Neutral Citation Number: [2023] EAT 106

Case No: EA-2022-000609-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1 August 2023

Before:

HIS HONOUR JUDGE AUERBACH
DR GILLIAN SMITH MBE
MISS N SWIFT

- -

Between:

MS ROWENA OWEN **Appellant**

- and -

NETWORK RAIL INFRASTRUCTURE LIMITED **Respondent**

- -
- -

Rad Kohanzad (instructed by way of direct access) for the **Appellant**
Orlando Holloway (instructed by Dentons UK and Middle East LLP) for the **Respondent**

Hearing date: 27 June 2023

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JUDGMENT

SUMMARY

JURISDICTIONAL / TIME POINTS

In considering whether to grant a just and equitable extension of time in relation to **Equality Act 2010** complaints, the employment tribunal erred in law in its approach. In particular, it considered that, if no explanation or reason for the late submission of the tribunal claim could be found in the evidence, this necessarily meant that an extension of time should be refused, as opposed to that being a relevant, but not necessarily decisive, consideration to weigh in the balance. **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640; [2018] ICR 1194 and **Concentrix CVG Intelligent Contact Limited v Obi** [2022] EAT 149; [2023] ICR 1 considered.

HIS HONOUR JUDGE AUERBACH:

Introduction – the Tribunal Claim

1. We will refer to the parties as they were in the employment tribunal, as claimant and respondent. The claimant's employment with the respondent began on 1 March 2012. She is a signaller. At the time of the employment tribunal hearing, and, we were told, at the time of the hearing of this appeal, her employment was continuing.

2. On 5 November 2015 the claimant moved to the signal centre at Wimbledon. There were about 40 staff in total, of whom only two or three were women. The claimant's case before the tribunal was that, from when she moved to Wimbledon until when she went off sick from 31 May 2017, she was subjected to numerous incidents of conduct on the part of a number of male colleagues, that amounted to direct discrimination because of sex, and/or harassment by way of unwanted conduct related to sex or of a sexual nature. The conduct was said to have taken such forms as use of sexual swear words or other course language, sexually-themed or misogynistic discussions or comments, viewing of pornography in the claimant's presence, displaying of sexist images from tabloid newspapers, vulgar suggestions, and, on one occasion, displaying a sex toy. The great majority, though not all, of the allegations, were of such inherently sexist or sex-related conduct.

3. Having gone off sick in May 2017, the claimant first raised her concerns at a meeting on 8 June 2017. On 3 November 2017 she raised a formal grievance. She formally returned to work at that time, but was placed on paid leave while the grievance process continued. The investigating manager was Ms Styles, who did not uphold the grievance. The claimant internally appealed against that decision. That appeal was considered by Mr Barron and rejected in February 2020.

4. The claimant began ACAS Early Conciliation (EC) on 20 March 2020 and the ACAS EC Certificate was issued on 4 May 2020. The claim form was presented on 4 June 2020. The claimant was represented by solicitors and counsel. As well as complaining of the alleged conduct of

colleagues at Wimbledon between November 2015 and May 2017, the claimant also complained of various matters said to have occurred in the period from when she began her formal grievance on 3 November 2017, to the conclusion of her grievance appeal on 17 February 2020.

5. The overall list of alleged incidents relied upon was set out in a schedule, which, in the terminology that originated in construction litigation, but is now commonly also used in employment tribunals, was referred to as a Scott Schedule. The first 25 matters on the schedule related to the alleged incidents during the period up to when the claimant went off sick in May 2017. The remainder, numbered 26 – 34 in the Scott schedule, related to the period from November 2017 to February 2020.

6. The matters complained of in that second period included the alleged leaking of the claimant's grievance to colleagues at Wimbledon, matters relating to aspects of the conduct of the grievance investigation, and its outcome, certain alleged conduct on the part of an RMT representative, Mr Kemp, and the outcome of the internal grievance appeal. The individuals whose conduct was complained of in respect of this second period were principally, though not entirely, Ms Styles, Mr Barron and/or Mr Kemp. These matters in the second period were said to amount to direct discrimination because of sex and/or victimisation, the protected act relied upon being the grievance.

The Employment Tribunal's Decision

7. The full merits hearing took place before Employment Judge Martin, Ms Denton and Ms Omer, sitting at London South, by CVP. The claimant was represented by Mr Kohanzad, and the respondent by Mr Holloway, both of counsel, and both of whom appeared again in the EAT. Evidence was heard over a number of days in March 2022. There was, we were told, a further day in April for submissions. The tribunal's reserved decision was then promulgated in May.

8. The claimant gave evidence and had two other witnesses from outside the workplace. The witnesses for the respondent were the claimant's line manager from the period up until shortly before

she went off sick in 2017, Ms Styles, Mr Barron and Mr Kemp. There was also a statement from another witness for the respondent, but who was not called to give evidence. In introducing its account of the hearing the tribunal said this at [3]:

> **"In December 2021, the Respondent had applied to extend the hearing to 20 days as there were allegations against 22 individuals at the Respondent. on 11 March the Respondent sent a further letter withdrawing its application to extend the length of the hearing. It explained that to call the witnesses would cause operational and safety critical difficulties for the signalling operations at the Respondent's Wimbledon Area Signalling Centre and that on reflection the Respondent opted to limit itself to calling four witnesses. This meant that there was no live evidence from the Respondent about the individual allegations made by the Claimant."**

9. As well as the Scott Schedule the tribunal had before it an agreed list of issues.

10. At [38], introducing its findings of fact and conclusions, the tribunal observed:

> **"The Tribunal has made the following findings of fact having heard the evidence and considered the documents and submissions. All evidence was considered even if not specifically referred to here. These finding are confined to those that are relevant to the issues, and necessary to explain the decision reached. One of the issues relates to whether the Tribunal has jurisdiction to hear the Claimant's claims as they are out of time. To determine this, the Tribunal must make findings first. Therefore, the Tribunal considered each item in the Scott Schedule to determine if the things happened as the Claimant said they did and if so, whether they were discriminatory on the grounds of sex. We then considered the question of jurisdiction."**

11. The tribunal went on to accept in its entirety the claimant's factual account in evidence of all the matters said to have occurred during the period up to May 2017. It did so taking into account that the respondent "chose not to call the individuals who are named in the Scott Schedule" and that the claimant's evidence was "largely unchallenged" [44], but also in light of its appraisal, over a number of paragraphs, of various features of the documentary evidence, the claimant's live evidence and its assessment of her credibility. The tribunal then observed:

> **"51. The Tribunal therefore finds that all the events happened as set out in items 1 – 25 of the Scott Schedule. The question is whether these amounted to discrimination on the protected characteristic of sex. For the purposes of this decision at this stage, the Tribunal has taken the Claimant's claims at their highest namely that all events happened, and all events were discriminatory on the grounds of sex.**
>
> **52. Whether the matters in items 1-25 were brought in time depends on the Tribunal's findings in relation to the allegations from the grievance onwards (items 26 - 34 on the Scott Schedule). On the face of it, the first 25 allegations are out of time, and it is**

> **only if they can be linked to the remaining allegations to form a continuing act of discrimination that they will be deemed to be in time and give the Tribunal the jurisdiction to consider them. Had the Tribunal found them to be part of a continuing act it would have gone on to consider each allegation individually to consider if they were acts of discrimination, or other non-discriminatory actions."**

12. The tribunal then went on to make its substantive findings about what it called the "post-grievance allegations", beginning as follows:

> **"53. The Tribunal considered the evidence which was given in relation to items 26 – 34 of the Scott schedule. Ms Styles was candid in her evidence, accepting that she had got matters wrong, and accepting her limitations in being able to deal with such an extensive and wide-ranging grievance. Ms Styles was very inexperienced in conducting grievances having only dealt with one before. What was apparent from her evidence and the documents relating to the grievance process, is that she did not fully understand her role. This is not surprising, as she was given little or no guidance or support and was expected to do her full substantive role at the same time. She said that if she were presented with a grievance of this magnitude again, she would insist on being taken off her substantive duties to enable her to devote sufficient time and resource to the grievance process.**
>
> **54. On reading the minutes of the interviews it is striking that Ms Styles took what was said at face value without any follow up or probing. This is despite her evidence that she believed in much of what the Claimant had alleged. She appeared to be unaware of the burden of proof to be applied, and that she should make her findings on the balance of probabilities. She appeared to consider that she had to make findings beyond reasonable doubt and that she needed corroborating evidence from those she interviewed. No doubt this was because of inadequacies in the training and support she was given.**
>
> **55. What was also striking was the number of allegations made by the Claimant which were not investigated at all. This was spelt out clearly by the questions Mr Kohanzad asked in cross examination. There was a long list of allegations in the grievance put to Ms Styles which she agreed she had not investigated or considered. From the Judge's notes of evidence there were 21 matters not considered. The Respondent commented on the Scott Schedule and says frequently that there was no evidence to back up the Claimant's claims. This is not surprising, because a significant number of witnesses were not called, and even if they were, were not asked questions about many of the allegations made by the Claimant.**
>
> **56. The investigation was a shambles, and the conclusions reached were inadequate. Whilst this was unreasonable, the Tribunal is mindful that this is not a claim of unfair dismissal. It is a claim of discrimination. The question to be answered is whether the actions of Ms Styles amounted to less favourable treatment on the grounds of sex. There needs to be a causal connection between the two. Not only this, but parts of documents were lost, for example, the statement made by Mr Wiggs. The Tribunal finds that whatever the failings of the grievance investigation and outcome, this was not because of the Claimant's sex but was because Ms Styles was overwhelmed by the grievance, was not adequately trained, and not properly supported. The Claims of direct sex discrimination and victimisation by Ms Styles are not made out."**

13. The tribunal went on to find that Mr Barron was also out of his depth, and, at [59], that his

conduct of the appeal "whilst having deficiencies was not done in that way because of discrimination but because he was insufficiently trained or supported throughout the process." It also found that Ms Styles and Mr Barron took reasonable steps to investigate the use of shift signal managers' computers. It went on to reject the complaints about the conduct of Mr Kemp. We note also that the tribunal exhibited to its reasons the Scott schedule in the form that it was presented to it, and a further version of the entries relating to complaints 26 – 34 which included a column in which the tribunal set out findings and observations about each of those complaints.

14. The tribunal concluded, at [65], that its rejection of complaints 26 – 34 on their merits meant there was "no continuing act of discrimination which could bring items 1 – 25 of the schedule in time". It then noted, at [66], that the time limit in section 123 **Equality Act 2010** could be extended "[i]f there are just and equitable grounds for doing so".

15. We will set out the remainder of the tribunal's decision in full.

> **"67. In Robertson v Bexley Community Centre t/a Leisure Link 2003 [IRLR] 434 CA, it was noted that, while Tribunals have a wide discretion to extend time in discrimination cases, it should only be exercised in exceptional circumstances. 'time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion.'**
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> **68. In O'Brien v Department for Constitutional Affairs [2009] IRLR 294, the Court of Appeal held that the burden of proof is on the Claimant to convince the Tribunal that it is just and equitable to extend time. In most cases there are strong reasons for a strict approach to time limits.**
>
> **69. Throughout the matters complained of the Claimant was a member of the RMT. She sought advice from the RMT from an early stage. She then sought advice from another union. The Claimant had union representation at the grievance hearing. The Claimant did not provide any information about why she delayed bringing her claim to the Tribunal. Waiting for an internal process to complete is not sufficient. There was no evidence adduced either by oral testimony or documentary evidence that the Claimant was unwell such that she was prevented from bringing a claim or any other reason given. It is not known what steps if any the Claimant took to obtain advice other than via her union.**
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> **70. The Respondent submitted that it was for the Claimant to show why time should be extended. The Tribunal was referred to s33(a) Limitation Act 1980 which states that the Tribunal must look at the length of the delay and the reasons for the delay. It was submitted that there was a substantial delay with no reasons given for it. Given**

this, it was submitted that the cogency of evidence was likely to be affected on both sides as the allegations related largely conversations only. It was submitted that the Claimant acted very slowly, and that she should have known from November 2015 about the facts giving rise to this claim yet there was no evidence as to what she did to enforce her rights, prior to contacting ACAS on 20 March 2020.

71. The Respondent referred to the case of Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, CA. In this case, the claim was presented three days out of time, and it was held not to be just and equitable to extend time. It was said: "The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) Case No: 2302233/2020 13 [Equality Act] is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular, "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."

72. The Claimant submitted that if the investigation was discriminatory, then jurisdiction was not in question. However, the Tribunal has found that the investigation was not discriminatory. The Tribunal was invited to start from the unvarnished question of whether it is just and equitable to extend time and must consider all the matters. It was suggested that the question of prejudice can be decisive. It was submitted that the only prejudice to the Respondent is its failure to call witnesses which was a choice it made. The Respondent does not say that the passage of time was a reason for not calling a witness. It was submitted that it was known why the Claim was late and it does not need an explanation in a witness statement. It is not expected that she would address any single permutation. Here there is a broad chronology that the Claimant went off sick, dealt with the issues internally and then she complained to the Tribunal which is not unreasonable.

73. In response the Respondent submitted that it is difficult for the Claimant to get around the fact that she has provided no explanation as to why she submitted her claim late. If reasons had been put forward there would have been a range of questions for her for example, what advice did she get, when did she seek it, why did she decide not to put claim in earlier when she knew of time limits. It was accepted that the Clamant did go off work, but she returned to work in November 2017, so this was not a valid explanation. It was emphasised that it is of relevance to consider the length or reason for delay. The Tribunal was reminded that the allegations ran November 2015 to May 2017.

74. The Tribunal has reluctantly concluded that the Claimant has provided no evidence on which it can exercise its discretion to extend time. It accepts the submissions made by the Respondent that the Claimant must give some explanation. It is not sufficient for her representative to give reasons in submissions, this is not evidence. The Tribunal accepts that the Respondent chose not to call witnesses and the reasons for this are set out earlier in this judgment. However, this does not detract from the fact that the Claimant has not provided any explanation as to why she did not present her claim earlier. It is inevitable that the length of time between the allegations and the presentation of the claim will prejudice witnesses. For the Claimant, the matters were significant and memorable. For the other witnesses it is likely that the matters were not of significance given it appears that this type of behaviour had been common for some time. Without explanation from the Claimant, it is not possible for the Tribunal to extend time. Therefore, the Claimant's claims are dismissed."

The Grounds of Appeal

16. There are five grounds of appeal. Grounds 1 – 4 relate to the tribunal's decision on just and equitable extension of time. Ground 5 raises a discrete challenge to do with the burden of proof.

17. Ground 1 contends that the tribunal erred at [74] in stating that the claimant "has provided no evidence on which it can exercise its discretion to extend time" and that it "is not sufficient for her representative to give reasons in submissions, this is not evidence."

18. Reliance is placed in particular on **Accurist Watches v Wadher**, UKEAT/0102/09, 23 March 2009, in which Underhill P, as he then was, rejected a submission that evidence as to the cause of the delay in presenting a claim must come in the form of witness evidence, typically in the form of a written witness statement. It could come in the form of other evidential material put before the tribunal, which might enable it to form a proper conclusion on the matter. That might include documentary evidence or inferences to be drawn from undisputed facts or contemporary documents.

19. Reliance is also placed on the decision of Cox J and members in **Doherty v The Training and Development Agency for Schools**, UKEAT/0394/09, 29 October 2009, to similar effect, and in the course of which they added, at [243]:

> **"Whilst there must be evidence before the Tribunal, upon which they can make findings as to the reason for the delay, and be satisfied that it is just and equitable to extend time, that evidence can come from a variety of sources and not just from the claimant in a witness statement or in the witness box. This is likely to be the case where, as here, there are many allegations of victimisation made on a "continuing act" basis, involving different events and personnel over a lengthy period of time, but where eventually only one of them succeeds. It is in our view unrealistic, in such circumstances, to expect a claimant, in evidence, to have dealt with the extension of time point separately, in respect of each, discrete allegation, on the somewhat artificial and entirely hypothetical basis that only one of them might succeed."**

20. In the present case, submitted Mr Kohanzad, it was clear that when the tribunal said, at [74], that there was "no evidence", it meant "no witness evidence", as, in the same passage, it referred to *the claimant* having failed to give, or provide, any explanation. But the tribunal had other evidence that the claimant, having been subjected to a barrage of sexual harassment, had gone off sick with

mental ill health, which, on her case, was caused by that conduct. She then submitted a grievance in November 2017 which was finally concluded in February 2020. ACAS was contacted in March 2020. The chronology suggested that at least part of the reason for the timing of the institution of the tribunal claim was that the claimant was seeking to exhaust the internal process in the first instance.

21. This was also, said Mr Kohanzad, a case where it was unrealistic to have expected the claimant to address all the different permutations that might arise, depending on which of her complaints succeeded or failed. The issue was only raised by the respondent's counsel, Mr Holloway, in closing submissions. Mr Kohanzad had responded by highlighting the evidence that had been before the tribunal, pointing to the claimant having sought to exhaust the internal process before bringing her claim, and as to her ill health. This amounted to counsel properly referring to evidential material from which the tribunal could draw inferences, not to reasons for the late claim being wrongly advanced purely in submissions instead of being shown by evidence.

22. Ground 2 contends that the tribunal erred at [74], in which it concluded: "Without explanation from the Claimant, it is not possible for the Tribunal to extend time. Therefore, the Claimant's claims are dismissed." It erred by considering that the presence of some explanation for the delay was, as a matter of law, a pre-requisite for the extension of time. The ground in particular cites the following statement of Leggatt LJ (as he then was, Bean LJ concurring), in **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640; [2018] ICR 1194 at [25]

> **"There is no justification for reading into the statutory language any 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."**

23. Ground 3 contends that the tribunal erred by failing properly to consider the balance of prejudice. In particular, the first part of this ground contends that, while it highlighted at [74] the purported prejudice to the respondent, were time to be extended, the tribunal failed to weigh against

that, the hardship to the claimant that would be occasioned by it dismissing as out of time, her complaints relating to events during the course of the period working at Wimbledon. The second part of the ground contends that the tribunal erred in holding that the delay in presenting the claim had caused the respondent prejudice. That was an error, given that the respondent had chosen not to call the Wimbledon witnesses for reasons that were unrelated to the delay by the claimant in instituting her claim. That delay therefore did not in fact cause any prejudice.

24. Ground 4 contends that, if the tribunal was concerned that it may find that the complaints were out of time, and by the fact that the claimant had not addressed the time point in her written or oral evidence, the proper thing was to raise that with the parties, and allow her the opportunity to give further evidence on the subject. The ground asserts that, in discrimination cases where the claimant's primary case is that her whole claim is in time, it is common for time not to be addressed in witness statements, as, at a final hearing the "natural focus of the parties is on the substantive issues."

25. Ground 5 contends that the tribunal erred by failing to address the claimant's case on the burden of proof in relation to the complaints that related to the conduct of Ms Styles, who investigated and decided her grievance. Mr Kohanzad confirmed in submissions that this therefore specifically related to the complaints numbered 29, 30, 32 and 33 on the Scott schedule. The ground asserts that the tribunal failed to engage with the fact that Ms Styles accepted in cross-examination that there were a number of untruths in her grievance report. That would found a shifting of the burden of proof: **Base Childrenswear Ltd v Otshudi** [2019] EWCA Civ 1648; [2020] IRLR 118. This ground asserts that the tribunal erred, however, by going straight to the "reason why" question. Reliance is placed on the discussion in **Field v Steve Pye & Co (KL) Ltd** [2022] EAT 68; [2022] IRLR 948.

Discussion and Conclusions

26. We do not consider that the tribunal erred in the manner contended by ground 1. In the course of [69] the tribunal said: "The Claimant did not provide any information about why she delayed

bringing her claim". Read alone, that might be thought ambiguous as to whether the tribunal was focussed solely on her witness evidence. But, further on in the same paragraph, the tribunal said that there was "no evidence adduced either by oral testimony or documentary evidence" that the claimant was prevented by illness from bringing a claim, which clearly indicates that the tribunal cast its net wider than just considering whether there was witness evidence from her to that effect. At [72] it referred to a submission by Mr Kohanzad that it was known why the claim was late "and it does not need an explanation in a witness statement". Mr Kohanzad told us that he specifically cited **Doherty** when making that submission. This passage also shows that the tribunal had the point on board.

27. Against that backcloth, we do not detect any error in the statement at [74] that "the Claimant must give some explanation. It is not sufficient for her representative to give reasons in submissions, this is not evidence." Read with [69] and [72], this does not show that the tribunal failed to take on board that the evidence need not come in the form of witness evidence. Rather, the point being made is that, while a submission may highlight evidence that is relied upon by the party concerned, which need not be witness evidence, the submission still has to rely upon *some* feature of the evidence.

28. Mr Kohanzad contended that there was ample evidence that the claimant referred to her ongoing stress and anxiety repeatedly as events unfolded in the period from June 2017 through to January 2020, including a reference at one point to her having seen a specialist and being on anti-depressants, and references in late 2019 and early 2020 to the lack of communication from the respondent exacerbating her stress. He contended that his submission to the tribunal as to the explanation for the delay *was*, therefore, supported by the evidence.

29. However, these features of the evidence do not in themselves show that the tribunal erred in not finding that mental ill health was the reason, or a contributing reason, for that delay. Whether the claimant was experiencing mental ill health so severe that it had an impact on the timing of her complaint to the tribunal was a matter for the tribunal's appreciation. As Mr Holloway pointed out,

the medical evidence only went so far as to show that she was signed off work in the period to November 2017. Certainly it was not perverse not to find that this was a contributing reason.

30. Nor do we agree that this was a case where the claimant was not in a position to give evidence, or advance a case, on the time point which went against her, until the tribunal's conclusions on the merits (subject to time points) of her various individual complaints were known. This was not a case where the existence of potential time points only became obvious once the outcome on the facts and merits were known. Time was obviously a general potential issue, at least because of the overall time span covered by the complaints, and it specifically formed issues 1 and 2 (including by reference to continuing act and just and equitable extension) on the agreed list of issues before the tribunal.

31. Further, the tribunal, having found that every one of the incidents in the first, Wimbledon, period, factually occurred, but that none of the complaints relating to the second period succeeded on their merits, then identified that, even if all the incidents in the first period involved conduct because of sex, related to sex, or of a sexual nature, the claimant would still require a just and equitable extension of time in relation to them. The tribunal was, for the purposes of that just and equitable extension issue, then looking for evidence as to why the claimant did not present her tribunal claim sooner than she did, following her going off sick in May 2017.

32. True it is that, had the tribunal allowed that it would be just and equitable to extend time in respect of that period, it would still then have had to consider whether all of the incidents that factually occurred in the first period involved conduct because of sex, related to sex, or of a sexual nature; and it is not impossible that further time points might have arisen in that regard. In particular, while most of complaints 1 – 25 related to conduct that was inherently or overtly related to sex, or sexist, not all of them did. But a scenario in which the claimant might succeed on some or all of her complaints relating to that first period, but on none of those relating to the second period, was an obvious potential particular outcome in this case.

33. Indeed, that was the particular scenario on which Mr Holloway made submissions to the tribunal, and to which Mr Kohanzad then responded, prior to the tribunal's reserved decision being known. It therefore appears to us that, if it was the claimant's case that, after going off sick, she did not present her claim until she did, because of ill health, and/or because she was awaiting the final outcome of the internal grievance process, or both, she, for her part, could have given, or presented, evidence to that effect or in support of that case.

34. For all of these reasons, ground 1 fails.

35. Ground 2 raises a different challenge, being that the tribunal erred in concluding that, as a matter of law, in the absence of any evidence of the reason for the delay, it was bound to refuse to extend time. There was no dispute between Mr Holloway and Mr Kohanzad before us, that this is not the law, and neither counsel suggested to the tribunal that it was. Mr Holloway said that he regarded the point as clear law in light of the discussion in cases such as **Morgan** and **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23. In his written submission to the tribunal he wrote: "Although not a precursor to an extension of time, whether or not there is a good reason for a delay in bringing proceedings will be of particular relevance in determining whether to grant such an extension (as noted in **Adedeji**)."

36. However, there is no statement of the law to that effect in the tribunal's decision itself. Nor can we be confident that the tribunal would have regarded the point as familiar and settled law. In fact, for some years there were conflicting decisions of the EAT on the point. As recently as **Concentrix CVG Intelligent Contact Limited v Obi** [2022] EAT 149; [2023] ICR 1, it was contested again before the EAT, on the footing that neither **Morgan** not **Adedeji** had definitively settled the point. The EAT concluded in that case that there is no rule of law that, in the absence of any explanation in the evidence for the delay in presenting the claim, the tribunal is bound to refuse an extension (as opposed to treating this as a relevant consideration). But the decision in **Obi** was

only given on 4 May 2022, in point of time after the tribunal heard submissions in the present case (and was not published until after the present tribunal gave its reserved decision).

37. The fact that the tribunal did not address this particular point of law in its decision would not by itself necessarily mean that it got it wrong. But it began [74] by saying: "The Tribunal has reluctantly concluded that the claimant has provided no evidence on which it can exercise its discretion to extend time." That reads like it was saying: "our hands are tied." At the end of that paragraph, it concluded: "Without explanation from the Claimant, it is not possible for the Tribunal to extend time." That again suggest that the tribunal wanted to convey that it would like to be able to give the claimant a remedy for the conduct that she was factually subjected to during her time at Wimbledon, most, if not all of which, it was likely, because of its nature, to find was unlawful; but that, because of the absence of that explanation, it was legally not possible for it do so.

38. Ground 2 must therefore be upheld.

39. Turning to the first part of ground 3, true it is that in stating its conclusions at [74] the tribunal did not expressly refer to what the claimant would lose by the refusal of an extension, being a remedy in respect of the subject-matter of those complaints relating to the first period which the tribunal might have found to be well-founded. But, as Mr Holloway pointed out, the tribunal had, earlier in the very same decision, considered and accepted the claimant's factual account of what occurred, and it was plainly virtually inevitable that, because of its nature, most of the conduct would be found in principle to amount to direct discrimination or harassment. Plainly, then, the tribunal was aware of what the claimant stood to lose if time were not extended, and its very use of the word "reluctantly" and the phrase "it is not possible" suggests that the tribunal was of the view that this would be a significant loss to her. We therefore do not think the fact that it did not specifically refer to this expressly at [74] shows that it did not take it into account.

40. We turn to the second part of this ground, which asserts that the tribunal erred by finding that

there was potential prejudice to the respondent by virtue of the passage of time, as it had in any event indicated that it had decided not to call any of the Wimbledon colleagues as witnesses, for organisational reasons. As to that, as the tribunal recorded at [3], the respondent did indeed so advise the tribunal, having previously contemplated that it would be calling at least some of them.

41. However, as noted by the tribunal at [70], and confirmed to us, Mr Holloway also made a submission that the respondent had been disadvantaged by the claimant's delay in raising her tribunal claim, coupled with the fact that, even when she raised her concerns initially, she at first declined to name names, and it took her some time to identify the full list of colleagues who she said were involved in the conduct of which she complained.

42. If extending time will in fact place a respondent at a disadvantage, it is not necessary also to show that the delay on the part of the claimant caused it. The issue here, however, was whether the respondent was in fact put at a disadvantage at all. The tribunal at [74] stated first that it accepted that the respondent chose not to call the witnesses and that was for the reasons earlier set out – plainly a refence to the letter mentioned at [3]. But it also referred further on to the inevitability that the passage of time would have affected the memories of the Wimbledon witnesses. It is not clear what it considered to be the impact of each of these things, or whether both made a contribution.

43. Given the nature of the issues, and the passage of time, we do not think that the tribunal erred in considering the fading of memories to be at least a *potential* consideration. But we conclude that its reasoning on this aspect is unsatisfactory and unclear. At the very least the tribunal needed to explain more clearly whether it concluded that the fact that the delay on the part of the claimant meant that the respondent had not been able to gather evidence sooner, may also have played, or did play, a part in the respondent's decision not to call the witnesses, or some of them; or otherwise why, or how, it also took this aspect into account. For these reasons we also uphold this part of ground 3.

44. We reject ground 4. As we have already observed, there plainly were potential time points in

this case not only in relation to continuing acts, but also in relation to just and equitable extension. These were the very first points identified in the list of issues. The claimant was not ambushed by the issue. She was represented, and, as we discussed in relation to ground 1, it would have been open to her to give some account in her evidence of why she presented her claim form when she did, and why she did not present it sooner than she did. If there was other additional evidence thought to be relevant such as, if there was any, further medical evidence, that too could have been produced.

45. Mr Kohanzad made it clear, quite rightly, that he did not criticise Mr Holloway for not having raised the issue until closing submissions. Unsurprisingly Mr Holloway did not raise, when cross-examining the claimant, a point on which she had given no evidence. He also fairly made the point to us that, if she *had* asserted in her witness evidence that the delay was on account of ill health and/or because she wished to await the final outcome of the grievance, there were a number of points of challenge that he might have taken up with her. It was not incumbent on the tribunal proactively to flag the point up during evidence or invite the claimant to give evidence on it; in fact, we are inclined to think, the tribunal would have crossed the line of descending into the arena, had it done so.

46. We turn to ground 5. The matters relied upon by the claimant are that Ms Styles' grievance report stated that she could not find evidence of certain particular matters, such as the making of sexist comments, and the display of pornography, but she accepted in cross-examination that such evidence did exist, and that certain factual statements in her report were incorrect.

47. Mr Holloway made the point that the tribunal had, however, not found that Ms Styles had deliberately lied about these matters in her report. He said it was not bound to find that this feature shifted the burden. It seems to us that, even if this feature could, if not should, have been treated by the tribunal as causing the burden of proof to shift, the more important point is that it is well-established that, where it feels able to make a positive finding as to the reason or reasons for the conduct complained of, it is not necessarily an error for the tribunal not to decide first whether the

burden has shifted to the respondent. This point has been made in a number of authorities, including by the Supreme Court in **Hewage v Grampian Health Board** [2012] UKSC 37; [2012] ICR 1054.

48. The decision in **Field** does not say otherwise, and, as Mr Holloway pointed out, the EAT in that case disavowed making any new law. However, one of the points discussed in **Field** is that, where a factual feature could or should be treated as shifting the burden, then, one way or another, the tribunal needs to consider that feature, in the process of deciding whether the protected characteristic, or protected act, materially influenced the conduct. A tribunal that does not proceed in two stages may risk failing to spot this and sufficiently to engage with that question.

49. In the present case, however, the tribunal, which heard Ms Styles' cross-examined on these points, plainly engaged with these, as well as other, criticisms, that were made by the claimant of her investigation and of her report, at [53] to [56]. This included the tribunal noting that she "accepted that she had got matters wrong", and finding that she appeared to be unaware of the burden and/or standard of proof that she should be applying, and that she appeared to consider that the claimant's allegations needed to be corroborated by other evidence. The tribunal made positive findings, for reasons that it set out, that her impugned conduct was not because of the claimant's sex, or her grievance. It had earlier directed itself correctly on the law, including the burden of proof and the proposition that the conduct should not be "to any extent because of" the protected characteristic or act. The fact that the test in respect of such complaints, is material influence, and not sole or principal reason, is very well-established and familiar to tribunals.

50. For all these reasons we are satisfied that the tribunal reached a decision it was entitled to reach in relation to these particular complaints, without error in relation to the burden of proof or otherwise. Ground 5 accordingly fails.

Outcome

51. Our decision to uphold ground 2, and, in part, ground 3, means that we must quash the

tribunal's decision on just and equitable extension of time. Both counsel agreed that, were we to uphold any of grounds 1 – 4, we would need to remit the matter to the tribunal. Mr Holloway submitted that we should remit to the same tribunal, and Mr Kohanzad indicated that, if, as has happened, ground 5 was not upheld, he did not demur from that course.

52. We agree that remission is necessary. Indeed, depending on its fresh conclusion in relation to just and equitable extension, the tribunal may also need to make further findings about complaints 1 – 24. The existing tribunal will be best placed to do this, and we agree that we should remit to it.