

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION**



**G 163 of 2020
(LACV 116 of 2020)**

**IN THE MATTER OF AN APPLICATION FOR DIRECTION UNDER SECTION 39 OF THE
LIMITATION ACT (1996 REVISION) (O.32, r.9A; O.33, r.3)**

AND IN THE MATTER OF SECTION 13 (4) OF THE LIMITATION ACT (1996 REVISION)

HERFA ROBINSON

Plaintiff

AND

ATTORNEY GENERAL OF THE CAYMAN ISLANDS

Defendant

IN CHAMBERS

CORAM: Walters J. (Actg.)

**Appearances: Mr Rupert Wheeler of KSG for the Plaintiff
Mr Michael Smith of Attorney General's Chambers for the
Defendant.**

Heard: 17 January 2022

Draft circulated: 25 January 2022

Judgment Delivered: 15 February 2022

HEADNOTE

**Personal injury, limitation defence - factors to take into account when exercising discretion to
make a direction pursuant to S39 Limitation Act and GCR O 32, r. 9A that S13 of
Limitation Act should not apply to plaintiff's claim**



JUDGMENT

1. These proceedings relate to a claim for damages brought by the Plaintiff in relation to injury suffered by her whilst employed by the Customs and Border Control Department (“CBC”) of the Cayman Islands Government during the period from 1 November 2001 until she was placed on early retirement for medical reasons effective 1 February 2018. The injuries are described in the Plaintiff’s statement of claim as being an allergic reaction to various types of fungal mold found in the CBC building in which she worked as an administrative assistant.
2. In summary, the Plaintiff’s claim is that the Defendant was negligent in failing to ensure her health and safety at work by exposing her to conditions that they knew or ought to have known were detrimental to her health and by failing to provide her with protective equipment. The allergic reaction first manifested itself around 2010. From 3 January 2014 the Plaintiff was treated by Dr Glatz, an ENT specialist. Dr Glatz wrote various letters to the Defendant alerting them to the Plaintiff’s condition and advising that she should not continue to be exposed to the mold. The Plaintiff’s case is that the Defendant failed to act on those letters, allowing her exposure to continue, ultimately leading to long term health consequences (shortness of breath, hoarseness of her voice, speech and hearing issues) and the Plaintiff’s retirement from CBC in 2018 on the basis that she was found to be medically unfit to continue to work. The Plaintiff claims general and special damages.
3. A writ was issued by the Plaintiff on 30 October 2020. A defence was filed on 10 December 2020 denying liability and raising limitation as a defence on the basis that the alleged cause of action did not arise within three years before the date of the writ and is barred by section 13 of the Limitation Act.
4. The current application is by way of originating summons seeking:
 - 4.1 a determination of the date of the Plaintiff’s knowledge pursuant to section 13 (4)(b) of the Limitation Act (1996 Revision);
 - 4.2 a direction pursuant to section 39 of the Limitation Act and GCR O32, r.3 that section 13 of the Limitation Act should not apply to the action;
 - 4.3 a trial of these preliminary issues pursuant to GCR O.33, r.3; and,
 - 4.4 such other orders and relief as the Court deems appropriate including as to costs.



5. As at the date of the hearing, the parties had agreed that limitation began to run from 12 October 2016, meaning that the first determination sought by way of the originating summons was no longer pursued. Based on that agreed date, the limitation period for the Plaintiff's claim expired on 12 October 2019, almost a year before the writ was issued.
6. The Plaintiff's application is supported by her affidavit dated 15 December 2021 and the Defendant served an affidavit in reply sworn by Ms Simone Lynch dated 10 January 2022. Ms Lynch is the Senior Human Resources Manager and Deputy Freedom of Information Officer for CBC.

Background facts

7. The Plaintiff is 51 years old and her date of birth is 18 September 1970. The Plaintiff left school in 1986 when she was 16 without any qualifications. Prior to working for CBC, the Plaintiff worked in the hospitality industry.
8. The Plaintiff began working for CBC on the 1 November 2001. She was employed as what she describes as a "tally clerk". In her affidavit she refers to three of the main areas of the CBC building in which she worked. She describes them as the collections area ("Collections"), which is a large open area in the downstairs of the building with some offices set up around the sides. Items that have arrived in Grand Cayman via the airport are brought to Collections. Individuals come to Collections to pay customs duties and pick up their items.
9. Above Collections on the first floor is the mezzanine ("Mezzanine") which is a filing area. Upstairs from the Mezzanine was an area of offices ("Upstairs"). The Plaintiff initially started working Upstairs but spent the majority of her time in the Mezzanine filing paperwork.
10. The Plaintiff describes starting to experience health problems in or around 2013. Apparently within 30 minutes of arriving at work her throat would become sore, there would be a burning sensation and her voice would become hoarse. She says that she did mention this to her supervisors at the time but did not want to risk her job by making more of a fuss about it and hoped that the symptoms would go away.
11. The Plaintiff's condition worsened and on 3 January 2014 she went to the George Town hospital where she was seen by Dr Jha. Dr Jha referred the Plaintiff to Dr F. Robert Glatz, an ENT specialist.



After examining the Plaintiff, on 9 January 2014 Dr Glatz wrote to CBC indicating that the Plaintiff had been found to have an increasing history of chronic sore throat, voice hoarseness and burning sensation in her throat. He referred to a recent environmental health report that had been prepared for CBC which documented heavy mold growth in the Mezzanine. He confirmed that after allergy testing, the Plaintiff had demonstrated an allergy to *Caldosorium* and *Stachybotris* which Dr Glatz noted the environmental health report had found growing heavily in the Mezzanine. Dr Glatz recommended that until the mold problem had been resolved and the area properly ventilated, the Plaintiff be kept out of the Mezzanine, should not handle any files from that area and, if she did have to work there, she should be given a fully sealed face mask.

12. It should be noted at this point that Ms Lynch on behalf of the CBC exhibited a number of documents to her affidavit. These included two reports prepared by the Cayman Islands Department of Environmental Health. The first was based on an inspection on 8 November 2013 and recorded that several CBC staff had complained of feeling unwell while in the building. In relation to the Mezzanine, the report notes that “[o]ne employee, however, who more frequently spends longer time periods in the room, complained of hoarseness, congestion and throat irritation after spending hours [there]”. It is not clear if this was a reference to the Plaintiff. Some mold was detected and recommendations made for how the relevant areas should best be managed from an environmental health perspective. A further report was prepared by the Department of Environmental Health after an inspection on 6 May 2015. It again noted some evidence of mold and made further recommendations.
13. The Plaintiff states that after receipt of Dr Glatz’s letter dated on 9 January 2014 CBC did not remove her from the Mezzanine and did not provide her with a face mask. When she asked about the mask she was told that it had been lost.
14. The Plaintiff was signed off work on health grounds by Dr Glatz for seven days on 9 January 2014 and for a further seven days on 30 January 2014. On 6 February 2014 Dr Glatz wrote again to CBC noting that when away from work the Plaintiff’s symptoms improved, concluding that it was her work environment that was the cause of the problem. He notes that her condition generally had worsened. During this period and leading up to 2016, the Plaintiff states that she continued to be assigned to work in the Mezzanine, her health worsened and she was prescribed medication and



ultimately a weekly injection to neutralize her allergic symptoms. Dr Glatz wrote on a number of occasions to CBC continuing to raise concerns about the Plaintiff's health.

15. On 29 February 2016 Dr Glaz performed an operation on the Plaintiff described as:

"mircolaryngoscopy with bilateral vocal cord stripping."

On 4 March 2016, Dr Jha provided a surgical pathology report in which he made a post-operative diagnosis of

"Bilateral vocal cord nodules/polyp", "Left vocal cord (biopsy): Acanthosis and fibrosis consistent with vocal cord nodule".

After the procedure, the Plaintiff underwent speech therapy for around a year. Despite this, her speech continued to deteriorate.

16. The Plaintiff's health did not improve and despite further correspondence from Dr Glatz the Plaintiff states that she was still required to work in the Mezzanine and felt that her superiors did not believe her health complaints.

17. In early October 2016, at the suggestion of a colleague, the Plaintiff approached Ms Sheridan Brooks QC of Brooks & Brooks attorneys seeking advice as to whether she may have a claim for compensation. Ms Brooks advised the Plaintiff to apply for legal aid, which she did. The application was refused by a judge of the Grand Court on 7 October 2016 and confirmed way of a certificate dated 7 October 2016. The reason for the refusal was:

"Dr Glatz's reports do not suggest that the applicant has suffered any permanent injury or disability but that her allergic condition can be treated by medication and ameliorated by change of her work environment. No cause of action is revealed and there is no prospect of a successful claim against the Government as her employer. It is assumed that her medical expenses are covered by CINICO."

18. As a result of the reasons for the refusal of legal aid, the Plaintiff states that she believed her circumstances did not give rise to a legal claim. She could not afford to retain a lawyer so took no further action.

19. On 12 October 2016, Dr Glatz wrote again to CBC advising that the Plaintiff's medical condition had not improved and that her continued exposure to adverse conditions at work was making it worse.



Out of the work environment her conditions improved. Dr Glatz recommended that the Plaintiff be retired early from CBC on medical grounds. On 28 October 2016 the Plaintiff was placed on sick leave until the question of her medical retirement could be decided.

20. On 22 August 2017, following a meeting with a medical board convened by the Cayman Islands Health Authority, the board suggested that Plaintiff be retired from CBC on medical grounds. The report states that:

“The Board also concurs that Ms Herfa Robinson’s exposure to mold at her workplace, initially contributed to her Hypersensitization/Upper Respiratory/Laryngeal condition.”

21. In an email dated 18 December 2017 from Ms Darlene Whittaker of the Cayman Islands Health Services Authority to Simone Mamby (Simone Lynch), Ms Whittaker states:

“The Doctors met with Ms Robinson, and following the meeting they agreed that Ms Robinson developed a severe reaction to working in a closed vicinity, and air-conditioned environment because of her reaction to mold allergies. It was noted that Ms Robinson has tried optimal medical care and has not found much improvement. It was therefore the Board’s recommendation that Ms Robinson be retired on the basis of medical grounds. It was also unanimously agreed that her exposure to mold at her workplace, initially contributed to her Hypersensitization/Upper Respiratory/Laryngeal condition.”

22. One of the areas of factual dispute between the parties is in relation to the question of a claim by or on behalf of the Plaintiff for workmen’s compensation under the Workmen’s Compensation Act (1996 Revision). Section 3 of that Act provides that:

“If, in any employment, a workman suffers personal injury by accident arising out of and in the course of such employment, his employer shall be liable to pay compensation in accordance with this [Act].”

23. The Plaintiff’s evidence is that a few months after she had been medically retired, she was told by Ms Simone Lynch that she was entitled to workmen’s compensation. She says that she was told that the Collector of Customs had put a claim in for her and that she would receive compensation. The Plaintiff says that this was repeated to her on subsequent occasions by Ms Lynch and by Mr Charles Clifford the Collector of Customs. The Plaintiff says that she relied on what she was told and had no



reason to doubt it. Having heard nothing about the compensation claim, the Plaintiff contacted the secretary to Mr Kenneth Jefferson, the then Financial Secretary and says that she was told that the compensation would come through eventually. The Plaintiff states that she spoke to Mr Jefferson himself who indicated that the matter had been referred to the Attorney General. Ultimately the Plaintiff wrote to the Attorney General on 23 October 2018 about her claim but says that she received no reply.

24. Ms Lynch deals with this in her affidavit and says in paragraph 15:

“On 1st February 2018 the Plaintiff retired at the end of her 3 months’ notice period. On 28th October 2018 the Plaintiff wrote to the Attorney General of the Cayman Islands seeking “workmen’s compensation”. I do not know if there was any response to this letter, or why the Plaintiff thought that the Collector of Customs had submitted a claim on her behalf.... I did not myself make, and was not aware of anyone else making, such submission and in any event compensation other than under the early retirement provisions of the Personnel Regulations would be a matter for the Ministry of Finance & Economic Development, not Customs.”

25. Ms Lynch contends in paragraph 17 (h) of her affidavit that neither she, nor to her knowledge Mr Clifford, ever stated to the Plaintiff that she would be receiving workmen’s compensation as it was not in their power to award it.
26. This is not a factual issue that requires to be resolved for the purposes of this application. The Plaintiff says that as a result of the delay in receiving workmen’s compensation, on 19 August 2019 she contacted her current attorneys, KSG. This was still within the limitation period that commenced on 12 October 2016 and expired on 12 October 2019. KSG sent a letter before action to the Defendant on 11 December 2019 setting out the Plaintiff’s claim and requesting various information and documents. There was no response to that letter despite KSG following up by email on 29 January 2020 and on 16 July 2020. An application for legal aid was made by KSG on behalf of the Plaintiff on 4 September 2020. On 14 September 2020 KSG was advised by the Legal Aid Clerk that the decision on legal aid had been deferred because of the previous refusal to grant it in 2016. After some correspondence with KSG, legal aid was finally granted on 24 September 2020. As indicated earlier, the writ was filed on 30 October 2020.
27. The Plaintiff claims that she continues to suffer health problems as a result of the exposure to mold and that this has affected her daily life and ability to exercise. Previously she was a keen runner. The



Plaintiff now works as a bus driver and has suffered a reduction in income compared to what she was earning at CBC. Again, these are not matters that require any further analysis at this stage of the proceedings.

28. Ms Lynch whose affidavit was sworn on behalf of the Defendant joined CBC as an HR Manager in October 2014. Ms Lynch states that her first involvement with this matter was on 18 March 2015 when she was asked by Ms Emalie Wilks the Deputy Director of Customs Administration to attend a meeting with the Plaintiff. At the meeting the Plaintiff provided a letter from Dr Glatz dated 18 March 2015.
29. Another area of factual disagreement between the Plaintiff and Ms Lynch is the extent to which the Defendant relocated the Plaintiff within the CBC buildings to avoid exposure to mold. Ms Lynch provides some detail in her affidavit about the efforts made by the Defendant in this regard.
30. Ms Lynch sets out the efforts made to have the CBC headquarters cleaned by a specialist cleaning company on March 25 2015. Ms Lynch also confirms that this is an ongoing exercise. Ms Lynch recounts in some detail the continued correspondence received from Dr Glatz and the efforts that she says the Defendant made to accommodate the Plaintiff's health issues, ultimately leading to her medical retirement. Ms Lynch says that in the two years after the Plaintiff's retirement she spoke and met with the Plaintiff on several occasions and that (paragraph 16 of her affidavit):

"I became an avenue for [the Plaintiff] to vent and share her woes. I explained the process and difference between the payment of \$25,661.80 which she was statutorily entitled to [in accordance with The Personnel Regulations (2017 Revision) Schedule 1, Section 20 (3) (c) and (6) (b) (i)], and received from Customs as part of her early retirement payout on the one hand .. and the entirely separate issue of any compensation for her injuries countless times during that period."

31. At no point in her affidavit does Ms Lynch suggest that the Defendant is at any disadvantage as a result of the delay between the expiry of the limitation period and the date upon which proceedings were commenced or that any witnesses or documents are unavailable as a result.



Relevant law

32. Section 13 of the Limitation Act provides that the limitation period for personal injury claims is a period of three years which begins to run from the date that the cause of action accrued (section 13 (4) (a) or the date of knowledge (if later) of the person injured (section 13 (4) (b)).

33. Section 39 provides:

“(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which –

- (a) section 13 or 16 prejudices the plaintiff or any person whom he represents; and*
- (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents,*

the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.

(3) In acting under this section, the court shall have regard to all the circumstances of the case and, in particular, to –

- (a) the length of, and the reasons for, the delay on the part of the plaintiff;*
- (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 13 or 16 (as the case may be);*
- (c) the conduct of the defendant after the cause of action arose, including the extent, if any, to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff’s cause of action against the defendant;*
- (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;*
- (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages; and*
- (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.”*



34. In his submissions on behalf of the Plaintiff, Mr Wheeler pointed out that Section 39 (3) makes it clear that the court shall have regard to *all* the circumstances of the case and that the factors set out in subsection (3) (a) – (f) are not exhaustive.
35. Section 39 of the *Limitation Act* gives the court a discretion as to whether or not to direct that the limitation period in section 13 should not apply to a particular cause of action. That discretion has been considered in two decisions of the Grand Court to which counsel for the Plaintiff has referred. In *Fisher v. Fireworks Limited* [2012 (1) CILR 190] Quin J heard a successful application to disapply the period of limitation for a personal injury claim. Factors considered by the court in that case included: the fact that the limitation period was missed by 10 weeks because of a failure by the plaintiff’s attorney to give timely advice; whether the plaintiff acted promptly as soon as she had received proper legal advice; and, the extent to which there was prejudice to the defendant and in particular whether there was any risk that the defendant might, as a result of the delay, be at a disadvantage in terms of evidence in support of its case.
36. When considering the breadth of the discretion Quin J said:

“56 ... *The words ‘If it appears to the court that it would be equitable to allow an action to proceed ... the court may direct that those provisions [i.e. 2A and 2B] shall not apply to the action’ and ‘the court shall have regard to all the circumstances of the case’ seem to me to give the court as wide a discretion as could well be imagined. I find it impossible to understand how any restriction to ‘difficult’ or ‘unusual’ cases can be read into them.*”

57 *In Firman v. Ellis* [1978] Q.B. 886, *the English Court of Appeal permitted the claims to proceed in each of the four appeals, holding that the court had an unfettered discretion to extend time and in each case there was an overwhelming case for exercising that discretion in favour of the plaintiffs; the plaintiffs would be greatly prejudiced by being statute-barred due to their solicitors’ mistakes, whereas the defendants had known the nature of the claims throughout and would not be prejudiced at all.*”

37. The court has to balance the question of prejudice to the Plaintiff against the prejudice to the Defendant, if it loses its limitation defence. In *Fisher*, Quin J citing Parker L.J. in *Hartley v Birmingham City Council* [1992] 1 WLR at 980 said:

“53 *In that case Parker, L.J. emphasized ... that— “in my view, however, as the prejudice resulting from the loss of the limitation defence will always or almost always be balanced by the prejudice to the plaintiff from the operation*

of the limitation provision, the loss of the defence as such will be of little importance. What is of paramount importance is the effect of the delay on the defendants' ability to defend."

38. In *Carroll v Chief Constable of Greater Manchester Police* [2018] 4 WLR 32, Sir Terence Etherton giving judgment in the English Court of Appeal said of the question of discretion (pp7-8, 42):

- “3. *The essence of the proper exercise of the judicial discretion under section 33 [the equivalent of section 39 Limitation Act] is that the test is a balance of prejudice and the burden is on the claimant to show that his or her prejudice would outweigh that to the defendant...*
4. *The burden on the claimant under s33 is not necessarily a heavy one. How heavy or easy will it be for the claimant to discharge the burden will depend on the facts of the particular case.*
5. *Furthermore, while the ultimate burden is on a claimant to show that it would be equitable to disapply the statute, the evidential burden of showing that the evidence adduced, or likely to be adduced, by the defendant is, or is likely to be, less cogent because of the delay is on the defendant.”*

39. In *Fisher*, Quin J approached the question of the reason for delay caused by the plaintiffs legal advisers as follows:

“29 *It is [the plaintiff's] position that the omission of her attorneys in failing to advise that she ought to join Fireworks Ltd. to the action, should not be visited upon her. The plaintiff relies on Das v. Gaju [1999] P.I.Q.R 260 where the English Court of Appeal, in exercising its discretion in favour of the plaintiff (with a claim which they issues five to six years outside the primary limitation period) in circumstances where the failure to issue in time was the fault of her solicitor, held that, in the judgment of Buxton, L.J ([1999] P.I.Q.R at 269).....: “the failings of the plaintiff's lawyers are not, in that respect, to be visited upon her ... here was no other way in which the plaintiff's conduct could be properly criticized ... “Sir Christopher Staughton noted ([1999] P.I.Q.R. at 268) that if the plaintiff's claim were struck out “ ... she is left with a claim that must be somewhat speculative against solicitors and counsel. She will then have two hurdles to overcome – proof of the merits of her action against Dr. Ganju, and proof that he counsel and solicitors were negligent.”*

“50. *I find that the failings of the plaintiff's attorneys are not to be visited upon her and further, I can find no evidence in which the plaintiff's conduct could be properly criticized.”*

40. In relation to the question of delay itself, Quin J said:



“54 ... In *Hartley v. Birmingham City Council*, *Parker, L.J.* referred (*ibid.*) to a passage from *Preston & Newsom’s Limitation of Actions*, 4th ed., para. 4.4.4, at 26 (1989):

“... [A] defendant will normally suffer prejudice if an order is made, but he will only have lost a windfall unless his ability to defend has been affected by the delay: *Thompson v. Brown*. Consequently, if the delay (however long) does not seriously affect the evidence, the power will generally be exercised.”

Parker, L.J. approved this passage (*ibid.*), save that he felt that it would be better to omit the words “however long.”

“61 The loss of a limitation defence should not properly be regarded as prejudice when the delay is so short, and should be regarded—to use the words of Lord Diplock in *Thompson v. Brown* (6) ([1981] 1 W.L.R. at 750)—“as being in the nature of a windfall.” In addition, should this court decline to exercise its discretion, the plaintiff would be deprived of the opportunity to pursue what appears to this court to be a genuine claim, with reasonable prospects of success, and significant value in circumstances where the impact of the injury has resulted in ramifications for the plaintiff in terms of pain, suffering and loss of amenity.”

41. In *W v. W* [2011 (1) CILR 382], a case involving personal injuries arising from domestic abuse and a delay of 21 months after the expiry of the limitation period, the Honourable Chief Justice stated at paragraph 9 that the one year and nine month delay in that case “while not *de minimis* or negligible, is well within the extent of delay for which dispensation may be granted by the exercise of discretion.” The Chief Justice went on to refer to *Buck v English Electric Co. Ltd* [1977] 1 W.L.R. 806 in which the English Court of Appeal allowed a delay of 12 years even while stating that a delay of five years would, in the usual case, create a rebuttable assumption of excessive delay.

42. In the same case, the Honourable Chief Justice said at [5]:

“As a matter of the test of proportionality, that pronounced by the English Court of Appeal in *Robinson v St Helens Metrop. B.C.*, it is an important factor for me to consider, in the exercise of my discretion, whether to grant dispensation from the statutory time limit, that there has been a serious effect on the plaintiff’s health or enjoyment of life and employability.”

43. It is important to bear in mind that when considering the prejudice caused by any delay that it is solely the period between the expiry of the limitation period and the commencement of the action that is taken into account (*Fisher*, paragraph 33).



44. When considering the question of prejudice it is relevant to consider when the defendant first had notification of the claim and the opportunity to meet it if he is not permitted to rely on the limitation defence (*Fisher*, paragraph 40).
45. In summary, therefore:
- 45.1 the court has a wide, unfettered discretion under section 39 Limitation Act when considering the facts of the case and the factors in section 39 (3);
 - 45.2 when exercising that discretion the court has to balance the prejudice to the plaintiff from the operation of the limitation period with the prejudice to the defendant of losing its defence;
 - 45.3 the period of delay within which to assess the question of prejudice is between the expiry of the limitation period and the commencement of the proceedings;
 - 45.4 what is of paramount importance is the effect of the delay on the defendant's ability to defend;
 - 45.5 the ultimate burden is on the plaintiff to show that the prejudice to them outweighs the prejudice to the defendant and ultimately that it would be equitable to disapply the statute. Relevant to this will be factors such as the strength and value of the plaintiff's claim along with the impact that the injury has had on the plaintiff;
 - 45.6 there is a burden on the defendant to show that the evidence adduced, or likely to be adduced, by it is, or is likely to be, less cogent because of the delay and that they are thereby prejudiced;
 - 45.7 although the plaintiff's conduct will be relevant, failings by their legal advisors are not necessarily to be attributed to them; and,
 - 45.8 relevant to the question of prejudice is the question of when the defendant first had notice of the claim and the opportunity to meet it.

The parties' submissions

46. On behalf of the Plaintiff in relation to the general exercise of the court's discretion it is submitted that:
- 46.1 the period between the expiry of the limitation period is just over one year and is not substantial;



- 46.2 the claim has significant merit and the Plaintiff has good prospects of success in establishing liability;
- 46.3 the claim is likely to be of significant value (Plaintiff’s counsel made very general reference to the Judicial Studies Board guidelines for lung type disease and suggested that if liability is established, general damages could be in excess of CI\$40,000);
- 46.4 it is evident that the Plaintiff’s condition has had a serious effect on her health and enjoyment of life;
- 46.5 if the limitation period is not disapplied, the Plaintiff will be left uncompensated for a life changing injury and the Defendant will receive a windfall; and,
- 46.6 the Plaintiff has acted reasonably and the Defendant will suffer no prejudice if the limitation period is disapplied.
47. Specifically addressing the S39 (3) criteria the Plaintiff’s submission are as follows:
- 47.1 S39 (3) (a) length and reasons for delay - The delay between the expiry of the limitation period and the commencement of this action was caused by:
- 47.1.1 a failure of the Defendant to respond to the Plaintiff’s letter before action;
- 47.1.2 a short delay in legal aid being granted; and,
- 47.1.3 to the extent that the Plaintiff’s attorneys may be at fault for not issuing the claim in time, the Plaintiff herself should not be punished
- 47.2 S39 (3) (b) prejudice to evidence of defendant - The effect of the delay has not prejudiced the Defendant. The delay is short and the Defendant was on notice of the issues relating to the Plaintiff long before the expiry of the limitation period. Both parties have presented a significant picture of events within the affidavits filed in relation to this application.
- 47.3 S39 (3) (c) conduct of defendant after cause of action arose - It was not unreasonable for the Plaintiff to wait until 2018 when her medical retirement was finalised before commencing legal action against CBC, her employer. If the question of medical retirement had been dealt with more quickly by the Defendant, the Plaintiff might have progressed matters quicker herself. Indeed, the Plaintiff’s position in relation to what is described as “incorrect or ineffective” legal advice from the legal aid office is that not only did it lead her to believe that she had no claim but it also meant that she had no funding to take further legal advice. The Plaintiff delayed seeking legal advice because of what she understood was her pending



claim for workmen's compensation. The failure of the Attorney General to reply to her letter exacerbated this. Finally, the Plaintiff refers to the conduct of the Defendant in returning her to the very workplace that was causing her health problems.

47.4 S39 (3) (d) duration of disability of plaintiff - The Plaintiff was on long term sick leave from around October 2016 and the Plaintiff puts it, at best, that the Plaintiff's condition had a negative effect upon her. It is conceded that it did not prevent her from seeking legal advice.

47.5 S39 (3) (e) extent to which plaintiff acted promptly and reasonably – It is submitted that the Plaintiff has acted reasonably at all times.

47.6 S39 (3) (f) steps taken by the plaintiff to obtain medical or legal advice and nature of that advice - The Plaintiff sought advice and relied on what she was told by the legal aid office in relation to her claim and by her superiors in relation to workmen's compensation.

48. The position of the Defendant is as follows:

48.1 S39 (3) (a) length and reasons for delay - On 12 October 2016 the same day when the Plaintiff's application for legal aid was refused, Dr Glatz wrote a letter reiterating his opinion that the Plaintiff's condition was being caused by her workplace, that it had not been possible to control her allergic response and documenting her need for medical retirement. The Defendant says that the Plaintiff should have submitted that letter to the legal aid office and asked it to re-consider her application.

48.2 It was unreasonable for the Plaintiff to delay filing these proceedings because she thought that a claim for workmen's compensation had been made. The Defendant's position is that no such application was made and that the Plaintiff was never told that CBC would make any such application. It was open to the Plaintiff to make her own application for workmen's compensation pursuant to section 26 of the Workmen's Compensation Act and she failed to do so.

48.3 S39 (3) (b) prejudice to evidence of defendant – Many of the assertions made by the Plaintiff in her affidavit are unsupported by documentary evidence and can only be corroborated or contradicted by witness evidence and that some of the assertions go to the fundamental issues in the case. A year of delay in filing means a year longer for memories to fade, potential witnesses to move on and for documents to be lost. The Defendant says that important evidence on behalf of both parties would be prejudiced by the non-trivial delay of one year.

48.4 S39 (3) (c) conduct of defendant after cause of action arose – The Plaintiff had in her possession every document needed to show her injury prior to 12 October 2016 or shortly



thereafter and should have taken steps at that point to bring proceedings. The letter before action was sent by KSG after the limitation period had expired so a failure to reply is irrelevant.

- 48.5 S39 (3) (f) steps taken by the plaintiff to obtain medical or legal advice and nature of that advice – There is unexplained delay between the Plaintiff first consulting KSG and the expiry of the limitation period. KSG should have been aware that time was running and a protective writ should have been filed.

Analysis and conclusion

49. The most logical way to approach the question of the exercise of discretion in this case is to follow the factors set out in section 39(3) considering at the same time what other factors, if any, might be relevant. Whilst conducting that exercise, I bear in mind the respective burdens of proof that fall on the Plaintiff and Defendant.
50. Starting with the question of delay, the Plaintiff is criticized for not commencing proceedings when the Defendant says she had sufficient medical evidence to do so, well before the expiry of the limitation period. I accept the evidence from the Plaintiff that after the refusal of legal aid in 2016, she was left with the impression that she did not have grounds to bring a legal claim against the Government. As she has explained, she also did not have the resources to pay for further legal advice. The Plaintiff was also waiting for the results of the workmen's compensation claim that she thought had been made, despite the confusion and factual dispute that appears to have arisen about that.
51. When the Plaintiff did seek further advice on 19 August 2019, the limitation period was allowed to expire on 12 October 2019 without a protective writ being filed. There is no explanation for that other than it was the fault of the Plaintiff's attorneys. Further delay was caused whilst the Plaintiff's attorneys waited for a response to their letter before action dated 11 December 2019. Legal Aid was not applied for until September 2020. Although it is surprising that there was no response, I do not think that it is reasonable to blame any part of that delay on the Defendant's lack of response to the letter before action. Again, this appears to be the responsibility of the Plaintiff's attorneys. Having said that, in my view there are no grounds to criticize the Plaintiff for the delay after she instructed her current attorneys. In the circumstances of this case, therefore, which are not dissimilar to those in *Fisher*, I do not think that it is appropriate to visit the failings of her lawyers on the Plaintiff.



52. The next question is the extent to which, having regard to the delay, the evidence to be adduced by either party and, in particular, the Defendant is or is likely to be less cogent than if the action had been commenced within the limitation period. Affidavits have been filed on behalf of both parties. Both are detailed and deal with the various facts and issues clearly and without any qualification as to memory or loss of records. In particular, the affidavit sworn by Ms Lynch exhibits a great many documents relating to the Plaintiff's employment and the environmental health issues relating to the CBC premises. Ms Lynch does not suggest that the delay of just over a year has had any impact on either the evidence available to the Defendant or its ability to defend these proceedings. Mr Smith on behalf of the Defendant made reference in his oral submissions to the various factual issues that he says are in dispute in this case and which may require evidence from witnesses. That may be the case, but neither he, nor Ms Lynch identified any witnesses who because of the delay might be unable to recall events or who were no longer available. Mr Smith submitted that documents might have been lost as a result of the Government's document destruction policy. The policy was not in evidence and there were no specifics given about any documents that were effected by any such policy.
53. In my view, this is an appropriate point to consider the question of notice and when the Defendant could be said to have had notice of the Plaintiff's claim. It is in evidence that as early as 2013, the CBC was aware that the health of its employees could be adversely affected by environmental factors such as mold. From 2014, the CBC was aware of the particular health concerns of the Plaintiff and received multiple letters from Dr Glatz to that effect.
54. Significantly, exhibited to Ms Lynch's affidavit is an exchange of emails in March 2017 between Ms Lynch and the Ministry of Finance & Economic Development in relation to the medical retirement of the Plaintiff. The Financial Secretary, Mr Kenneth Jefferson was copied in to the exchange. In one email dated 20 March 2017 (Exhibit "SL1" page 138) Ms Anne Owens, the Senior Assistant Financial Secretary and Information Office indicated to Ms Lynch and the Financial Secretary that she had no objections to the early retirement and goes on so say:

"On another note, the attached letter from HSA's Faith Gealey [the speech therapist treating the Plaintiff] states "This patient's voice deficits are directly correlated to the significant amount of mold and other airborne environmental allergens that she is exposed to at her work facility".



Has it been proven that Ms Robinson's medical condition resulted from her work environment? Have tests been conducted to prove this and to eliminate her home environment?"

55. In my view, by at the latest 20 March 2017, the CBC and the relevant Ministry were on notice that there was a potential claim by the Plaintiff that she had suffered injury as a result of the conditions of her work place. On that basis, the CBC has had ample opportunity to document and record the evidence in relation to this claim and I do not find that it has established that it has suffered or will suffer any prejudice as a result of the delay.
56. I do not think that the conduct of the Defendant after the cause of action arose is of any particular materiality for the purposes of the question of balancing the respective prejudice to the parties. The Defendant did not respond to the Plaintiff's letter before action but the Plaintiff had available to her all the information necessary to issue proceedings.
57. Mr Wheeler accepted that there was nothing about the Plaintiff's condition that prevented her from instructing counsel. Based on the facts that have been set out above, I do not think that the Plaintiff can be criticized for the way that she approached obtaining medical and legal advice and the bringing of these proceedings.
58. I also take into account the strength and value of the Plaintiff's claim along with the impact that the injury has had on her. It is not for the court at this stage to do more than observe that the Plaintiff appears to have a claim against the Government with reasonable prospects for success for an amount of damages that is likely to be significant to her. It is also clear, in my view, that the Plaintiff's health, has deteriorated as has her ability to work and her enjoyment of life.
59. Taking into account all of these factors and the circumstances of this case, in the exercise of my discretion, I find that the Plaintiff has discharged the burden on her to show that the prejudice to her of allowing the Defendant to rely on its limitation defence would far outweigh any prejudice to the Defendant if this action is allowed to continue. On that basis, I make the direction sought in paragraph 2 of the originating summons that pursuant to section 39 of the Limitation Act and O32, r 9A, section 13 of the Act should not apply to this action.



60. There is no order for costs as Regulation 10(2) of the Legal Aid Regulations, 2016 provides: “*No order for costs in favour of an assisted person may be made against the Crown*”.

A handwritten signature in black ink, appearing to read "Alistair Walters", written over a horizontal line.

**Honourable Mr. Justice Alistair Walters, (Actg.)
Judge of the Grand Court**