractor to the Respondent; her agent is not said also to have been acting as the Respondent's agent at any stage and given the potential for conflict I consider it most unlikely that she would have done so. To the extent that any of this conduct is in time (and it is not possible for me to know from the Claimant's pleaded case whether the details were in fact passed on by anyone at the Respondent and if so, who that was and when they did so) I conclude that the Respondent cannot be vicariously liable for action taken by either Ms Road or her agent. Therefore these complaints are also struck out.
37. I cannot identify any complaints of disability, sex or sexual orientation discrimination relied on by the Claimant that were brought in time and similar considerations apply in relation to the Claimant standing no reasonable prospect of success of persuading a Tribunal to extend time for these purposes. Accordingly, those claims are also struck out.
38. The Claimant has given no detail of anything said to have been done specifically by Ms Linton within the time limit but nor have they given any detail of anything said to have been done that could amount to discrimination outside the time limit. However there is one allegation against Ms Clancy, whom the Respondent confirms is its employee, that is in time. That allegation (4.3.4.3) is that Ms Clancy continued to email the Claimant up to and including during the month of April 2022, despite the Claimant having asked her not to do so.
39. Sensibly, Mr McNerney did not pursue his argument that mere repetition of the sending of emails could not amount to a continuing course of conduct and thus the final email, which I gather was sent by Ms Clancy to the Claimant in April 2022 means that for this complaint alone, the claim is in time and is made against an individual for whom the Respondent could be liable. However, I remind the parties, and particularly the Claimant, that the comparator in a claim of less favourable treatment is someone who is in not materially different circumstances to the Claimant save that they do not share the protected characteristics of race and/or transgender identity. The Claimant may therefore wish to consider whether Ms Beaumont remains an appropriate comparator.
40. Since that single complaint is in time, I consider that the Claimant stands reasonable prospects of success in persuading the Tribunal that, if proven, the other alleged conduct by Ms Clancy that would otherwise be out of time is part



of a continuing act or course of conduct. This means that the following also proceed to a Hearing:

- a. Allegation 4.3.4.1 (that on an unspecified date or dates between December 2021 and April 2022, Ms Clancy refused to provide the Claimant with the grievance policy to allow her to raise a grievance) which is now an allegation of direct discrimination i.e. less favourable treatment done because of the Claimant's perceived race and transgender identity;
  - b. Allegation 4.3.4.2 (that on an unspecified date in December 2021 Ms Clancy sent the Claimant an email, the contents of which amounted to direct discrimination, i.e. less favourable treatment because of the Claimant's perceived race and/or transgender identity, and/or race- or transgender-identity related harassment); and
  - c. Allegation 4.3.4.4 (that on unspecified dates between November 2021 and 22 February 2022, Ms Clancy called the Claimant into meetings and required them to express the issues the Claimant was having, rather than permitting the Claimant to raise a grievance, which is now an allegation of direct discrimination, i.e. less favourable treatment done because of the Claimant's perceived race and transgender identity).
41. EJ Stout having already listed this matter for a Hearing, a variation to her Case Management Directions (including notification of the details of a reduction in the length of that Hearing) will be issued under separate cover and sent to the parties in due course if required.

**Employment Judge Norris**

10 March 2023

Sent to the parties on:

13/03/2023

For the Tribunal: