EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss N Coward	AND	Royal Cornwall Hospitals NHS Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin ON 20 March 2017

EMPLOYMENT JUDGE N J Roper **MEMBER** Mr J H Williams
(Mr G Jones having recused)

Representation

For the Claimant: **Mr T Styles, Consultant**
For the Respondent: **Mr D Dyal of Counsel**

JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claims for unfair dismissal and breach of contract were presented out of time and are dismissed.

REASONS

1. In this case the claimant Miss Norma Coward claims that she has been unfairly dismissed, and that the principal reason for this was because she had made protected disclosures. She also brings a claim for breach of contract in respect of her notice pay. The respondent contends that the reason for the dismissal was gross misconduct, and that the dismissal was fair, and denies the claims. The respondent also asserts that the claims are out of time.
2. This matter was listed for a full main hearing today but the parties consented to the following: first that the issue of whether the claimant's claims were presented out of time should be dealt with initially as a preliminary issue; secondly that there was no separate claim of public interest disclosure detriment arising from the appeal process and that therefore time started running for the claimant's unfair dismissal and breach of contract claims with effect from the date of dismissal; and thirdly that Mr Jones should recuse himself as a member of the tribunal panel (because one of the claimant's potential witnesses knew him) and that the preliminary issue should be determined by a tribunal panel of two consisting of the Employment Judge and Mr Williams, the remaining member.

3. We have heard from the claimant. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The claimant was employed by the respondent NHS Trust as a senior midwife for many years until her summary dismissal for gross misconduct which was effective on 11 December 2015. She was suspended on full pay and subjected to an investigation into five separate allegations of gross misconduct. The letter calling her to a disciplinary hearing made it clear that if proven the allegations might amount to gross misconduct. The letter of dismissal made it clear that Allegations 1 and 3 were upheld and that she was dismissed by reason of gross misconduct. Allegation 2 had not been upheld, and Allegations 4 and 5 were expressed to have been upheld but warranted a final written warning, and not dismissal. The claimant appealed against the findings of gross misconduct only, and it was clear from her appeal and the minutes of the appeal hearing that the claimant knew that Allegations 1 and 3 had been held to have been gross misconduct.
5. The appeal hearing took place on 26 February 2016, and the decision of the appeal panel was communicated to the claimant on 14 March 2016. The appeal panel decided to uphold the claimant's appeal in respect of Allegation 3, but rejected her appeal against the finding that Allegation 1 amounted to gross misconduct. The claimant now says that the appeal panel upgraded Allegation 1 to gross misconduct for the first time on 14 March 2016 so as to justify the decision to dismiss her, and that they needed to do this because her appeal against Allegation 3 had been upheld.
6. The claimant claims that she did not know that Allegation 1 was one of gross misconduct until 14 March 2016, and did not consider her dismissal to have been unfair until then. We reject that assertion. It is clear from the contemporaneous documents and the claimant's conduct at the time that she was aware of the allegations against her, and that they were expressed to be potential gross misconduct, and that she was dismissed for gross misconduct arising from Allegations 1 and 3. She appealed against the findings of the disciplinary panel on that basis.
7. The claimant had suffered from a previous mental health condition and after her dismissal she became depressed. She joined her partner on holiday for the month of January 2016, and on her return she prepared her own appeal against dismissal. She prepared a detailed written appeal in which she challenged the decision of the disciplinary panel in a thoughtful, detailed and cogent way. She was also nuanced in her approach in that she chose to appeal allegations 1 and 3 only (Allegation 2 having been dismissed, and Allegations 4 and 5 having been held to have been worthy of a final written warning short of dismissal). The claimant also appeared in person without representation at her appeal, and addressed the panel in a sensible and thoughtful manner. The claimant has adduced no medical evidence to suggest that she was prevented by illness from managing her affairs properly at that time, nor to suggest that she was prevented by any mental health condition or impediment from preparing and submitting a simple form of ET1 originating application to the Employment Tribunal to protect her position. Neither has the claimant adduced any evidence to suggest when she says she became capable of preparing and submitting an ET1 following any period of alleged incapacity.
8. The claimant was originally represented by her trade union representative from the National College of Midwifery (NMC), during her suspension and at the disciplinary hearing. We were not told why, but after the decision to dismiss her, the NCM no longer represented the claimant. The claimant says that she was unaware of the Employment Tribunal, and the right to seek redress following an unfair dismissal, and was also unaware of any time limit. The claimant sought further professional advice at about the time that the appeal panel communicated their decision on 14 March 2016. She was informed then by her adviser of the right to present a claim, the need to obtain an EC certificate, and the relevant time limit.

9. The claimant first approached ACAS under the EC provisions (Day A) on 25 April 2016 and obtained the EC certificate (Day B) on 5 May 2016. She then issued these proceedings on 18 May 2016. The proceedings claim unfair dismissal both generally, and on the ground that she had raised protected public interest disclosures relating to the safe staffing and working practices on her ward from 2014 until her dismissal. The respondent has conceded that four of the claimant's expressed concerns amount to protected public interest disclosures, but the respondent asserts that they played no part in the reasons for the claimant's dismissal, which was for the gross misconduct set out above. The claimant also claims for breach of contract in respect of her notice pay.
10. Having established the above facts, we now apply the law.
11. The relevant statute is the Employment Rights Act 1996 ("the Act"). Section 111(2) of the Act provides that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
12. These provisions are effectively replicated for breach of contract claims under Article 7(a) and (c) of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.
13. Put simplistically, with effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.
14. Subsection 18A(1) of the Employment Tribunals Act 1996 ("ETA") provides that: "Before a person ("the prospective claimant)" presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter." Subsection 18A(4) ETA provides: "If - (a) during the prescribed period the conciliation officer concludes that a settlement is not possible, or (b) the prescribed period expires without a settlement having been reached, the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective claimant." Subsection 18A(8) ETA provides: "A person who is subject to the requirements in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4).
15. Section 207B of the Act provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.
16. We have been referred to and have considered the following cases, namely: Palmer and Saunders v Southend-on-Sea BC [1984] ICR 372; Porter v Bandridge Ltd [1978] IRLR 271 CA; Wall's Meat Co v Khan [1978] IRLR 499; London Underground Ltd v Noel [1999] IRLR 621; Dedman v British Building and Engineering Appliances [1974] 1 All ER 520; Wolverhampton University v Elbeltagi [2007] All E R (D) 303 EAT; Cambridge and Peterborough NHS Foundation Trust v Crouchman [2009] ICR 1306 EAT.

17. In this case the claimant's effective date of termination of employment was 11 December 2015. The three month time limit therefore expired at midnight on 10 March 2016. The claimant does not benefit from an extension of time under the EC provisions because she did not approach ACAS (Day A) until 25 April 2016 (when the three month time limit had already expired), and she did not obtain the EC certificate (Day B) until 5 May 2016. She then issued these proceedings on 18 May 2016.
18. The question of whether or not it was reasonably practicable for the claimant to have presented her claim in time is to be considered having regard to the following authorities. In Wall's Meat Co v Khan Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the claimant, see Porter v Bandridge Ltd. In addition, the Tribunal must have regard to the entire period of the time limit (Elbeltagi).
19. In Palmer and Saunders v Southend-on-Sea BC the headnote suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the Industrial Tribunal taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, in determining whether or not it was reasonably practicable to present the complaint in time, an Industrial Tribunal may wish to consider the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit. The Industrial Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used. Contrary to the argument advanced on behalf of the appellants in the present case and the obiter dictum of Kilner Brown J in Crown Agents for Overseas Governments and Administrations v Lawal [1978] IRLR542, however, the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time. The views expressed by the EAT in Bodha v Hampshire Area Health Authority on this point were preferred to those expressed in Lawal:-
20. To this end the Tribunal should consider: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.
21. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) concluded that "reasonably practicable" does not mean reasonable (which would be too favourable to employees), and does not mean physically possible (which would be too favourable to employers) but means something like "reasonably feasible".
22. Subsequently in London Underground Ltd v Noel, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for

doing so. As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of practicability … the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204).

23. Against this background we consider each of the claimant's reasons for the delay. The grounds relied upon by the claimant for suggesting that it was not reasonably practicable to have issued proceedings within three months are that: (i) she was unaware that she might have had an unfair dismissal claim until the respondent's appeal panel upgraded Allegation 1 to one of gross misconduct (having upheld her appeal on Allegation 3) which occurred on 14 March 2016; (ii) that she was suffering from stress and unable to prepare her claim; and that (iii) she and/or her advisers were unclear as to her rights and the relevant tribunal time limits. We deal with each of these in turn.
24. It is clear to us that Allegation 1 was always included in the list of 5 allegations all of which were said to amount to potential gross misconduct which might result in summary dismissal. It was also made quite clear at the disciplinary hearing that it was being treated as a ground of gross misconduct, and clearly set out in the dismissal letter as such. It is clear that the claimant knew it was an allegation of gross misconduct when she appealed against that finding. We find that it is disingenuous of the claimant to suggest that she did not know until the decision of the appeal panel was communicated to her on 14 March 2016 that Allegation 1 was potentially treated as gross misconduct. The claimant has also alleged that her dismissal was by reason of earlier public interest disclosures, and she was not precluded from issuing proceedings earlier for this reason because of any perceived confusion as to the grounds of gross misconduct relied upon by the respondent. We find that there was no new information before the claimant at the appeal decision which was crucial or fundamental to her claim for unfair dismissal and no bar or impediment to her bringing her claims timeously beforehand.
25. The second ground is that she was prevented from stress or other mental ill health from bringing her claim within the limitation period. Whereas we accept that the claimant was upset at the dismissal and this could well have aggravated any pre-existing mental ill health condition, it is nonetheless clear that the claimant was well enough to go on holiday for a month during January 2016, and more importantly was well enough to have prepared a detailed and thorough written appeal by way of written responses to the grounds for her dismissal. She also presented her own appeal in a cogent and constructive manner. She was clearly well enough to do so, and would appear therefore to have been well enough to have submitted a simple form ET1 within time to protect her position. In any event we have seen no medical evidence to suggest that the claimant was in any way too unwell at the relevant times to have submitted her claims in time.
26. Thirdly we turn to the claimant's advice and advisers. In the first place we find the claimant's evidence that she did not know of the Employment Tribunal or her right to bring a claim when she first met with her NCM representative to be highly implausible. Such rights are common knowledge, particularly for a person of professional standing such as the claimant who was employed by a public body with a large HR department and detailed policies and procedures. We also find it implausible that the NCM representative would not have advised the claimant of her rights to bring a claim and of the relevant time limit when declining to assist the claimant further after the dismissal decision and before the appeal. In any event the claimant conceded in her evidence that she obtained further professional advice at about the time she learned of the appeal decision in mid March 2016, and that she knew then of her right to present a claim, the need to obtain an EC certificate, and the time limit. She still failed to do so, and did not approach ACAS for some six weeks, and after obtaining the EC certificate, still waited nearly two weeks more before issuing these proceedings.
27. We are not satisfied that there was any substantial cause which prevented the claimant from complying with the time limit, and no physical impediment preventing compliance. We find that it was reasonably practicable for the claimant to have brought her claims within three months from the date of dismissal on 11 December 2015. There was no impediment which prevented her from doing so. In any event, even if it were not

reasonably practicable to have done so, the claimant has presented no evidence to suggest when it did become practicable to do so, and why there was even further delay thereafter. The claimant has not discharged the burden of proof to convince us that she issued these proceedings within such further period as was reasonable.

28. We therefore conclude that the claimant's claims of unfair dismissal and breach of contract were presented out of time and are accordingly dismissed.

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Employment Judge N J Roper
Dated 20 March 2017

Judgment sent to Parties on

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