

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104827/17

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Held in Glasgow on 20 February 2018

Employment Judge: Robert Gall

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Ms Nazia Shabbir

**Claimant
Represented by:
Mr R Byrom -
Solicitor**

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Glamour Eyes Ltd

**Respondent
Represented by:
Mr I MacLean -
Employment Consultant**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

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The following claims brought under the Employment Relations Act 1996 ("ERA") are brought out of time: –

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(1) a claim of automatic unfair dismissal in terms of Section 99(3)(b) in respect of the claimant's alleged dismissal, said to have occurred on 20 February 2017.

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(2) a claim under Section 47(C)(2)(b) of detriment that if the claimant was not dismissed on 20 February 2017, she was demoted on that date.

The following claims brought under the Equality Act 2010 ("EQA") are brought out of time: –

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(1) a claim of direct discrimination under Section 13, the act of discrimination said to have been dismissal or demotion of the claimant on 20 February 2017.

5 (2) a claim of discrimination under Section 18(4), the act of discrimination said to have been dismissal or demotion of the claimant on 20 February 2017.

The time for the bringing of the claims under ERA is not extended under Section 111 of that act. It was not not reasonably practicable for those claims to be brought in time.

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The time for bringing of the claims under EQA is not extended under Section 123 of that act. It is not just and equitable that the time be extended to enable the claims to be brought out of time.

15 A case management preliminary hearing will be set down for arrangements to be made in respect of the claims which are to proceed to hearing. Those claims are:–

(1) a claim under Section 47(C)(2) (b) of ERA, the detriment alleged being the failure by the respondents to uphold the grievance of the claimant at appeal on 5 May 2017.

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(2) a claim under Section 13 of EQA, the act of discrimination alleged being the failure to uphold the grievance of the claimant in May of 2017.

25 (3) a claim under Section 18(4) of EQA, the act of discrimination alleged being the failure to uphold the grievance of the claimant in May of 2017.

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REASONS

1. This case called for Hearing at Glasgow on 20 February 2018. The claimant was represented by Mr Byrom, solicitor. The respondents were represented by Mr MacLean, Employment Consultant.
- 5 2. Evidence was heard from the claimant herself and from her husband, Malik Hayat. A joint bundle of productions was lodged.
3. The PH was set down in circumstances where it was accepted by the claimant that elements of the claim brought by her were presented out of time.
10 Other elements of the claim were accepted by the respondents as having been presented in time. The evidence was directed to support the claimant`s position that the claims brought under ERA should be permitted to proceed as it was not reasonably practicable for them to be presented in time. It was also to support her position that the claims brought under EQA should also
15 be permitted to proceed on the basis that it was just and equitable that this occurred.

Facts

- 20 4. The following were found to be the relevant and essential facts as admitted or proved.

General

- 25 5. The claimant was employed by the respondents. She claims that she was dismissed from her position. She is now employed in a different position. Alternatively she claims that she was demoted. The dismissal or demotion took place on 20 February 2017. Claims founded upon the decision taken and implemented on 20 February 2017 were presented out of time.
- 30 6. A grievance was lodged by the claimant. It was not successful. The claimant lodged an appeal. The appeal was unsuccessful. She brings a claim related

to the decision not to uphold her grievance. Claims founded upon events relating to her grievance have been brought in time.

5 7. It is not said that the acts constitute conduct extending over a period such that the act on 20 February 2017 is brought in time by reason of presentation in time of the claim based upon the refusal to uphold the claimant`s grievance.

10 8. The claim was presented on 1 October 2017. Application to ACAS for the Early Conciliation Certificate was made on 18 July 2017. The Certificate was issued on 1 September 2017. A copy of it appeared at page 1 of the bundle.

Claimant`s Personal Circumstances

Period - February 2017 to October 2017

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9. The claimant is married. She has a son. She was absent from work with the respondents on maternity leave with a scheduled return to work date of 20 February 2017.

20 10. The claimant and her husband live in a 4 bedroomed house in Glasgow. The claimant`s husband is in Manchester for work some 4 days of each week. The claimant lives with her son in the house at all time and therefore when the claimant`s husband is absent in Manchester for 4 days.

25 11. The claimant meets costs associated with the house in Glasgow. She also meets costs associated with the running of a car.

30 12. The claimant was upset at the conversation between herself and the respondents on 20 February 2017. She returned home and spoke to her friends and to her husband about her upset. She sent an email to the respondents detailing her unhappiness at the decision of the respondents communicated to her on 20 February 2017. A copy of that email appeared at page 128 of the bundle. A reply was sent by the respondents to this email.

A copy of that reply appeared at page 129. It was sent to the claimant on 23 February 2017.

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13. The claimant sent a further email to the respondents on 23 February 2017 having received the email from the respondents of that date. She set out once more her concerns with their decision and her distress. The claimant said in her email to the respondents of 23 February 2017 that she had met her doctor who had advised her to take rest. A copy of that email appeared at page 130 of the bundle.
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14. The claimant was in fact seen by her doctor on 24 February 2017. He certified her as being unfit for work due to work related stress. A copy of the sick note appeared at page 168 of the bundle. The claimant was certified as being unfit for work in the period 23 February 2017 to 12 March 2017.
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15. Page 169 of the bundle was a further sick note certifying the claimant as being unfit for work due to work related stress. That related to the period from 13 March 2017 to 3 April 2017. It was issued on 13 March 2017.
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16. At page 171 of the bundle a further sick note appeared confirming that the claimant was unfit for work due to work related stress, this in the period from 4 April 2017 to 18 April 2017. The sick note was issued on 4 April 2017.
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17. The claimant did not take medication from her doctor. She was concerned that medication might make her drowsy and unable to cope with looking after her son. In particular she had those concerns in relation to night time when she had responsibility for caring for her son without support from her husband on 3 nights of the week.
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18. In addition to the emails of 21 and 23 February 2017 referred to above, the claimant`s husband telephoned Citizens Advice Bureau on 22 or 23 February 2017 seeking advice upon the position of the claimant. He also telephoned the helpline for Admiral Home Legal Costs Insurance. A copy of the email by

way of response to the claimant`s husband appeared at page 172 of the bundle. That email was dated 23 February 2017. It referred the claimant`s husband to a claim form online and provided a link to that claim form.

5 19. The advice to the claimant`s husband, which he relayed to her, both from Citizens Advice Bureau and the Legal Insurers Helpline, was that she should lodge a grievance with the respondents. When he was involved in any contact in this matter, the claimant's husband acted with the knowledge and authority of the claimant.

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20. The claimant`s husband understood from what was said to him that it would be necessary for the grievance to be dealt with prior to any claim being brought to an Employment Tribunal. He relayed that position to the claimant. The claimant's husband is a director in a limited company. He has responsibility for dealing with employees of the company and their employment issues. He has not, however, been involved in a Tribunal claim. He was unaware, prior to finding out as detailed in this Judgment, of any time limit for presentation of claims to an Employment Tribunal.

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20 21. The claimant lodged a grievance with the respondents in an email dated 1 March 2017. A copy of that appeared at page 132 of the bundle. The grievance was acknowledged by the respondents by letter of 8 March 2017. A copy of that letter from the respondents appeared at pages 133 and 134 of the bundle. A grievance meeting was arranged for 13 March 2017. That was subsequently rearranged for 23 March 2017 after the claimant had said that she was not able to attend the meeting on 13 March 2017 as she was not well enough so to do.

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22. At pages 173 and 174 of the bundle the claimant`s written submissions relative to her grievance appeared. Those were sent to the respondents by email on 21 March 2017.

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23. The grievance hearing took place on 23 March 2017. A reply with the outcome of that grievance meeting was prepared and dated 27 March 2017. A copy of it appeared at pages 137 to 144 of the bundle. Her grievance was not upheld.
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24. By letter of 4 April 2017 the claimant appealed against the grievance outcome. A copy of her appeal letter appeared at pages 146 and 147 of the bundle.
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25. The respondents confirmed by letter of 11 April 2017, a copy of which appeared pages 148 and 149 of the bundle, that the appeal against the claimant`s grievance would be held on 19 April 2017. The appeal took place as planned. The report determining the outcome of the grievance appeal was issued on 7 May 2017. A copy of it appeared at pages 150 to 156 of the bundle. The appeal was unsuccessful.
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26. The claimant discussed the position at this point around 7 May 2017 with family and friends and her husband. Her understanding from those discussions was that she had 3 months from that point in which to lodge the claim. She took no steps however to initiate a claim or to investigate time limits any further as a result of this information.
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27. On 10 July 2017 the claimant submitted to her legal expenses insurers papers relative to a potential Tribunal claim against the respondents. A copy of the email with those papers attached to it appeared at pages 177 to 181 of the bundle. That email was acknowledged by the insurers by email of 12 July 2017. The email from the insurers enclosed an attachment explaining that the papers had been passed to a legal firm, Jackson Boyd LLP, for assessment. A copy of the respondents` email and attachment appeared at pages 182 to 185 of the bundle.
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28. There followed an email exchange in which the solicitor handling the matter within Jackson Boyd sought the claimant`s authority to speak to Mr Hayat as

Mr Hayat had telephoned him seeking to discuss the claim. The claimant gave that authority.

5 29. In discussion with Mr Hayat around 14 July 2017 the solicitor from Jackson Boyd informed Mr Hayat that the 3 month time limit within which a claim required to be lodged commenced from the date of the incident founded upon i.e. 20 February 2017. He said therefore that there was a potential issue with timebar.

10 30. On this being communicated to the claimant she wrote an email to the solicitor within Jackson Boyd. That was on 17 July 2017. A copy of that email appeared at pages 186 and 187 of the bundle.

15 31. In that email the following passage appeared:-

“Insurance asked if grievance was dealt with? So I went through proper grievance procedure. I even went through appeal so I leave no stone unturned before going through expensive court procedures. You can see from the reports what has gone wrong and what aspect of my job have been ignored (sic) and why I have been discriminated when back from my maternity?”

Everything has been put in writing to my employer and the insurance company. Now I need an answer ASAP if you are willing to fight my claim or I seek another law firm.

My final letter came 10 May. So in my eyes I have 3 months from that day.

30 *Tribunal don` t accept cases unless you have ACAS letter. ACAS tell you to go through grievance so as the insurance company (sic). I went through all.”*

32. By email later on that day of 17 July 2017 the solicitor within Jackson Boyd wrote to the claimant. A copy of that email appeared at page 189 of the bundle. The email contained the following paragraph:-

5 *“While we are in the process of assessing the prospects of you successfully raising a claim we would advise that you lodge an ACAS Early Conciliation form. We have identified that there may be an issue with time-bar and therefore lodging an ACAS Early Conciliation form may protect your position.”*

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33. The claimant lodged the application for the ACAS Early Conciliation Certificate on 18 July 2017 as mentioned above.

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34. In the course of July 2017 Mr Hayat spoke with the claimant`s now solicitors regarding the claim. He sought advice from them upon the claim. They provided advice to him upon the claim.

Period - 1 September 2017 to 1 October 2017

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35. The ACAS Early Conciliation Certificate was issued on 1 September 2017. The claimant received that at that time or immediately thereafter. The claim was presented to the Tribunal on 1 October 2017.

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36. Between 1 September 2017 and 1 October 2017 the claimant considered her position. She was concerned as to how she would manage to fund a claim as she was aware that she would be privately funding the claim without support from her legal expenses insurers. She was conscious of savings and commitments which she had, such as the cost of maintenance and running of her house and the car. She discussed the position with her husband. She considered her health issues as she continued to feel unwell at this time. She ultimately decided to proceed with her claim, presenting that to the Employment Tribunal on 1 October 2017 as stated above.

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The Issues

37. The issues for the Tribunal were whether the following elements of claim founded upon the events of 20 February 2017 and brought out of time were to be permitted to proceed, the test to be applied by the Tribunal in each case being stated after each ground of claim:-

(1) Claim of automatically unfair dismissal in terms of Section 99(3)(b) of ERA (able to be brought if it was not reasonably practicable to bring the claim in time)

(2) Claim of alleged detriment in terms of Section 47(C)(2)(b) of ERA, the alleged detriment being demotion of the claimant on 20 February 2017 (able to proceed if it was not reasonably practicable to lodge the claim within the relevant time limit).

(3) Claim of direct discrimination under Section 13 of EQA, the act of discrimination being said to be the dismissal or demotion of the claimant on 20 February 2017 (able to proceed if the Tribunal considered it just and equitable for this to occur).

(4) Claim under Section 18(4) of EQA, the alleged act of discrimination being dismissal or demotion of the claimant on 20 February 2017 (able to proceed if the Tribunal considered it just and equitable that this occurred).

Applicable Law

38. Section 111 of ERA provides that claims under ERA of the type brought by the claimant require to be presented to the Tribunal within 3 months 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 3 months”.

39. Section 123 of EQA states that claims of the type brought by the claimant in terms of EQA may not be brought after the end of the period of 3 months or “*such other period as the Employment Tribunal thinks just and equitable.*”

Not Reasonably Practicable

40. “*Reasonably practicable*” has been interpreted in ***Palmer & Another -v- Southend-On-Sea Borough Council [1984] ICR 372*** (“*Palmer*”) as meaning something akin to “reasonably feasible”.

41. Consideration requires to be given to the facts and circumstances set out in evidence by a claimant to explain why the claim was not lodged on time.

42. It may be that a claimant is ignorant of the requirement to present a claim within a time period. It is not enough, however, that a party is unaware of any time limit applying. The question is whether that ignorance of rights was in itself reasonable. That may turn upon consideration of whether advice was taken and whether the opportunity to obtain advice existed. Where a claimant knows of the existence of rights, that is generally held to result in such a claimant having been put on notice as to the time limit. In ***Trevelyan (Birmingham) Ltd -v- Norton [1991] ICR 488*** (“*Trevelyan*”) the Employment Appeal Tribunal (“*EAT*”) said that when a claimant knows of his or her right to complain of unfair dismissal such a claimant is under an obligation to seek information and advice about how to enforce that right.

43. An instance of a claimant being under a misapprehension as to the commencement date for any time limit to operate is seen in the case of ***Sodexo Health Care Services Ltd -v- Harmer EATS 0079/08*** (“*Sodexo*”). In that case the claimant presented the claim 23 days late. She had wrongly assumed that the end of the appeal process was the date from which the 3

month period for presentation of the claim ran. The EAT held that in circumstances where she knew of the time limit but had failed to make proper enquiries about it she was not reasonably ignorant of the start date for the time limit. It was held that the time limit would not be extended.

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44. The case of ***Dedman -v- British Building & Engineering Appliances Ltd [1974] ICR 53*** (“***Dedman***”) is of relevance in relation to two points in particular. It is said in that case that the provisions should be given a “*liberal construction in favour of the employee*”. That case also highlights that if a solicitor is engaged to act in presentation of the claim it will normally be the case that a Tribunal holds it was reasonably practicable to present the claim in time.

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45. In assessing the position a Tribunal may therefore have regard to whether steps were taken to instruct representation, to obtain advice and if not, why not. Consideration also is appropriately given by a Tribunal to what awareness a claimant had of rights and what steps such a claimant took to obtain information or clarify any points in the period prior to presentation of the claim.

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46. The state of health of a claimant is also a relevant factor for consideration by the Tribunal. There may, clearly, be instances where a claimant is simply unable for health reasons to present a claim. The majority of cases reflect degrees of illness. ***Asda Stores Ltd -v- Kauser EAT/0165/07*** (“***Kauser***”) was a decision in which the EAT held that something more than “*mere stress*” was needed if a claim was to be permitted to be presented though late. In that case the claimant had been arrested and released on bail in the period of 3 months after dismissal. The EAT held that it was not sufficient that the claimant had been found by the Tribunal to have been “*very stressed*” and “*in some turmoil*” during the period of the Police enquiries. The Police enquiries had concluded just prior to expiry of the 3 month period. The case of ***Schultz -v- Esso Petroleum Co Ltd [1999] ICR 1202*** (“***Schultz***”) highlights that a Tribunal should consider what has happened during the whole of the 3 month

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period, however, should focus attention on the later part of the period rather than the earlier part of the period.

47. In addition to considering why a claim was not presented on time, a Tribunal also requires to consider when, after the 3 month period, the claim was presented. A claim must be presented "*within such further period as the Tribunal considers reasonable*". This requires the Tribunal to consider whether the claim was presented within a reasonable time after the time limit expired. A claimant requires to act with reasonable promptness once whatever may have prevented presentation of the claim in time is no longer "*in place*".

48. It is a matter of judgment for the Tribunal to determine whether the time taken for the claim to be presented after the time limit expired was reasonable in the particular circumstances of the case. That involves assessment of whether the steps taken by the claimant were such that the claimant acted promptly to present the claim after expiry of the time limit.

Just and Equitable

49. The test of whether it is just and equitable to extend time for presentation of a claim allows consideration of a wider range of matters than does the test of whether it was not reasonably practicable to present the claim in time.

50. Nevertheless the onus remains on the claimant to persuade the Tribunal that the claim should be permitted to proceed though late. Exercise of discretion by the Tribunal is said in the case of ***Robertson -v- Bexley Community Centre t/a Leisurelink [2003] IRLR 434*** ("***Robertson***") to be "*the exception rather than the rule*".

51. The case of ***British Coal Corporation -v- Keeble & Others [1997] IRLR 336*** ("***Keeble***") outlines the factors which would be relevantly considered by a Tribunal in its assessment of this question.

52. A Tribunal should consider the prejudice to each party if, on the one hand the case was permitted to proceed and if, on the other hand it was not permitted to proceed. All the circumstances of the case should be considered. Regard should be had to the length of and the reason for delay. A Tribunal should keep in mind whether the evidence it might hear would be affected by the delay. The swiftness with which a claimant presented a claim once aware of the facts which formed the basis of the claim should be considered. Any conduct by a party which might mislead a claimant is also a relevant factor. Similarly any delay in information being given by a party to the claimant is also a relevant factor. If it is said that there is incorrect advice which has been given by an adviser to a party, whilst that is not particularly persuasive in the context of whether it was not reasonably practicable to lodge a claim, it is looked upon, from a claimant's perspective, less unfavourably in consideration of the question of whether it is just and equitable to permit a claim to proceed. Similarly if a party is ignorant of their rights, that is looked upon less stringently in the context of whether an extension of time is granted on a just and equitable basis than is the case where the test is whether it was not reasonably practicable for the claim to be presented in time.

53. It is relevant to consider delay while a claimant was going through internal employment procedures with their employer when assessing whether an extension of time is to be permitted on a just and equitable basis. There is no general principle that extension of time would be granted in that circumstance on the basis of that being just and equitable.

54. This is confirmed in the case of ***Apelogun-Gabriels -v- Lambeth London Borough Council & Another [2002] ICR 2713 ("Apelogun")***.

Submissions

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Submissions for Claimant

55. Mr Byrom tendered written submissions. He spoke to those. What is now set out is a summary of those submissions as supplemented by oral submissions.
56. The law in relation to the time for presentation of claims of the type brought by the claimant was set out, together with the legal provisions of ERA and EQA which permit for extensions of time for presentation of claims.
57. Mr Byrom highlighted the incident at the root of the late claims was on 20 February 2017. The claimant had sent an email to the respondents on 21 February 2017. She had then been signed off work with work related stress on 23 February 2017. She had sought advice from Citizens Advice Bureau (“CAB”) and her insurer on 23 February 2017. The evidence was that she had been informed that she required to complete internal grievance procedures before any claim could be made to the Tribunal.
58. A grievance had then been lodged by the claimant. The grievance hearing took place on 24 March 2017 with the claimant receiving the outcome on 28 March 2017. She had lodged an appeal and ultimately had received the notification of the appeal decision, that being sent to her on 8 May 2017.
59. The claimant had submitted the form to her insurer intimating that a claim was being made. That had led to a call with the solicitor for the insurers on 14 July 2017 where a potential issue with timebar was specifically highlighted. The claimant had responded stating that her understanding was that she had 3 months from date of receipt of the final letter intimating the grievance outcome in which to lodge her claim.
60. The application for the ACAS Early Conciliation Certificate had been made on 18 July 2017. That Certificate had been issued on 1 September 2017. The claim was then submitted on 1 October 2017.
61. The law relating to possible extension of time was then referred to by Mr Byrom. He quoted *Dedman* with its comment that there should be a liberal

construction in favour of the employee. He said that the case of **Marks & Spencers Plc -v- Williams-Ryan [2005] ICR 1293** ("**Williams-Ryan**") was of relevance. Specifically he highlighted the passages in paragraph 15 which appeared on the fifth and sixth page of the judgment.

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62. In that case the claimant had awaited the outcome of the internal appeal, her belief being that she required to do that before she could make a complaint to the Tribunal. The Court of Appeal had said that given the facts found by the Tribunal that the claimant had only been advised by CAB about her internal appeal and not about the application to the Employment Tribunal, together with the finding that the employer had issued insufficient and misleading advice and the pressure which the claimant was under from the course which she was undertaking at the time, it was not reasonably practicable for the claim to be lodged in time. This case was analogous to that case, said by Mr Byrom.

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63. Mr Byrom also highlighted the case of **University Hospitals Bristol NHS Foundation Trust -v- Williams UK/EAT/0291/12** ("**Williams**"). That case, he said, was of relevance as the claimant in that case had had mental health difficulties. He referred to paragraph 4 of the Judgment which noted from the Tribunal Judgment that there had been written and oral testimony from the claimant about her mental health difficulties. In addition to that paragraph he also referred to paragraph 8 of that Judgment. Again he said that the claimant in that case was similar to the claimant.

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64. He urged that the Tribunal find that it was not reasonably practicable for the claim to have been presented in time.

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65. Turning to the just and equitable extension, Mr Byrom said that this question required a broader approach. He accepted that the onus was on the claimant and there was no presumption of exercising discretion. He referred to **Ahmed -v- Ministry of Justice UK/EAT/0390/14** ("**Ahmed**"). That case, in a

passage to which Mr Byrom referred, at paragraph 62 of the Judgment had highlighted the principles set out in *Keeble*.

5 66. Looking at those factors, the Tribunal should grant an extension of time to the claimant.

67. The claimant believed that she had to exhaust internal procedures prior to making a claim. Whilst that was not in itself a reason for extension being granted, it was one element to be considered. The claimant had been
10 advised, wrongly, that internal procedures required to be followed before proceeding with a claim. She had not been informed of any time limit by CAB or her insurers. The claim had been presented 4 months after the date at which it would have been in time. The ACAS Conciliation period had, however, taken some 6 weeks.

15 68. Mr Byrom submitted that the incident was one year prior to this Hearing. Documentary evidence existed, he said. A part of the claim was in time. It relied on the same factual matrix in that it arose from a grievance which the claimant had submitted in relation to the events surrounding her
20 dismissal/demotion. It was highly unlikely, he said, that the cogency of evidence would be affected by delay in the case.

69. The respondents had not dealt with the claimant`s initial emails. She had been obliged then to raise a grievance. This was a relevant factor in that the
25 actings of the respondents could be considered by the Tribunal in assessing whether granting an extension of time was just and equitable.

70. Once the claimant was alerted by the solicitors acting for the insurers that there was a possibility of the claim being late, she contacted ACAS in relation
30 to the Early Conciliation Certificate the following day. On obtaining the Early Conciliation Certificate from ACAS she considered the position carefully and then lodged the claim one month later. That was a reasonable time within which to present the claim given issues which she had with her health, with

childcare and with reliance on her husband who was not present on a regular basis. It was clear, said Mr Byrom, from the claimant`s evidence at the Tribunal that she continues to be upset and to have what he referred as “*mental disclarity*”, being confused over dates. It would be harsh if any deficiencies in her testimony at this Hearing counted against her.

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71. Taking account of all the relevant circumstances, and looking to the prejudice which she would suffer if the claim was not permitted to proceed as against the prejudice which the respondents would encounter in facing this claim, the extension of time should be granted, it being just and equitable for that to occur.

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Submissions for the Respondents

72. Mr MacLean said that this was in many ways a difficult case. He extended his sympathy to the claimant. He said, however, that the law required to be followed in this case. The respondents` position was that it had not been not reasonably practicable to present the claim in time. Further, it was not just and equitable to permit an extension of time.

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73. Looking firstly at the issue of reasonable practicability, Mr MacLean said that the claimant had immediately taken advice when she became aware of an issue. She had then proceeded with the grievance and the grievance appeal. She had then taken further advice. That had led to notification of the claim to ACAS.

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74. It appeared from the history of events that the claimant was well able to handle her affairs, even if that involved assistance from her husband and family. There was nothing to suggest that she was prevented from lodging a claim within the relevant time.

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75. It appeared to be the case that the claimant had been given some misleading advice. She and her husband had, however, made enquiries. They could

have asked as to any time limits. There was nothing preventing them taking that step.

5 76. The Tribunal should also carefully look at the time taken to submit the claim when the issue of timebar was apparent. Looking to the terms of the email from the claimant at page 186 of the bundle, it appeared that the claimant was of the view that she had 3 months from date of receipt of the notification of the grievance appeal outcome. The claim, however, had not been lodged with the Tribunal until 1 October 2017.

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77. As a matter of law proceeding with an internal grievance did not stop the clock.

15 78. It was reasonably practicable to present the claim in time. The evidence from the claimant should not persuade the Tribunal to exercise its discretion to extend time for lodging the claim.

20 79. Moving on to address the Tribunal in relation to the just and equitable potential basis for extension of time, Mr MacLean repeated his position in relation to the time line.

25 80. He said that the claimant had not acted promptly. There had been a big delay prior to her lodging the claim. Whilst she had health problems with which Mr MacLean had sympathy, the Tribunal required to note that she had taken advice, was supported by her husband and was clear in the position she set out. She had obtained the ACAS Early Conciliation Certificate with the claim then being presented one month later.

30 81. There was prejudice to the claimant, Mr MacLean recognised, if she was not permitted to proceed with the claim under EQA. There was also, however, prejudice to the respondents if the claim was permitted to proceed. They would face a claim which they would not otherwise face. The events went back one year. Time limits were there for a purpose, in order to bring certainty.

It was not just and equitable for there to be an extension of time. If this claim was permitted to proceed the respondents would be facing a far more serious claim than would be the case if it did not proceed.

5 **Brief Reply from the Claimant**

82. Mr Byrom in a brief reply to Mr MacLean`s submissions said that in terms of ***Khan -v- Walls Meat Co Ltd [1979] ICR 52*** that the Tribunal should have regard to human affairs in making its assessment.

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83. The Tribunal should also keep in mind that the claimant`s evidence which was that she only became aware of there being a time limit and what that time limit was when the solicitor for the insurer informed her of this in July 2017.

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84. I raised by Mr Byrom the fact that the claimant had said in evidence that she obtained advice from his firm in July 2017 and that she had been made aware through that route of the time limit, as well as through the conversation with the solicitor for the insurers. Mr Byrom accepted that as being the position and acknowledged that the claimant had waited one month after the ACAS Certificate had been issued before presenting the claim. Mr Byrom said that this was reasonable on her part given her mental state and the need to consider the position before proceeding with the claim.

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85. Mr Byrom acknowledged that Mr MacLean was right in stating that the claimant could have asked about time limits and did not take that step. It was unfortunate that CAB and the insurers with whom initial contact was made did not raise with the claimant the time limit of 3 months for presentation of the claim.

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86. Mr Byrom repeated his position that the Tribunal should grant the extension of time as sought by the claimant to enable the elements of claim founded upon of events of 20 February 2017 to proceed.

Discussion & Decision

5 87. The facts and circumstances which founded the application for extension of time were the same in the consideration by the Tribunal both of whether it was not reasonably practicable to present the claim in time and whether it was just and equitable to grant an extension of time.

10 88. That said, I was conscious in examining those facts that the tests are different.

89. Wider consideration can be given to facts and circumstances when considering whether it is just and equitable to grant an extension of time.

15 90. I first considered whether it was not reasonably practicable for the claim to have been presented in time.

20 91. I accepted that Ms Shabbir relied on her husband to a degree to support her in her assessment of the position and in her interaction with the respondents, the insurers and CAB following upon the events of 20 February 2017. I was satisfied, however, that she was fully aware of what had happened and was actively involved in decisions taken. At the very least, she was able readily to obtain support from her husband.

25 92. Her quick reaction to events of 20 February 2017, both in contacting the insurers and in emailing the respondents, emphasised the ability to act on the part of the claimant and her swiftness of response. I accepted that she was absent from work through work related stress. Clearly, however, she was not prevented from interacting with her husband and submitting emails to the respondents.

30 93. Those emails included the one in terms of which she lodged the grievance on 1 March 2017.

94. I accepted that the course followed of proceeding with the grievance, and therefore internal procedures within the respondents' organisation, was one suggested both by the insurers and by CAB. The evidence which I had was that neither the insurers or CAB referred to there being a time limit for presentation of claims to the Employment Tribunal. That is surprising, as is the view which they both apparently expressed that it was necessary to proceed with the internal grievance prior to presenting a claim to the Employment Tribunal.

95. Having embarked upon the internal grievance procedure, the claimant pursued that to the point where her appeal was rejected. She became aware of that on 10 May 2017. Around that time, on her evidence, she became aware from family and friends of the 3 month time limit for presentation of claims to an Employment Tribunal.

96. It was unclear to me in the evidence why the claim form submitted to the insurers was not submitted until 10 July 2017, when the claimant was aware of the outcome of the grievance appeal two months prior to that. She was also aware of the 3 month time limit. There was no evidence as to her taking advice in that time. It seemed somewhat odd that having been informed that she would require to proceed with the internal grievance prior to presenting a claim to the Employment Tribunal, upon the internal grievance procedure being exhausted, she did not then, with a degree of swiftness, take advice upon proceeding to present an Employment Tribunal claim. This was especially so in circumstances where she was aware of a 3 month time limit for presentation of a claim.

97. It was upon submission of the claim form in the email of 10 July 2017 that contact resulted leading to conversation with the solicitor for the insurers who, on the evidence, informed Mr Hayat that there may be an issue with timebar. That was around 14 July 2017.

98. At this time the claimant also took advice from Mr Byrom`s firm. Mr Byrom`s firm informed her of the time limit that applied for presentation of claims to an Employment Tribunal.

5 99. At this stage therefore the claimant was in no doubt that there was a risk that her claim may be out of time insofar as founded upon events of 20 February 2017. That was the position of the insurers` solicitor. The advice from Mr Byrom`s firm appeared to go further and to say that this element of claim was out of time.

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100. Notification was then given to ACAS in terms of the Early Conciliation procedure. That was done swiftly. It took some 6 weeks before the Early Conciliation Certificate was issued. It was issued on 1 September 2017.

15 101. It then took a further month before the claim was presented to the Tribunal. When asked about this, the claimant said that she was looking after her son and had to think very carefully as to the costs involved in proceeding with a Tribunal claim. She also had to keep in mind her health position. Further, her husband was not at home on a day to day basis.

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102. Looking to the law in this area, it seemed to me that the reason that the claim was not presented on time was that the claimant was unaware at that point of the time limit. Her husband was likewise unaware of the time limit. He, however, is a Director of a company which has employees. He confirmed in evidence that he had responsibility for dealing with employment issues with those employees. He said, however, that he had never been to a Tribunal and was unaware of time limits for presentation of a claim. Nevertheless, with his background, it seemed to me that he had at least access both to computers and potential advice in relation to employment matters. I appreciated that the insurance company and, it would appear, CAB, had said that the grievance should be proceeded with prior to any claim being presented to a Tribunal.

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103. The question which I had to assess was whether the ignorance of there being a time limit was reasonable or not.

5 104. It seemed to me that it was not reasonable of the claimant to accept, without question, the information given to her that she should proceed with the internal grievance prior to presenting an Employment Tribunal claim. A question might have been asked as to there being any time limit involved. Further, the claimant had not made any enquiries when the internal grievance procedure completed. That ought, in my view to have been a trigger point for her to speak with the insurers or CAB or some other advisor or to make enquiries herself as to lodging of a Tribunal claim. Family and friends had informed her, she said, of there being a 3 month time limit for presentation of a claim. At that point, she was in time and would have been able to notify ACAS in terms of the Early Conciliation procedure, thereby “*stopping the*
10 *clock*”. That, however, did not occur. I bore in mind **Trevelyan** and **Sodexo**.
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105. The onus is on the claimant, as set out above and as accepted on her behalf, to persuade the Tribunal that it was not reasonably practicable to present the claim in time. I was not so persuaded on the basis of the facts and
20 circumstances detailed in evidence in this case. I took account of the claimant`s health and of her childcare duties. I took account of the advice which she and her husband received. I also kept in mind the fact that she consulted with her husband in this area and wished to consider carefully the position before proceeding. I had regard to **Apelogun**.
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106. Having determined that, in my view, it was not not reasonably practicable to present the claim in time, I might have halted consideration of this point at that stage. I believed it was appropriate, however, to go on to consider whether, had I been of the view that it was not reasonably practicable to lodge
30 the claim in time, I would have been satisfied that the claim was presented within a reasonable time of expiry of the time limit.

107. I would not have been so satisfied. It seemed to me that the claim had not been presented within a reasonable time of expiry of the time limit. The claimant knew, as did her husband, at time the when the ACAS Certificate was issued on 1 September 2017 that the claim was out of time. That had
5 been the advice from Mr Byrom`s firm. She knew that the insurers had also highlighted the potential problem in this area and had said that they would not act on her behalf.

108. Against that background, to take a month to prepare and present the
10 Employment Tribunal claim led, in my view, to the position that the claim had not been presented within a reasonable time. I would therefore not have exercised my discretion to extend time on that basis, had I been persuaded that it was not reasonably practicable to present the claim in time.

15 109. I then moved on to consider whether it was just and equitable to extend time for presentation of this element of the claim.

Just and Equitable Extension of Time

20 110. In consideration of whether to extend time on the basis of that being just and equitable, a wider range of matters are relevantly considered by the Tribunal than is the case in determination of whether an extension of time is to be permitted due to it not having been reasonably practicable to present the claim in time.

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111. It is of relevance to consider whether the claim was not presented on time due to ignorance of the legal position. It is also relevant to consider the health of a claimant. The Tribunal has to have regard to the prejudice caused to one party if on the one hand the claim is permitted to be presented although late,
30 together with the prejudice which would be caused to the other party if the claim is permitted to proceed although late. The factors in ***Keeble*** are of relevance.

112. **Robertson**, however, confirms that the exercise of discretion remains the exception rather than the rule.

5 113. I weighed all the matters which in my view are properly considered by a Tribunal in this scenario. The claimant will undoubtedly suffer prejudice if the claim is not permitted to proceed although late. She is unable to advance a claim of discrimination based on the events of 20 February 2017. The respondents suffer the prejudice, if the claim is permitted to proceed, of facing a claim based upon that matter. The claim though is not one which comes at
10 a late date in the sense of being well after the events. It is not one which, in my view, ought to cause them significant difficulty in gathering of evidence in order to consider their position. The evaluation of prejudice weighed, on balance, in favour of exercising discretion to allow the claim to proceed, though presented late on the basis that it was just and equitable so to do.

15 114. The claimant`s position is that she was unaware of the time limit and that this ignorance on her part was reasonable. That is a relevant matter for consideration by the Tribunal.

20 115. It was not suggested that there had been any deliberate misrepresentation by the respondents or that they had, for example, not replied to any particular enquiry in order to lengthen the process and result in a late claim being presented to the Tribunal.

25 116. The claimant`s position was that she had been unaware of the precise details of any time limit until the solicitor for the insurers highlighted this in mid-July 2017. She had been informed by family and friends of there being a 3 month time limit for presentation of claims to an Employment Tribunal. That was in May of 2017.

30 117. There were 4 points which I regarded as being significant in considering how the Tribunal was to exercise its discretion.

118. Firstly, there was the fact that the claimant`s position was that she had contacted both insurers and ACAS both of whom had told her that she should exhaust the internal grievance procedure before lodging any claim. According to her no time limit had been mentioned. That, if correct, seemed odd to me.
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119. Secondly, the outcome of the grievance was known to the claimant on 10 May 2017. She took, however, no steps to contact the insurers or any independent solicitor or advisor to check time limits or to investigate the position. She did not present the claim at that point. Contact was made with the insurers` solicitor only in mid-July 2017. She had knowledge from family and friends some 2 months prior to this of their being a 3 month time limit for presentation of claims.
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120. It was at that point that the solicitor for the insurers said specifically to the claimant that there might be an issue with timebar.
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121. The third significant point is that when replying to this information by the email which appeared at page 186 of the bundle the claimant does not express surprise that there is a time limit. She does not express surprise that the time limit is 3 months. Rather, what she says is that in her eyes she had 3 months from date of receipt of the letter intimating the outcome of the grievance. That, to me, is consistent with her having an awareness of there being a time limit and of that time limit being 3 months. It reinforces her evidence that she was aware of the time limit of 3 months in May 2017. At that point, the claim, had it been presented, would have been in time. The ACAS Early Conciliation Certificate being sought would have "stopped the clock". No advice was however taken nor were further enquiries made at this point, notwithstanding the knowledge the claimant had.
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- 30 122. Certainly the claimant was aware through solicitors advice in mid-July 2017 that the period of 3 months from date of the events on 20 February 2017, said to have been discriminatory, was the relevant time period within which a claim required to be presented.

123. The fourth critical point as I see it is that, notwithstanding this knowledge, the claimant took no action to present her claim until one month after date of receipt of the ACAS Early Conciliation Certificate.

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124. I appreciate that the claimant was not in the best of health around this time. As mentioned above, however, she remained able to take advice and to contact the insurers. She was also able to take steps to notify ACAS in connection with the Early Conciliation procedure. I appreciate that some of these steps were taken by the claimant`s husband. They were taken, however, with her authority and knowledge.

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124. Balancing all the facts and circumstances as those came out in evidence I came to the view that it was not just and equitable to extend the period for presentation of the claim in relation to the events said to have occurred on 20 February 2017. The claim of discrimination therefore remains timebarred.

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125. The claim in respect of the failure to uphold the claimant`s grievance will proceed. The Clerk to the Tribunals is requested to arrange a 1 hour telephone case management Preliminary Hearing with a view to confirming the dates for that Hearing and other arrangements in relation, for example, to documents.

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Employment Judge: Robert Gall
Date of Judgment: 07 March 2018
Entered in register: 08 March 2018
and copied to parties

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