Appeal No. UKEAT/0180/16/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 15 November 2016

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

MS U EDOMOBI — APPELLANT

LA RETRAITE RC GIRLS SCHOOL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR THOMAS COGHLIN (of Counsel) Instructed by: South West London Law Centres Merton & Sutton 112 London Road Morden London SM4 5AX
For the Respondent	MS SOPHIA BERRY (of Counsel) Instructed by: Law By Design Limited Kingsley Hall 20 Bailey Lane Manchester Airport Manchester M90 4AB

SUMMARY

JURISDICTIONAL POINTS - Extension of time: just and equitable

The Claimant appealed against a decision of the Employment Tribunal ("the ET") not to extend the time for bringing her discrimination claim. The Employment Appeal Tribunal held that the ET had not misdirected itself in law and that its decision was open to it on the facts. The appeal was dismissed.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

Introduction

1. This is an appeal from a Decision of the Employment Tribunal sitting at London South ("the ET"). The ET consisted of Employment Judge Elliott ("the EJ"). In a Decision announced on 23 February 2016, the ET held that the Claimant's discrimination claims were presented outside the statutory time limit and that it was not just and equitable to extend the time for bringing them. At the Claimant's request the ET sent Written Reasons to the parties on 24 February 2016. I shall refer to the parties as they were below. The Claimant was represented today by Mr Coghlin of counsel, appearing under the auspices of the Bar Pro Bono Unit, and the Respondent by Ms Berry of counsel. I am grateful to both counsel for their lucid written and oral submissions.

The Claimant's Claims and the Issues for the ET at the Hearing

2. In her claim form the Claimant made claims of unfair dismissal, age and race discrimination, breach of contract, unlawful deductions from wages and failure to provide written particulars of employment. I note that in paragraph 15 of the rider to her claim form the Claimant said that the Respondent's panel that dealt with her complaint knew she was making a complaint of discrimination on the grounds of age and race and upheld her complaint. The Respondent was therefore bound by that decision, and she relied on it for the purposes of her complaint. Alternatively, she said the effect of the panel's decision was that there were no grounds justifying the Respondent's complaints against her, there were no valid reasons for dismissing her, it followed that the complaints were made in bad faith, there must be some other reason why she was dismissed, and that the only reasonable inference was that it was on the grounds of her race and age. Paragraphs 18 and 19 of the rider acknowledged that the claim

had been brought out of time. The text gave two explanations for that: (1) a lady at ACAS had advised her in a conversation not to bring her discrimination claims until she had exhausted the grievance procedure, and she believed that she should not start proceedings until she had done that; and (2) it was reasonable to extend time because her complaints had been upheld but the Respondent had given her no remedy.

3. The unfair dismissal claim was struck out in due course because the Claimant had not been employed for long enough to have the right not to be unfairly dismissed. She later withdrew her claims for unlawful deductions from wages and for failure to provide written particulars of employment because she accepted that she was not an employee of the Respondent. She relied therefore at the hearing on her discrimination claims only. The only issue at the hearing on 23 February was the time point.

4. The Respondent had accepted before the hearing both that the Claimant was a "worker" for the purposes of the **Equality Act 2010** ("the 2010 Act") and that she was a "contract worker" for the purposes of section 41 of the **2010 Act**. The Respondent was represented by counsel; the Claimant represented herself. The EJ said that there was no bundle of documents for the hearing. The Claimant handed the EJ a copy of an email dated 16 March 2015 from ACAS to her. The EJ was shown, but not given, an incomplete copy of the Claimant's letter of complaint to the Respondent dated 16 March 2015. Pages 2 and 3 of that letter were missing. It is clear from an agreed note of the Claimant's evidence that the EJ was told by the Claimant that her letter of complaint was similar to the grounds in the rider to her ET1. The EJ heard evidence from the Claimant. She did not produce a witness statement. I am told by Ms Berry, who was at the hearing, that the parties arrived at the hearing not being clear about what was to be dealt with at the hearing and there having been no directions from the ET about what

preparations the parties should make for that hearing. That perhaps explains why there was no bundle of documents and no witness statement from the Claimant.

The Facts Found by the ET

5. The ET found that the Claimant worked for the Respondent as a Learning Support Assistant at its school in Clapham. She did one-to-one work with children who have special educational needs. She worked there from 20 January 2014 until 10 March 2015; so she did not have two years' continuous service. She was an agency worker. She was supplied to the Respondent by the Tradewind Recruitment Agency.

6. A claim form was presented on 3 December 2015. The primary time limit had expired on 9 June 2015. ACAS was first notified by the Claimant on 19 October 2015; four months and ten days after that period had expired. ACAS issued an early conciliation certificate on 13 November 2015. Because the primary time limit had expired, the ET noted, the early conciliation provisions in section 140B of the **2010 Act** did not operate so as to extend the time for bringing the claim. The EJ said that the Claimant knew when she presented her claim that it was out of time. The EJ quoted from paragraphs 18 and 19 of her grounds of complaint, which I have already referred to.

7. The EJ observed at paragraph 16 of the Decision that the Claimant was not an employee and therefore did not have the benefit of the grievance procedure. The EJ revisited that point in two other parts of the Decision. At paragraph 22 she said:

> **"22. The claimant pursued a complaint against the school. As she was not an employee she knew it was not a grievance but a complaint. …"**

A At paragraph 37 the EJ said this:

> **"37. … She was not in any event using a grievance procedure as she was not an employee. She was an external complainant."**

B Mr Coghlin submitted that there are three different ways of reading these references to the fact that the Claimant made a complaint rather than a grievance. I do not consider I need to resolve this issue, as it is not material to my decision.

C 8. The EJ noted that the Claimant was told on 10 March that her contract had been terminated. She was shocked and upset. She did not know if she could afford legal advice. She contacted the Citizens Advice Bureau, the Free Representation Unit and ACAS. She spoke

D to ACAS on 16 March, as evidenced by the email of 16 March. This, the EJ said, was a standard email not tailored specifically to the Claimant. It came from a no-reply email address and was addressed to "Dear customer". It provided links to "Grievances" and to the "ACAS

E Publications landing page".

9. The Claimant wrote a detailed six-page letter of complaint to the Respondent on 16 March, and, as I have said, we know from the agreed Notes of Evidence that she accepted that

F this was similar to the grounds in the rider to her ET1. On page 5 of her complaint she said that she was:

G > **"… fully aware of the legislation surrounding agency workers and dismissal procedures and although I was an agency worker I had not committed gross misconduct so would not expect to be treated and dismissed in such a humiliating manner. …"**

10. The EJ recorded at paragraph 19 of the Judgment that the Claimant had said that she had been told by ACAS that she had to exhaust the internal grievance procedure before she could

H take the matter any further. The EJ recorded her evidence that she spoke to the CAB. That evidence was that the CAB told her about grievance procedures but not about the Employment

Tribunal. Her evidence was that her reason for calling was that she knew she was a contract worker and wanted to know what she could do. Her evidence, as recorded at paragraph 20 of the ET's Judgment, also was that in March 2015 FRU had advised her to file a grievance and that she had to go through ACAS because she could not go "straight to trial". She said that when she went to FRU she felt that she would need to go to court because she felt "extremely discriminated against". They told her she had to go through ACAS conciliation first. She asked what right she had to go to court, as she saw this as a last resort and not something you do first of all. The EJ recorded that the Claimant knew that what had happened to her was unlawful and was discrimination. She also knew about the Employment Tribunal. She did her own research on the internet about how to pursue it. She found out about FRU by searching on Google (see paragraph 21 of the EJ's Judgment).

11. The EJ recorded that the Claimant pursued a complaint against the Respondent. She received the outcome of the complaint in June 2015. She appealed. There was a delay in the appeal outcome. It was sent to her in a letter dated 28 September 2015. The EJ recorded that she (the EJ) was not shown that letter at the hearing. The Claimant's evidence was that her complaints were upheld. She received the letter on 29 or 30 September 2015.

12. She then called FRU and spoke to an adviser. She said that that person did not tell her about the time limit. She called FRU again at the beginning of October 2015. She spoke to a FRU administrator called Claire Anslow, who made an appointment for her with Mr Andrew Hillier QC. She saw him at Sutton & Merton Law Centre on 18 November 2015. He told her that her claim was already out of time. By that time her early conciliation had finished. A certificate of early conciliation was issued on 13 November 2015. I note that, as the EJ recorded, the early conciliation certificate states that ACAS received the early conciliation

notification on 19 October 2015. The Claimant, the EJ said, then waited just over two weeks before presenting her claim even though she knew it was out of time. Mr Hillier QC told her how to submit the claim form online. She had had some concerns about paying the fee but found that she could claim an exemption.

13. The EJ found that the Claimant is an intelligent woman. She has an undergraduate degree from Goldsmiths College, University of London, in Anthropology and Sociology. She is part of the way through a Master's degree at Oxford University in Psychodynamic Counselling. She worked full-time as a Teaching Assistant from September 2015. She was not working, however, at the time of the ET hearing.

The ET's Reasons

14. The ET quoted section 123 of the **2010 Act** at paragraph 29 of the Judgment. The EJ stated five correct propositions in the following paragraphs of the Judgment: (1) the "just and equitable" test is a broader test than the "reasonably practicable" test in the **Employment Rights Act 1996**; (2) it is for the Claimant to satisfy the ET that it is just and equitable to extend time; (3) the ET has a wide discretion; (4) there is no presumption that the ET should exercise the discretion in favour of a Claimant - it is the exception rather than the rule (**Robertson v Bexley Community Centre** [2003] IRLR 434 CA); and (5) there is no general principle that an extension of time will be granted where the delay is caused by an internal grievance or appeal hearing (**Apelogun-Gabriels v London Borough of Lambeth** [2002] IRLR 116 CA). There is no challenge from Mr Coghlin to those five propositions of law.

15. At paragraph 31 of the Judgment the ET referred to **British Coal Corporation v Keeble** [1997] IRLR 336 EAT, one of the many cases in which the time limit has been

considered. The ET summarised this decision as showing that the ET should consider the prejudice that both parties would suffer and should have regard to all the circumstances, including the length of and the 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 co-operated with any request for information, the promptness with which the Claimant acted once he or she knew of the facts giving rise to the cause of action and the steps taken to get professional advice once she knew of the cause of action. Those factors are derived from section 33 of the **Limitation Act 1980** ("the 1980 Act").

16. Mr Coghlin draws attention to paragraph 33 of the decision of the Court of Appeal in **London Borough of Southwark v Afolabi** [2003] ICR 800, in which Peter Gibson LJ said that it was not an error of law for the Tribunal not to go through all of the matters listed in section 33(3) of the **1980 Act** because Parliament limited that provision to actions relating to personal injuries or death. Peter Gibson LJ did not doubt the utility of considering such a checklist, but he did not consider it could be elevated into a requirement on the ET to go through such a list in every case:

> **"33. … provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion. …"**

17. The EJ said that this was not a case about a continuing act of discrimination; it concerned the termination of the Claimant's contract on 10 March. *Prima facie,* then, the time limit expired on 9 June 2015. The claim was nearly six months out of time. The Claimant had consulted ACAS, FRU and the CAB. She had done her own research. The EJ found that the Claimant decided to pursue a claim in March 2015 because she considered that what had happened to her was unlawful and was direct discrimination. She understood that there were steps she had to take before she could take the case to court. At paragraph 37 of the Judgment

the EJ said that she found it implausible that all three of the reputable organisations the Claimant had consulted had failed to tell the Claimant about the time limit and that all three organisations gave her the same incorrect advice that she had to exhaust the internal grievance procedure first. She was not, the EJ said, using the grievance procedure as she was not an employee but an external complainant. The EJ recorded that the Claimant had done her own research online. She had been given a link to ACAS publications. A short search on that link, the EJ said, would have informed her about the three-month time limit. The EJ found that the Claimant knew it was possible to take action as early as March 2015. She was an intelligent woman, and, although she is not a lawyer, litigants in person regularly act for themselves in the ET and find out about the time limits through their own research. It is not a difficult piece of information to find out.

18. Even when the Claimant had the outcome of her appeal on 29 or 30 September, it still took her over two months to present her claim. She was advised by Mr Hillier QC on 18 November 2015. He told her that she was out of time and how to present a claim. Even then, it took her over two weeks to present her claim. She did not act promptly even though her claim was already considerably out of time. The EJ recorded the Claimant's submission that it was in the public interest to allow her claim to go forward. The EJ agreed that it was important for her legal rights to be upheld but that did not allow the EJ to disregard a time limit enacted by Parliament. There is also a public interest in enforcing time limits and in certainty in litigation (see paragraph 42 of the Judgment). The EJ found that the Claimant knew or ought reasonably to have known about the time limits in March 2015 when she made the initial enquiries of three reputable organisations and was capable of doing her own research. She formed the view as early as March that going to court was a potential means of redress. She knew about the ET

A and considered that the Respondent's treatment of her was unlawful and amounted to direct discrimination. She therefore knew in March 2015 the facts giving rise to her cause of action.

B 19. The EJ distinguished the present case from the case of **Norbert Dentressangle Logistics Ltd v Hutton** UKEATS/0011/13. In that case, this Tribunal did not interfere with the decision of an ET to extend time for six weeks beyond expiry of the primary limitation period. The evidence of the Claimant in that case was that he felt unable to function and had C put in a claim as soon as he felt able to. Langstaff P (as he then was) had said that that was undoubtedly favourable to the Claimant but the ET had not erred in law as this was an assessment for the ET having heard the Claimant's evidence. In this case, said the EJ, the D Claimant had not said she was unable to function. She was working full-time from September to December 2015. Her evidence was not that she was unwell but that she did not know about the time limits and was following advice to pursue a grievance first.

E 20. At paragraph 45 of the Judgment the EJ found on the balance of probabilities that it was likely that one or more of the agencies consulted by the Claimant in March 2015 told her about time limits. Even if they did not, the Claimant did not take any steps to find out what she F needed to do in order to pursue the litigation which had been in her mind since March 2015. Even on her case that she needed first to exhaust the complaints procedure, she did not act with any promptness once she had her appeal outcome, nor did she act with any promptness once Mr G Hillier QC told her that her claim was already out of time. In those circumstances, the EJ found, it was not just and equitable to extend time.

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The Law

21. Section 123 of the **2010 Act** provides that subject to the early conciliation provisions, which, as the EJ observed, do not apply here, a claim may not be brought after the end of the period of three months starting with the date to which the complaint relates or such other period as the ET thinks is just and equitable. There have been many decisions of this Tribunal and of the Court of Appeal in which the discretion to extend time has been considered. The cases are well known. A range of factors are potentially relevant. What factors are relevant on the facts on a particular case is, subject to **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1948] 1 KB 223, a question for the ET, as I think Mr Coghlin accepted in his submissions. In other words, the ET will not err in law if it does not consider a specific factor unless no reasonable ET properly directing itself in law could have left that factor out of account (see **Department for Constitutional Affairs v Jones** [2007] EWCA Civ 894; [2008] IRLR 128 CA at paragraph 50 per Pill LJ).

22. **Keeble**, to which the EJ referred, was a case in which this Tribunal had referred to the checklist in section 33(3) of the **1980 Act** as a useful starting point. In **Habinteg Housing Association Ltd v Holleron** UKEAT/0274/14 Langstaff P (as he then was) considered an appeal from a decision of an ET, among other things, to extend the time for bringing a discrimination claim. The ET referred to the checklist in **Keeble**. It took into account the prejudice to the parties, the length of the delay and the fact that the Claimant must have received legal advice. There was no explanation in the Claimant's witness statement for the lateness of her claim. Langstaff P said that the first consideration from that checklist is the reason for and extent of the delay. There must be some evidence, even by inference, from which the reasons could be shown; here, there was none. The relevant act was on 4 December. The Claimant did not present her claim within three months of that date. The ET simply

extended time without saying why. Langstaff P held that that was the wrong approach. The Claimant had not explained why she presented the claim late. Langstaff P held that if there was no explanation for the delay from the Claimant the ET (judgment, paragraph 42):

> **"42. … could have come to no other conclusion than that the extension should be refused. There was no basis upon which it could be permitted."**

23. Langstaff P adopted a similar approach in **Smith-Twigger v Abbey Protection Group Ltd** UKEAT/0391/13 at paragraphs 17 and 18. In **Pathan v South London Islamic Centre** UKEAT/0312/13 at paragraphs 17 and 18 HHJ Shanks, sitting with two lay members, considered an appeal against a decision of an ET that dealt both with the merits of the claim and with the time point. This Tribunal was satisfied that the ET had not stated the law correctly in paragraph 19 of its Decision. The ET had said that it was for the Claimant to explain the delay and show why the ET should exercise its discretion to extend time. The ET held that the Claimant had shown no good reason for leaving it until she did to present her claim. She was intelligent and had taken advice in order to find out the time limit. The Claimant submitted that the ET had erred because it did not consider relative prejudice. That was an important factor that should, in the normal course, be considered by an ET. This Tribunal allowed the appeal on that point and remitted the time issue to the ET.

24. The decisions in **Habinteg** and **Pathan** were considered by another division of this Tribunal in **Rathakrishnan v Pizza Express (Restaurants) Ltd** [2016] ICR 283 EAT. In that case, the ET refused to extend the time for the making of a discrimination claim. This Tribunal allowed the Claimant's appeal against that decision and remitted the question to the ET. The Claimant had presented his ET1 within three months of his dismissal on 14 June 2013, but one of his claims, for reasonable adjustments, related to a period that ended 17 days before the three months preceding the date when the ET1 was presented. The Claimant was recalled to give

evidence about why this part of his claim was late. His reason was fear of recriminations because he was still working for the employer. The ET could find no evidence to support that. In fact, he had raised various long grievances in the course of his employment. He had also consulted solicitors shortly after he was dismissed and had had ample opportunity to find out about those time limits. He complained of suffering disability discrimination since 1992 in a letter dated 21 July 2013. The ET declined to extend time. The Claimant submitted on appeal that the ET had erred in law in not taking into account the balance of prejudice between the parties and/or the merits of the reasonable adjustments claim, the ET having heard all of the evidence about that at the hearing. The Respondent submitted that the ET's rejection of the Claimant's explanation for the delay was capable of being, and was, decisive.

25. HHJ Peter Clark accepted that if a Claimant advanced no explanation for any delay he was not entitled to an extension of time (judgment, paragraph 9). HHJ Peter Clark suggested that a case where a Claimant advanced an explanation that was rejected was materially different. He noted that in the **Afolabi** case the Court of Appeal held that in deciding whether it is just and equitable to extend time the ET is not obliged to run through the matters listed in section 33(3) of the **1980 Act** provided no significant factor is left out (judgment, paragraph 12). HHJ Peter Clark accepted at paragraph 13 of the judgment that prejudice and the merits were relevant. He was unable to accept that a Claimant's failure to explain delay will inevitably result in a refusal to extend time (paragraph 16 of the judgment). He held that on the particular facts of the claim before him the balance of prejudice and the merits of the reasonable adjustments claim were relevant and should have been considered by the ET; they were wrong not to do so. The claim was only 17 days out of time. The Respondent faced other claims, which were in time. They led evidence on the reasonable adjustments claim, and there was no suggestion that the delay made it harder for them to defend the claim. The ET had heard all of

A the evidence and were in a good position to assess the merits and otherwise of the claim (judgment, paragraphs 17 and 18).

B **Discussion**

26. There are three grounds of appeal. First, the ET failed to take into account relevant considerations. There are said to be three relevant considerations.

C (1) The balance of prejudice: this, it is said, necessitated taking into account the merits of the Claimant's case. This was a discrimination case with unusually strong merits. On any sensible reading of its letter to the Claimant, the Respondent's panel had upheld her complaint of discrimination.

D (2) The Claimant's use of the Respondent's complaints procedure: the ET failed fairly to weigh this in the balance when considering justice and equity.

(3) The fact that a significant part of the delay was taken up with early conciliation.

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27. The second ground of appeal is that the ET failed to give adequate reasons for its conclusions. The third ground of appeal is that the ET's reasoning about the advice given to the

F Claimant was wrong. The EJ in paragraph 37 of the Judgment misstated the effect of the Claimant's evidence. Only ACAS had told her that she had to exhaust an internal grievance process first (see paragraphs 15 and 19 of the EJ's Judgment). The Claimant did not say she

G was given this advice by FRU and the CAB. She was told by FRU that she had to go to ACAS for early conciliation first (see paragraph 20 of the Judgment). The CAB told her about grievance procedures but not about the Tribunal.

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28. Mr Coghlin accepted in his submissions that the ET does not necessarily err in law if it fails to deal with a "**Keeble**" factor unless that factor is a significant factor, and he accepted that whether a factor is significant is subject to **Wednesbury**, a matter for the ET rather than for this Tribunal. He also accepted that it is not necessary for an ET to spell out the balance of prejudice in every case. The balance of prejudice including the merits may on particular facts be a necessary part, however, of the ET's analysis. He accepts that in many cases an ET will not be in a position to make such an assessment.

29. So far as the merits of this case are concerned, he said that it was clear from the notes of evidence that the ET knew that the ET1 and the Claimant's letter of complaint of 16 March raised the same matters. He submitted that there was therefore a close relationship between the Claimant's letter of complaint and the ET3. He submitted that it was therefore clear that in upholding the Claimant's complaint the Respondent was admitting much, if not all, of the complaint and therefore much, if not all, of her claim. The complaint, he submitted, is clearly a complaint of race discrimination (see the introductory passage and the last sentence on page 1, paragraph 6 on page 4, and the penultimate paragraph on page 5 of the letter of complaint). He submits, given that the Respondent's panel upheld the complaint, that this is clearly a meritorious complaint of discrimination on the grounds of race.

30. Ms Berry, on the other hand, submits that the ET3 shows that the allegation of discrimination was disputed and that it was disputed that the panel in upholding the complaint admitted that the Respondent had discriminated against the Claimant on grounds of race. I have not found this altogether easy, but my conclusion is that, well though Mr Coghlin made his points, on the pleadings, whatever else may not have been in dispute the Respondent was disputing the allegation of discrimination on grounds of race. I do not consider, therefore, that

A the merits of this claim were so clear that the ET was bound to make an assessment of those and then to factor that into the balance of prejudice. **Pathan** and **Rathakrishnan,** on which the Claimant relies, are both cases in which the ET heard the claim on the merits at the same time as it heard the time point. They are both cases in which the ET, having heard all of the B evidence on the merits, was well placed to assess those. It may be that in such cases an ET may err by failing to take into account the merits of a claim when it considers extending time even when the Claimant puts forward no good reason for any delay in presenting the claim form or C does so but his or her evidence is not believed. This is not such a case.

31. In any event, **Habinteg** was also a case in which the ET had heard the claim on the D merits. If I had to choose between the approach in **Habinteg** and the approach in those two cases, I would choose the approach in **Habinteg**. The purpose of the time-bar is to promote finality and certainty. The structure of section 123 is that the claim may not be brought outside the time limit unless the Claimant persuades the ET that it is just and equitable to extend time. I E find it difficult to see how a Claimant can discharge the burden of showing that it is just and equitable to extend time if he or she simply does not explain the delay, nor do I understand the supposed distinction in principle between a case in which the Claimant does not explain the F delay and a case where he or she does so but is disbelieved. In neither case, in my judgment, is there material on which the ET can exercise its discretion to extend time. If there is no explanation for the delay, it is hard to see how the supposedly strong merits of a claim can G rescue a Claimant from the consequences of any delay.

32. In this case, however, I accept Ms Berry's submission that the ET was not in a position to assess the merits of the claim. The ET noted the assertion in the ET1 that the Respondent's H panel had upheld the complaint and her evidence to that effect (see paragraph 22 of the ET's

Judgment). The Claimant did not bring the panel's letter to the hearing or rely on it to show the merits of her claim. The point is that on the pleadings the discrimination claim was clearly disputed by the Respondent, even if it is not entirely clear to what extent the Respondent accepted the underlying factual allegations in the Claimant's complaint.

33. I also reject the submission that the ET's reasoning on the balance of prejudice issue is inadequate or erroneous. There are three reasons why. First, the ET noted the potentially relevant factors in paragraph 1 of the Judgment by reference to the decision in **Keeble**. Top of that list is the balance of prejudice each party will suffer. Secondly, the ET set out the Claimant's case for extending time at paragraph 15 of its Judgment. This referred expressly to the perceived merit of her claim. Thirdly, the ET referred expressly to (in paragraph 42 of the Judgment) and, in my judgment, balanced, the Claimant's submission that there was a public interest in letting her claim go forward against prejudice to the Respondent. The EJ accepted that it was important to uphold legal rights but as against that there was a need for legal certainty. It seems to me that, as I say, this is an express recognition of, and attempt to balance, the prejudice to either side that would flow from the decision that the ET had to make.

34. Mr Coghlin submits that two further relevant factors were left out of account in the ET's analysis and that its analysis is therefore flawed by those omissions. The first of those is the Claimant's use of the grievance procedure. He submits, relying on paragraphs 11 and 16 of **Apelogun-Gabriels**, that this factor must be "fairly considered" by the ET and put in the balance when the ET applies the just and equitable test. In my judgment, this factor was considered and weighed by the ET to the extent that it was capable of being relevant. The first point is that the ET recognised that this was a live issue, hence the reference in paragraph 33 of the Judgment to the decision in **Apelogun-Gabriels**. The difficulty, in my judgment, for the

Claimant on this aspect of the case is that even if one discounts the entire period during which the Claimant was pursuing her complaint there was still a period of unexplained delay of nearly two months after her complaint had been resolved. The ET specifically found that the Claimant did not act with promptness after 29 or 30 September when she received the appeal outcome. It took her over two months to present her claim (see paragraphs 40 and 46 of the Judgment). In paragraph 46, in effect, the ET is saying, taking the Claimant's case at its highest, she did not act promptly once she got the decision on the appeal.

35. Mr Coghlin submits that the second relevant factor that was not taken into account by the ET is that a significant part of the delay was taken up with early conciliation. That period is 19 October to 13 November. The difficulty, it seems to me, for the Claimant in relation to this point is that there was no explanation from her for the delay between 29 or 30 September and 19 October - Mr Coghlin said that there was no evidence about it - and no explanation for the time that it took after 13 November for her to issue the claim at a point when all the ducks were in a row, both because she had the outcome of her complaint and because she had gone through the early conciliation process. I do not consider on the facts of this case that the ET was required to do more than it did to factor this period into its overall analysis.

36. To summarise on this point, in my judgment the ET set out the Claimant's case for extending time and her evidence in support of that case. It referred expressly to the perceived merit of her claim, and it referred to her submission that there was a public interest in letting the claim go forward. In my judgment, on these facts, the ET was required to go no further than it did in the three respects identified by Mr Coghlin in his submissions on ground 1. Instead, the EJ was entitled to focus, as she did do, on the Claimant's evidence about what she did during

the period that elapsed between her dismissal and the presentation of her claim and to focus on the period between the receipt of the appeal outcome and the presentation of the claim.

37. I can turn now to ground 2, which is the Reasons challenge. Mr Coghlin frankly conceded that in effect it was a back-up to ground 1, and it follows from what I have said so far that I consider that the ET did give adequate reasons for its decision. It directed itself correctly in law, and it explained why it considered that it was not just and equitable to extend time. The Claimant knew why the ET had made this decision: it was not just and equitable to extend time after such a long delay in circumstances where she knew, or ought to have known, about the time limit in March 2015 and, even if she did not know that, in circumstances where she did not act promptly, first after getting the decision on her complaint, and secondly after being advised by Queen's Counsel that her claim was out of time and how to go about submitting a claim online.

38. I turn now to ground 3. In my judgment, the difficulty that the Claimant faces on this ground is that even if I were to assume that the EJ's approach to the Claimant's evidence about the legal advice that she received was mistaken on the ET's findings, and in particular the summary of those findings in paragraph 46 of the Judgment, she did not act promptly after receiving the outcome of her appeal in late September, and once she got the early conciliation certificate and after even on her own case she had been advised by Queen's Counsel both that time had expired and how to lodge a claim online she did not act with promptness either (see paragraphs 41 and 46 of the Judgment). More than two weeks elapsed between that advice and the presentation of the claim. The EJ was effectively saying that that further delay was unexplained. When combined with all of the earlier delay, that entitled the ET to refuse to

A extend time. It follows that any misdirection or inconsistency in the Reasons about the precise content of the advice that the Claimant received is immaterial.

B 39. Even if I were to assume that the EJ did not accurately reflect in her conclusions the nuances of the Claimant's evidence about the advice she received about presenting a grievance and early conciliation, the brutal fact is that the ET found that the Claimant knew or ought to have known about the time limits in March 2015 either from the agencies she consulted or from her own researches. She knew the facts giving rise to her cause of action then, as the EJ specifically found. The EJ found on the balance of probabilities that it is also likely that the Claimant was advised about time limits by one of the three agencies she consulted. Even if she was not so advised, the ET found, she did not take any steps to find out how to bring the claims that had been on her mind since March.

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E **Conclusion**

40. For those reasons, it seems to me that there is no material misdirection or error in the ET's approach. It follows that I dismiss the appeal.

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