Case No: 2601019/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mrs N Hunt**

Respondent: **Derbyshire County Council**

Heard at: **Nottingham**

On: **Thursday 17 January 2019**

Before: **Employment Judge Faulkner (sitting alone)**

Representation: **Claimant – in person**
Respondent - Ms E Hodgetts (of Counsel)

PRELIMINARY HEARING

JUDGMENT

1. The Claimant was continuously employed by the Respondent from 1 September 2014 until 21 October 2017.

2. It was not reasonably practicable for the Claimant to present her complaint of unfair dismissal in time but she did not present it within such further period as was reasonable. The complaint of unfair dismissal is therefore struck out.

3. Whilst brought after the expiry of the normal time limit, the Claimant's complaint of discrimination was brought within such other period as the Tribunal thinks just and equitable.

4. The complaint of discrimination will therefore be considered at a Final Hearing. A Telephone Preliminary Hearing will be arranged to identify the issues to be determined and make Case Management Orders accordingly.

REASONS

Complaints

1. By a Claim Form presented to the Employment Tribunal on 7 May 2018, the Claimant seeks to pursue complaints of:

1.1. Discrimination because of pregnancy and/or maternity leave as defined by section 18 of the Equality Act 2010 ("EQA") – she confirmed that she complains about a single act of alleged discrimination, namely her dismissal.

1.2. Unfair dismissal, it being alleged that the Claimant's dismissal was automatically unfair under section 99 of the Employment Rights Act 1996 ("ERA"), on the ground that the reason or principal reason for dismissal was the fact that the Claimant took maternity leave.

Issues

2. As identified during the Telephone Preliminary Hearing conducted by Employment Judge Heap on 26 September 2018, and by agreement with the parties at the outset of this Hearing, the preliminary issues to be decided were as follows:

2.1. The date on which the Claimant's continuous employment began – this would be relevant in particular should she be permitted to proceed with her complaint of unfair dismissal and should that complaint succeed such that the Tribunal was considering the amount of any basic award.

2.2. The effective date of termination of the Claimant's employment – this might be relevant for the same reason but was also pertinent to the question of time limits and extension of time limits.

2.3. Whether the complaint of unfair dismissal was presented after the normal time limit, if so whether it was not reasonably practicable for the Claimant to bring the complaint in time, and if it was not, whether she brought it within such further time as was reasonable.

2.4. Whether the complaint of discrimination was presented after the normal time limit, and if so whether it was brought within such further period as the Employment Tribunal thinks just and equitable.

3. The Claimant confirmed that she no longer pursued an application to amend her claim so as to also complain of ordinary unfair dismissal.

Procedural matter

4. Before dealing with the facts in this case, I should address a procedural point which arose after the Hearing. On 29 January 2019, the Respondent wrote to the Tribunal requesting an anonymity order pursuant to rule 50 of the Tribunal Rules of Procedure. The request was for the Claimant's details to be anonymised on the basis that it had been necessary to consider some of her medical information on the question of compliance with time limits. The

Respondent was concerned that the Claimant may not have been aware that these details could be published on the Employment Tribunals judgments website. By an email dated 4 February 2019, comments on the Respondent's application were requested from the Claimant. I am informed that as at the date of this Judgment, no response had been received.

5. Rule 50 provides that, "*(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person…. (2) In considering whether to make an order under this rule, the tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression*". Convention rights include of course the right under article 8 to respect for private and family life. The Employment Appeal Tribunal made clear in its recent decision in **A v Secretary of state for justice [2018] UKEAT 0263/17** that the protections afforded by article 8 are not limited to parties and witnesses, but can include a third party such as the child of one of the parties**.**

6. I have decided not to grant the Respondent's application for the following reasons:

6.1. The starting point in relation to any such application must be the importance of upholding the principle of open justice, as rule 50 itself makes clear. In other words, a clear case needs to be made as to why an application such as this should be granted.

6.2. I have considered carefully whether the article 8 rights of the Claimant or her child would be infringed by the contents of this Judgment, specifically the references to medical information, being available on the employment tribunals judgments website, such as to warrant an interference with the open justice principle. I am satisfied that is not the case, for the following principal reasons.

6.3. First, I have been able to decide the issues before me by making reference to the relevant medical history of the Claimant and of her child in the most general terms. It has not been necessary for me to set out detailed medical particulars. I am wholly satisfied therefore that the medical information which will appear online is no more than one would normally see in any case where medical information is relevant to the issues to be decided.

6.4. Secondly, in relation to the Claimant's child, whilst I do not for a moment diminish the serious concern which her health caused for the Claimant and her husband, her medical condition was not unusual for small infants and – thankfully – was relatively short-lived. I therefore conclude that there will be no adverse consequence for the Claimant's child of the general details of her brief ill health as a baby being available online.

6.5. Thirdly, I reach a similar view in relation to the Claimant herself. The context for her ill-health, as will become clear below, was the ill-health of her child and would be widely viewed as entirely unsurprising in the circumstances. Whilst again not diminishing its seriousness, it too was thankfully relatively short-lived. Again therefore, I conclude that there will be no adverse consequence for the Claimant of the general details of her brief ill health being available online.

6.6. For these reasons I am not satisfied that the general information about the health of the Claimant and her child which appears in this Judgment is sufficient or of such nature as to require interference with the principle of open justice. I am fortified in that view by the fact that the Claimant has not deemed it necessary to reply to the Tribunal's enquiries about the Respondent's application.

Facts

7. The parties agreed a bundle of around 150 pages. The Claimant produced a witness statement, as did Charlotte Webster-Topley, a Senior HR Consultant for Schools, who is employed in the Respondent's Children's Services Department. I read those statements and the documents referred to within them prior to hearing evidence. I also read Ms Hodgetts' detailed skeleton argument, though I was not able until after the conclusion of the Hearing to read the various authorities she referred to. The Claimant and Ms Webster-Topley gave oral evidence. On the basis of all of this material, I make the following findings of fact. Page references are references to the bundle.

Background

8. The Claimant is a qualified teacher. She was employed by the Respondent, initially at Whitwell Primary School from September 2014 and then at Brookfield Primary School from September 2016 (though see further below) until a date that is disputed. There is some dispute also about the job in which she was employed at Brookfield. She says that she was employed as a teacher, whereas the Respondent seems to say that she was employed in something like a teaching assistant role. It is not necessary for me to resolve that dispute.

Continuous service

9. The Claimant seeks to show that she had continuous service from September 2014 until at least October 2017. At pages 48 to 56 there is a principal statement of the terms and conditions of the Claimant's employment at Whitwell. As far as relevant to the issue of continuous service, it states the date of commencement of employment as 1 September 2014. Although the letter itself was only issued on 11 February 2015, there is no dispute about the start date for that role. The letter also states, "This post is fixed term due to fluctuating pupil numbers at the school and will cease on 31 August 2015. This is only an approximate end date [and] cannot be taken as definite. I must emphasise to you that this offer cannot in any way be regarded as an offer of an established appointment". It goes on to state, "Your period of continuous service for statutory employment rights dates from 1 September 2014, the date of commencement of your employment with this Council". There is then a standard statement regarding the Redundancy Payments (Continuity of Employment in Local Government etc) (Modification) Order 1999, but neither party suggested that was of relevance to the present case.

10. The Claimant said that by the time this statement was issued, she had discovered that fixed term contracts were often renewed at Whitwell and so did not necessarily expect that her employment there would cease on 31 August 2015, not least because pupil numbers actually rose and because her job share partner was retiring at the end of the school year. She accepts that in the end however her contract was not renewed. The headteacher at Whitwell met with the Claimant on two occasions, first to inform her that she may not have a

continuing role from September 2015 and the second to confirm that was the case. There was no discussion with her during the summer of 2015 about future work at the School and therefore the Claimant accepted that the contract terminated and she would no longer work there. She thus regarded herself as unemployed as at 31 August 2015.

11. The Claimant was however approached by Whitwell in September 2015 to see if she could return on a supply basis. The Respondent has been unable to locate the copy of the principal statement of terms and conditions which applied to that arrangement, but it is accepted that the template document at pages 57 to 61 is a proper representation of the statement which was issued to her in November 2015, it being recognized that she began work at Whitwell in a supply capacity at the start of the academic year in September 2015.

12. The document is headed, "Appointment of Supply Teacher". Under the heading, "Date of Commencement and Termination", it states, "This is not a contract of employment which carries mutuality of obligation, you will be asked to work only when work is available". It goes on to say, under a further heading, "Working Week", "When you are required to work, your working pattern will be determined in consultation with the Headteacher. You will be required to undertake duties as directed by the Headteacher …". In relation to continuous service, the statement says, "If as a result of your working pattern you build up rights of continuous service you will be advised of your entitlement at that time. Breaks in service of more than one week will result in no continuity of service".

13. The Claimant was engaged on the supply arrangement to cover someone on long-term sick leave and therefore worked, she says, full time hours from September to April, though as that person returned thereafter she worked reduced hours and began searching for work elsewhere, including attending interviews. Within Ms Webster-Topley's statement, at paragraphs 6 and 7, there is a table of hours worked by the Claimant for each month from September 2015 until June 2016. The actual timesheets for the hours which the Claimant worked each week were not available to the Tribunal for the period September 2015 to March 2016. They were available however for April, May and June 2016 and are summarised in paragraph 7 of Ms Webster-Topley's statement. The Claimant confirmed that she accepts the data which is there provided. Ms Webster-Topley concludes on the basis of this data that there were four gaps of one week during which the Claimant did not work at all under the supply contract, namely weeks commencing Sunday 3 April, Sunday 1 May, Sunday 29 May, and Sunday 26 June 2016. There are bank account statements from the Claimant and pay slips for 2015 to 2016 but I was not taken to them at all in the evidence. I therefore take the agreed position in respect of the hours worked by the Claimant under the supply arrangement to be that set out in Ms Webster-Topley's statement and at pages 88a, 88b and 110h which are the timesheet documents for the weeks in question.

14. The Claimant questioned whether some of the weeks referred to by Ms Webster-Topley were in fact school holidays. The Respondent says that the Easter holiday that year ran from 25 March to 10 April, which would account for the week commencing 3 April. The late May bank holiday Monday was 30 May and so week commencing Sunday 29 May would have been a half term holiday. The summer term ended on 26 July 2016. The Respondent's position is that the Claimant was only employed during the supply year whilst she was actually at work and was not employed when not at work. The Respondent also says there

was a break in continuity of service from at least late July through to the end of August 2016, that is during the summer holidays, where no work was done and no wages paid.

15. The Claimant said in unchallenged evidence that she was told by Whitwell – I take it at some point after the person on sick leave commenced their return to work – that she would be leaving the School altogether, although it was not clear whether this would be before or at the end of the school year as the Claimant was also carrying out some other cover work. In June or July 2016, she secured a fixed term contract at Brookfield. The Claimant says she was under the impression that she still had a contract at Whitwell until the School year ended, even though it is clear there was no possibility of supply work after 26 July.

16. It is agreed that prior to starting to teach at Brookfield from 1 September 2016 the Claimant made a number of visits to the School. This followed messages she exchanged with Natalie Tyrell, who was to be a senior colleague at Brookfield – see pages 101 to 110g. I was not taken to all of those messages in evidence, but at page 102 Ms Tyrell informed the Claimant, "There are a few dates Lynne the head wondered if you could attend Brookfield to get a feel for the school and lay some plans down so we can start some of the changes that need to happen". Four dates were then specified, namely: 6 July to meet Ms Tyrell and the new team, 13 July which was a new a class day for the whole School, 14 July which was a parent workshop for new starters, and 19 July to spend time with reception and year 1 children and look at some of the resources and classroom layout. The Claimant accepts that at least in respect of 13 and 14 July, the School would not have been able to move those dates to accommodate her availability.

17. The Claimant replied to Ms Tyrell's message – see page 106 – explaining that she was covering for various classes at Whitwell and so not in a class full time, as a result of which she could "come to all of the above no problem". She added, "I could come in one day this week too if you wouldn't mind? As only working part time as and when needed so am off this Wednesday and Thursday – could get to know your school/class/staff a bit while I have chance?" In response to the second part of that message, Ms Tyrell said that the Claimant was welcome to join her and some of the children who were going on a school trip on the Thursday. The Claimant agreed to attend the school trip and go into to the School on the Wednesday.

18. The Claimant thus says she was working at Brookfield from July 2016. On the basis that she was going to be employed from the start of the school year by the same employer, namely the Respondent, she says that she regarded herself as continuing in its service over the summer period. She accepted however that the headteacher was wondering about her availability to attend Brookfield during the summer and not instructing her to do so, although she said that in practice she could not have refused to attend – she would have had to negotiate release from Whitwell if that had been necessary. Although she said in evidence that it was "like starting work", she accepts that she did not have a contract of employment to work at Brookfield until September 2016, though she had accepted a job there. She said she was still under the Whitwell contract until the end of July; that was still her school. She was not paid for the days she worked at Brookfield during July, knowing the work was voluntary, though she added that it is well-known that teachers work regularly outside of the hours for which they are paid.

19. The terms of the Claimant's employment at Brookfield were set out in a letter from the Respondent dated 1 September 2016 – see pages 111 to 118. It is headed, "Principal Statement" and then, "Appointment of a Fixed Term Full Time Teacher". Under the heading, "Date of Commencement", the letter says, "Your date of commencement of employment is 1 September 2016. This post is fixed term due to fluctuating pupil numbers at the school and will cease on 31 August 2017. This is only an approximate end date [and] cannot be taken as definite. I must emphasise to you that this offer cannot in any way be regarded as an offer of an established appointment". This was identical wording to that used in the Claimant's first fixed term contract detailed above. At one point in her evidence the Claimant said she did not read this part of the letter, though she at another point accepted that she was aware from this wording that her employment might cease with effect from 31 August 2017, subject to being offered further work, also saying that another employee at Brookfield had been on fixed term contracts for six years. She did not regard it as certain therefore that her employment would end on the specified date, expecting to be offered further work and regarding the date as approximate, though accepting that her employment at the School would end unless she was offered more work. Ms Webster-Topley accepts that fixed term contracts are used regularly in schools and whilst the decision would not be hers, would expect that if the reasons for the fixed term contract being in place remained, namely particular pupil numbers, then employment would continue once the contract expired.

20. The letter went on to say that the Claimant's "period of continuous service for statutory employment rights dates from 1 September 2016 the date of commencement of your employment with this Council". The Claimant says that she did not pay attention to this at the time. Under the heading, "Period of Notice" (page 115), the statement read, "The appointment will be subject to the following minimum period of notice by either side: //Two months, terminating at the end of the Autumn Term (31 December) or Spring Term (30 April), //Three months, terminating at the end of the Summer Term (31 August)". Ms Webster-Topley's evidence was that this did not mean there was not a pre-determined end date, though she accepted it would be good practice to issue notice which did not happen in this case.

21. In October 2016 the Claimant became pregnant. She had several periods of sickness absence which appear to have been related to her pregnancy. Again, it is not necessary for me to say anything further about that. On 25 April 2017 the Respondent sent her a letter (pages 119 to 121) in response to the Claimant having provided her MATB1 form. The expected week of childbirth was 25 June 2017. Under the heading, "Occupational Maternity Pay" the letter stated, "As you have less than 1 year's continuous LEA service at the qualifying week, you are not entitled to Occupational Maternity Pay". The Claimant said she noticed this at the time and thought it was wrong. The letter also stated, "You may take up to a maximum of 52 weeks' maternity leave made up of 26 weeks' Ordinary Maternity Leave and a further 26 weeks' Additional Maternity Leave". This of course reflected the ordinarily applicable statutory position. Under the heading, "Return to Work", the letter went on to state, "You are entitled to 52 weeks maternity leave and given your chosen start date you will be expected to return to work on 5 June 2018. Should you wish to return to work before this date you are required to give 21 days' notice in writing to your Headteacher". The Claimant accepts that this too might have been wrong, though it is not what she thought at the time.

22. Ms Webster-Topley says in her statement that this reference to the Claimant's return to work was included in the letter in error. She says it was a standard format letter that appears not to have been altered to reflect the fixed term contract status of the Claimant. As she observes, there is a handwritten note on this letter, referring to it being a temporary contract, but it is not known whose note that was.

23. The Claimant commenced her maternity leave on 5 June 2017. The Respondent says that prior to or whilst she was off on leave, it decided to delete the posts she had held, and to no longer employ another teacher who had been engaged at the same time as the Claimant also on an ostensibly fixed term contract. It says that it decided instead to have one permanent position, reverting to the structure that had been in place prior to the Claimant's employment commencing. It says that it invited the Claimant to apply for the new role, or at least that she was aware that she was entitled to do so. The Claimant says that she did not know about this because she was on sick leave at the time. Although this is at the heart of the substantive dispute between the parties, it is not necessary for me to say anything further about it in order to decide the preliminary issues set out above.

24. The Claimant says there was no discussion with Brookfield School, along the lines of those which had been held at Whitwell in 2015, to say that her employment would end from 31 August 2017. It is accepted that she was not offered new work at Brookfield. She said in evidence that she knew her fixed term contract had ended but did not think that was relevant because she was on maternity leave. She says she was aware there was no contract in place but still believed she was employed because she was on maternity leave and had not been told she had been dismissed.

25. The Headteacher at Brookfield completed a leaver form – see page 122 – which was dated 10 October 2017 and specified the Claimant's date of leaving as 30 September 2017, and the reason for leaving as "Temporary contract ended". No doubt as a result of the submission of this form, the Claimant was sent her P45 by the Respondent under cover of a letter dated 20 October 2017 (page 123), which it is accepted the Claimant would not have received until 21 October 2017 at the earliest. The letter is in standard form and states in part, "Please find enclosed your P45 form from your employment with Derbyshire County Council. A P45 is issued when your employment ceases …". The P45 itself (pages 124 to 126) also specified the leaving date as 30 September 2017 and was dated 20 October 2017. The Claimant accepts that the receipt of the letter at page 122 and the P45 at page 123 was unambiguous communication of the termination of her employment. As Ms Hodgetts points out, the Claimant did not question the receipt of the form at the time. She received her last wage slip in November 2017 and then received a lump sum for the statutory maternity pay she was entitled to between November 2017 and March 2018.

26. For the purposes of ACAS Early Conciliation, Day A was 27 November 2017 and Day B was 6 December 2017 – page 127. The Claim Form was received by the employment tribunal on 7 May 2018.

27. The Claimant says in her statement that she believes the Claim Form was submitted in time as she would have been entitled to return to work on 5 June 2018. On the basis of the Case Management Summary produced by Employment Judge Heap however (pages 40 to 47), which recognised the strong

force in the argument that 20 October (or as it may be 21 October) 2017 was the effective date of termination, the Claimant says that she will accept this date as the termination date. She thus accepts that the complaints were presented after the normal time limits but seeks to argue that time should be extended in respect of both. The Claimant does not say that she believed she would be able to return to her role at Brookfield in June 2018, not least because someone else had been appointed. Nevertheless, because she was never explicitly told that she would not return, she was not 100% certain. Based on the 25 April 2017 letter, she thought she might have the legal right to do so.

28. The Claimant did not think about bringing a claim until she received the October letter and P45. She had an initial discussion with her trade union at that point, but that did not progress very far because she kept speaking to different representatives. She therefore spoke with ACAS to begin the process of Early Conciliation. She discussed with ACAS her belief that she had been discriminated against because she had taken maternity leave. She says that she was told by ACAS that she had three months, less a day, to start Early Conciliation beginning with the effective date of termination, which she says ACAS told her was 31 August 2017. In respect of the submission of a claim, she says she was told that it should be presented to the Tribunal as soon as possible after Early Conciliation was completed. She says she was unsure of the effect of contacting ACAS on time limits for bringing her claim. Having held these discussions with ACAS, the Claimant decided not to present the claim to the Tribunal because of her mental health concerns, which were related to her own health and that of her daughter. She says that it was not the stress of submitting the claim, but what that would set in motion, that was of concern.

29. The Claimant says – paragraph 4 of her statement – that in October 2017 her four-month-old daughter began to experience severe distress during the night which prevented her, and the Claimant herself, from sleeping. The Claimant says that as the problem became more serious, she became depressed. By the time her daughter was referred to a paediatrician in December 2017, she says that she found it difficult to leave the house or lead a normal life, her husband taking unpaid leave to care for their daughter whilst the Claimant tried to get some sleep.

30. The Claimant's daughter was eventually diagnosed with gastric reflux. The Claimant herself was formally diagnosed with post-natal depression in January 2018, which led to an increase in anti-depressant medication which the Claimant had been taking for other reasons for some time. The Claimant's daughter had surgery in January and March 2018 which led to a slow improvement in her condition, though the Claimant says her sleep was still seriously disturbed until May 2018. In her oral evidence the Claimant described huge sleep deprivation, feeling trapped at home and simply waiting for her husband to return from work. The couple shared the responsibility for looking after their baby during the night.

31. Although not referred to during the evidence, it was agreed during submissions that I should read the documentation within the bundle relevant to the Claimant's daughter's health. There is evidence at page 133 a of a telephone appointment in January 2018 with a paediatric dietician. There is then a letter at page 127a, arranging an outpatient appointment for 14 February 2018. The report following that appointment is at pages 133b to 133c and is dated 19 February 2018. The report confirms that the Claimant and her husband had described their daughter as increasingly unsettled particularly when lying flat from

around five weeks of age, together with other concerns such as vomiting. The report also records advice that the baby should be partly bottle fed, but notes that the Claimant had said that her daughter struggled to take it. The report records various steps taken subsequently in order to seek to improve the child's health, including a tongue tie correction and changes in diet. It records the Claimant as reporting that over the last seven or eight weeks the child's symptoms had significantly settled. The conclusion of the report is that the child was suffering from gastro-oesophageal reflux, but it is very positive about her development and progress, with its recommendations focusing on what medication to prescribe and what diet might be appropriate.

32. The Claimant's own GP records are at pages 133g to 133p. At pages 133g to 133i there are notes from June and August 2017 which recorded the Claimant doing well as a new mother, including answering questions for depression screening in a satisfactory manner. In late August 2017 there are notes about consultations with the GP unrelated to mental health. There is no consultation at all between 18 October and 15 November 2017, when the Claimant sought advice again for a matter unrelated to mental health. The first record of the Claimant contacting the GP in relation to anxiety about her baby is on 15 December 2017. The health visitor planned to visit her on 12 January 2018, which the Claimant accepts means that her anxiety was not acute.

33. There was no further contact with the GP ahead of the home visit on 12 January. The Claimant does not accept that this does not mean her condition was not serious; it just means that she did not contact her GP. She says that she was not mentally well enough to go back to the GP, though she accepts she was able to identify her concerns as at 15 December. The note of the home visit concluded that the Claimant should attend her GP regarding her low mood and said that sleeping was a big issue which was impacting on her mental health and her plans to return to work. The Claimant accepted in evidence that this meant she had in mind at this point that she would return to the job market. The home visitor report describes the Claimant as exhausted due to lack of sleep and it was agreed that her antidepressant medication should be reviewed. At page 133n there is a record of a visit to the surgery on 19 January 2018. It states the Claimant's concerns about her mental health, and that she was tearful, and diagnoses post-natal depressive disorder. Her medication was increased.

34. The Claimant's next contact with the GP was on 21 February 2018 when she discussed her medication by telephone. On 23 February, another telephone appointment led to her medication being increased and a postnatal course recommended – see page 133o -with a diagnosis of depressed mood, although it was noted the Claimant was less tearful. Another appointment seems to have taken place on 1 March 2018, again by telephone, with the Claimant reporting that her medication increase had improved her mood. There were several further discussions with the surgery at which the Claimant was issued with further antidepressant medication. These continued until 19 June 2018 and beyond.

35. In summary, the Claimant said in oral evidence that she felt somewhat better in early March as the baby began to show signs of improvement, but did not feel fully well until around June or July 2018. The Claimant also pointed out, correctly of course, that the records of GP visits in the bundle do not show the appointments she had to attend with her child.

36. One of the matters the Respondent draws attention to is that the Claimant was investigating the possibility of employment in February 2018. At pages 129 – 130, there is a reference request for the Claimant from an agency, addressed to the headteacher at Brookfield and dated 30 January 2018. There is then correspondence between the Claimant and the agency in February 2018 at pages 131 – 132, and then an email from the Claimant to the headteacher at page 133 dated 12 February 2018. That email reads, "Hi Lynne, hope you are well //I'm just coming to the end of my maternity leave and have decided to register with a supply agency. (Not much choice seeing as though I got a P45 through the post even though you have employed someone else as a teacher in Reception and Year 1!). //They said they would ask you for a reference, is this ok? //Thanks, Natalie". The Claimant does not accept that this meant she was also fit to submit a Claim Form to the Tribunal, noting that it was a very short e-mail. She says she felt it was too stressful to do so and was not at the forefront of her mind given her and her daughter's health issues.

37. She followed up her enquiry of the headteacher on 13 March, 2018 – see page 135. The agency chased the Claimant for further information in February and April 2018, the latter – see page 137 – apparently eliciting no reply. The Claimant says in her statement – see paragraph 7 – that when her maternity pay ran out and her husband took unpaid leave, the financial situation became quite desperate. She thus says that she was left with no alternative but to investigate obtaining employment through an agency but, because of her health, did not pursue the matter beyond an initial interview. The Claimant says that she telephoned Brookfield School around the end of April 2018, to ask whether any work would be available for her in the summer term. The Claimant began employment with an organisation she had previously worked for in June 2018.

38. There are two recent letters from medical professionals at pages 133q and 133r, which the parties also agreed I should read during my deliberations. The first is from the Claimant's health visitor who says that she supported the Claimant with maternal mental health from June 2017 to April 2018 and is of the opinion that the Claimant would have been unable to pursue a tribunal claim during this time. The second is from the Claimant's GP. It records the Claimant as having suffered from depression since 2002, seeing the practice on a fairly regular basis until 2011. It refers to the deterioration of the Claimant's mood at the end of 2017 coinciding with sleep deprivation. It goes on to say that she saw the Claimant in January 2018 with a multitude of issues affecting her mental health, the Claimant describing herself on that occasion as feeling very anxious and in low mood. The GP says she increased the Claimant's medication, referred her to a post-natal course and by 23 February she was slowly improving. Her opinion is that the general progression of depression will have contributed to poor concentration and motivation alongside the sleep deprivation associated with having a young child and says these factors are likely to have affected the Claimant's progress towards presenting her tribunal claim.

39. The Respondent says – see paragraph 25 of Ms Webster-Topley's statement – that the late presentation of the Claim Form is prejudicial to the Respondent because memory is fading with each passing month, this preliminary hearing further delays a final hearing, and the Respondent's key witness, Lynne Greenough (who was the headteacher at Brookfield) retired in December 2018 and "is not guaranteed to be in the country when asked to give evidence about events 18 months earlier". Ms Webster-Topley was not saying that Ms Greenough had left or would leave to live abroad, simply that once she retired,

she would no longer be tied to taking holidays during term time and so may not be available at all times throughout the year.

Law

Continuous employment

40. The statutory provisions related to continuous employment are set out in Part XIV ERA. So far as relevant to the issues before me, the legislation provides as follows:

40.1. Section 210: "*(3) In computing an employee's period of continuous employment for the purposes of any provision of this Act, any question - //(a) whether the employee's employment is of a kind counting towards a period of continuous employment, or (b) whether periods (consecutive or otherwise) are to be treated as forming a single period of continuous employment, //shall be determined week by week; but where it is necessary to compute the length of an employee's period of employment it shall be computed in months and years of 12 months in accordance with section 211". ///(4): Subject to sections 215 to 217 [not relevant in this case], a week which does not count in computing the length of a period of continuous employment breaks continuity of employment. //(5) A person's employment during any period shall, unless the contrary is shown, be presumed to have been continuous*".

40.2. Section 211: "*(1) An employee's period of continuous employment for the purposes of any provision of this Act – (a) … begins with the date on which the employee starts work, and //(b) ends with the date by reference to which the length of the employee's period of continuous employment is to be ascertained for the purposes of the provision*".

40.3. Section 212: "*(1) Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment. ///(3) Subject to subsection (4) [not relevant in this case], any week not (within subsection (1)) during the whole or part of which an employee is … //(b) absent from work on account of a temporary cessation of work, [or] //(c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose, … counts in computing the employee's period of employment*".

41. Ms Hodgetts referred to numerous authorities on the subject of continuous employment, all of which I have considered during my deliberations. I will deal with each briefly in the order in which she submitted them.

42. **Curr v Marks and Spencer plc [2002] EWCA Civ 1852** was a decision of the Court of Appeal. At the heart of the case was whether the former employee's time on a career break, agreed between her and the employer, counted towards continuous employment. The Court held that in order to fall within section 212(3)(c) ERA, an employee must be regarded by both the employer and the ex-employee as continuing in the employment of the employer for any purpose. In other words, there must be a mutual recognition by the arrangement that the ex-employee, though absent from work, nevertheless continues in the employment of the employer. Without there being a meeting of minds by the arrangement that both

parties regard the ex-employee as continuing in employment, the section will not be satisfied.

43. The second case, **General of the Salvation Army v Dewsbury [1984] ICR 498**, is Employment Appeal Tribunal ("EAT") authority for the simple proposition that the phrase "starts work" in what is now section 211(a) ERA is not intended to refer to the undertaking of the fulltime duties of the employment (in that case when the former employee began teaching). Rather it is intended to refer to the beginning of the employee's employment under the relevant contract of employment.

44. **Ford v Warwickshire County Council [1983] ICR 273** is a very well-known House of Lords authority, including on the meaning of "temporary cessation of work" in what is now section 212(3)(b) ERA, which is why it is relevant to the present case. It was a case of a teacher employed under a series of fixed term contracts each of which ran from the beginning of an academic year until its end. Lord Diplock referred back with approval to the earlier decision of the House in **Fitzgerald v Hall, Russell & Co Ltd [1970] AC 984**, and held that whether a cessation was temporary is a matter to be determined by looking back "from the date of the expiry of the fixed term contract in respect of the non-renewal of which the employee's claim is made over the whole period during which the employee has been intermittently employed by the same employer, in order to see whether the interval between one fixed term contract and the fixed term contract that next preceded it was short in duration relative to the combined duration of those two fixed term contracts during which work had continued". He said that "temporary" has the sense of "transient", that is lasting only for a relatively short time. I also note the observation of Lord Brightman that the work to which the subsection is directed is the employee's work, that is to say the work available to the employee personally. I shall return to this further below.

45. The next authority referred to by Ms Hodgetts was the decision of the EAT in **Hussain v Acorn Independent College Ltd [2010] UKEAT/0199/10**. The case concerned the application of **Ford** to a situation in which Mr Hussain was employed to cover the illness of another teacher until July 2008 and then started a permanent job with the employer in September 2008. The EAT held that what is required is to find the reason for the termination of the first contract. There is always a termination because by definition section 212 applies where there is "no contract of employment, no work being done, no right in the employee to demand work, no obligation in the employer to provide it". The EAT went on to say, "it is not a requirement of the statute that there be examination of the expectation of the parties of further work". Thus, continuity was preserved between the two contracts as the interval between them was short and temporary.

46. The Court of Appeal's decision in **Pearson v Kent County Council [1993] IRLR 165** does not seem to me to be of relevance in the present case, being concerned with the provisions of section 212(3)(a) ERA. I have though considered an additional case, **Welton v Deluxe Retail Ltd t/a Madhouse (in Administration) [2012] UKEAT/0266/12**, which bears on one of the points I discussed with Ms Hodgetts during her submissions. Ms Hodgetts submitted that there could be no temporary cessation of work between the Claimant's supply work at Whitwell and her employment at Brookfield because the contracts were at different schools – see her skeleton argument at paragraph 55(c). That seems to me to be expressly contradicted by paragraphs 34 and 36 of the EAT's judgment

in this case which reads: "There is nothing in the statutory provisions which requires a cessation of work to be one which arises in any particular circumstances. It is a pure question of fact: was there work of the employer available for the employee to do personally, during the week in question? The position of other employees is irrelevant. The reason why there is a cessation of work is irrelevant. Given that no contract is in existence governing the relationship during the week, any work subsequently taken up by the employee by the employer will be under a fresh contract. I see no reason why it should not be in another department or plant or location just as it may well often, even usually, be at the same workplace … The proper view depends upon the employee working for the same employer, and not upon where or in what circumstances he does so". What must be considered in this context therefore is whether there was a cessation of work for the Claimant herself, whether she was away from work due to that cessation, and whether the cessation was temporary. I should add that the decision in **Welton** also makes the same point as that made in **Dewsbury**, and addresses the requirement for any "arrangement" under section 212(3)(c) ERA to be prospective and not retrospective.

Termination of employment

47. I will not refer to all of the cases mentioned in Ms Hodgetts' skeleton argument on the question of termination of employment. On the question of the date of termination, she made the uncontroversial submissions that in order to be effective, dismissal must be communicated to the employee, be sufficiently unequivocal and communicate a specified or ascertainable date on which employment is to end. She also referred to **Kelly v Riveroak Associates Ltd [2005] UKEAT/0290/05**, a decision of the EAT which held that it was not open to the employment tribunal to conclude that the issue of a P45 had not terminated the employee's employment, where the content of the form was unequivocal, both parties believed the contract of employment had ended – albeit for different reasons – and both acted on the basis that this was the case, with no work being done and no further payment being made. The EAT left open the question of whether employment terminated on the facts of that case by way of resignation or dismissal. Ms Hodgetts also referred to the Court of Appeal's decision in **London Borough of Newham v Ward [1985] IRLR 509**. The short point in this case was that the issue of the P45 did not effect termination of the employee's employment on the facts; it had already been terminated at an earlier date and the P45 had simply been issued subsequently as required by relevant regulations.

Time limits – unfair dismissal

48. Section 111(2) ERA provides, "*... an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal - //(a) before the end of the the period of three months beginning with the effective date of termination, or // (b) 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*". Where, as in this case, the complaint of unfair dismissal has been presented to the Tribunal after the primary time limit has expired (even accounting for the impact of ACAS Early Conciliation), the Tribunal must answer two questions in order to determine whether the complaint should nevertheless be allowed to proceed. The first is whether the Claimant has established that it was not reasonably practicable to

present the claim in time and, if she has, the second is whether she presented it in such further period as was reasonable.

49. On the first question, there has been extensive case law over many years. In **Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119**, the Court of Appeal held that the test to be applied was not what was reasonable, nor at the other end of the spectrum what was physically possible, but whether it was "reasonably feasible" for the employee to present the complaint in time. This has to be assessed in all the circumstances of the case, the Court indicating that potentially relevant factors might include the manner of and reason for dismissal, the substantial cause of the Claimant's failure to comply with the time limit, whether there was any physical impediment preventing compliance such as illness, whether during the limitation period the Claimant was seeking to resolve her disputes with the Respondent using the latter's procedures, whether (and if so when) the Claimant knew of her rights, whether the Claimant had been advised and any fault on the part of the adviser. It is well-established that mere ignorance of time limits will not suffice to excuse failure to comply with a time limit, though it might if it is of itself reasonable. As Ms Hodgetts stated in her skeleton argument, where illness is said to be the reason for not presenting the claim in time, the tribunal must assess its effects in relation to the overall limitation period but as the Court of Appeal made clear in **Schultz v Esso Petroleum Co Ltd [1999] ICR 1202** the weight to be attached to a disabling illness will be greater where it falls during the crucial later weeks of the overall limitation period.

50. As for the second question, there is no particular period that will be "reasonable" in all cases. Again, the Tribunal is required to look at all the circumstances of the delay, and at how promptly the Claimant acted once any impediment to presenting a complaint had been removed. The point is not whether the Claimant acted reasonably but in all the circumstances of the case what extended period it is reasonable to allow for presentation of the complaint.

Time limits - discrimination

51. Section 123(1) of the Equality Act 2010 provides that proceedings on a complaint under Section 120 may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable.

52. The provision for extending time where it is just and equitable to do so gives to tribunals wider scope than the test of reasonable practicability which applies in unfair dismissal cases. Nevertheless, there is no presumption that it will be – **Robertson v Bexley Community Centre (trading as Leisure Link) [2003] IRLR 434**. In **British Coal Corporation v Keeble [1997] IRLR 336**, it was held that similar considerations arise in this context as would be relevant under the Limitation Act 1980, namely the prejudice which each party would suffer as a result of granting or refusing an extension, and all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the Claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the Claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

53. More recently, the Court of Appeal handed down its decision in **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640.** Leggatt LJ said that Parliament has given tribunals "the widest possible discretion" in deciding whether to extend time in discrimination cases. Notwithstanding **Keeble** there is no list of factors which a tribunal must have regard to, though the length of and reasons for delay, and whether delay prejudices a Respondent for example by preventing or inhibiting it from investigating the claim whilst matters were fresh, will almost always be relevant factors. At paragraph 25 he said that there is no reason to read into the statutory language any requirement that the Tribunal must be satisfied that there are good reasons for the delay, let alone that time cannot be extended in the absence of an explanation of delay from the Claimant. At most, he said, whether any explanation or reason is offered and the nature of them are relevant matters to which the Tribunal should have regard.

Analysis

Continuous service

54. Whilst accepting that strictly speaking it is only relevant if the out of time unfair dismissal complaint is allowed to proceed, I deal first with the question of continuous employment given that it was the subject of extensive evidence and submissions. I note in doing so that there is a presumption of continuous employment, unless the contrary is proved, according to section 210(5) ERA and, in addition, make the uncontroversial point that what is stated in documentation prepared by the parties is obviously not determinative.

55. I deal first with what is uncontroversial. The Claimant's fixed term contract at Whitwell is agreed to have commenced on 1 September 2014 and ended on 31 August 2015. The Respondent does not argue that any period between 31 August 2015 and the point in September 2015 when the Claimant began to provide supply work at Whitwell constituted a break in continuous service. Furthermore, whilst the supply arrangement made very clear that the contract of employment was only in place whilst the Claimant was actually working – this is doubtless what was intended by the reference in the statement of terms to breaks of more than one week – the Respondent accepts that there was no break in the Claimant's continuous service from September 2015 until April 2016, or at least it is not able to evidence any such break. I therefore proceed on the agreed basis that the Claimant had continuous service from 1 September 2014 until April 2016.

56. There were then three individual weeks which the Respondent is able to identify as weeks during which the Claimant carried out no work at Whitwell at all. Two of those weeks, namely those commencing on 3 April 2016 and 29 May 2016 respectively were school holiday periods; the other was week commencing 1 May 2016. It seems clear that the fourth week identified by the Respondent, namely week beginning 26 June 2016, was in fact the first in a number of consecutive weeks leading up to the end of term on 26 July 2016, and beyond into the school summer holiday, when again the Claimant carried out no work under the supply arrangement. The Claimant accepted as much in closing submissions. She did visit Brookfield School on a number of occasions between 26 June 2016 and the start date specified in her contract for that School, which was 1 September 2016. I have carefully considered the case law referred to above which makes clear that the written start date is not necessarily the same

as the start date under section 211 ERA. Nevertheless, it is plain to my mind that the work the Claimant carried out at Brookfield during the summer months of 2016 was purely voluntary so as to enable preparations to be made for when she in fact started work. There was no mutuality of obligation between the parties in respect of the visits, either as to work or pay. The Claimant herself accepted in evidence that there was no contract of employment for her work at Brookfield until 1 September. Accordingly, that work does not fall to be taken into account in assessing her continuous service.

57. That is the factual position. The key question is whether the Claimant had continuous service beyond 3 April 2016 until the start of her contract at Brookfield on 1 September 2016 (putting the summer visits to the School out of account), notwithstanding that there were plainly a number of weeks when there was no contract of employment in place. As I have said, two of the three gaps of one week each are explained by school holidays. In the case of week commencing 1 May 2016, it seems clear that no work was carried out because no work was offered to the Claimant; no other explanation was offered by either party. The same clearly appears to have been the case for the period from 26 June to 26 July 2016 – no work was offered to the Claimant; and the absence of any work from 26 July to 31 August 2016 is accounted for by the school summer holiday. There was, on the agreed arrangement, no contract of employment in force for any of these periods. Further, I can see no arrangement agreed between the parties in advance of any of the periods in question, such that section 212(3)(c) ERA does not assist the Claimant. The crucial question therefore is whether those periods count towards continuous service because of section 212(3)(b), namely that the Claimant was absent from work on account of a temporary cessation of work.

58. Taking first each of the three single weeks in April and May 2016, it is to my mind plain that the Claimant was absent from work on account of a temporary cessation of work. The two weeks that fell during school holidays are analogous to the situation in **Ford** (albeit the contractual arrangements were different to those which applied in that case) in that there was no work for the Claimant to do because the School was closed. Although it was open in week commencing 1 May 2016, it seems indisputable that this too was a week during which the Claimant was not required because there was no work for her. The need for supply work had ceased; it does not matter for these purposes why that was the case. Taking the backward-looking approach required by the case law, the cessation of work during those three weeks was clearly temporary; the work resumed and overall those three weeks were very short periods indeed compared to 22 months when a contract of employment – either the initial contract or the subsequent supply contract – was in place. Accordingly, all three of those weeks plainly fall within section 212(3)(b).

59. That brings me to the longer period during which there was no contract, namely from 26 June 2016 to 31 August 2016. I have already made clear that I reject Ms Hodgetts' argument that there cannot have been a temporary cessation of work during this period because the Claimant went to work at a different school – see the decision in **Welton**. As the case law makes clear, there is always a termination of a contract; it is not known necessarily at the time whether it will be temporary or not; that is why section 212(3)(b) is necessary and that is why the backward-looking approach is required. In my judgment, taking that approach, first it is clear that the Claimant ceased working at Whitwell in June 2016 because the School ceased to need her supply work, and secondly – looking

backwards – this period was also temporary when assessed overall, being just over two months in an overall two-year period.

60. I therefore conclude that the Claimant had continuous service, either because a contract of employment was in place, or because when it was not, she was absent from work on account of a temporary cessation of work, from 1 September 2014 until the termination of her contract at Brookfield. I therefore turn to the question of when that contract terminated which is when the Claimant's period of continuous service ended.

Termination date

61. Ms Hodgetts submitted that dismissal took place on the expiry of the 2016/17 academic year on 31 August 2017, being the date referred to in the Brookfield contract, with no further communication being necessary. Her alternative submission was that the dismissal took place upon the Claimant receiving the letter of 20 October 2017, which she accepted was to be taken as 21 October 2017. As already noted, the Claimant did not pursue her argument that termination took place any later than that date.

62. I do not accept Ms Hodgetts' submission that the Claimant was advancing a case that the terms of her employment at Brookfield were not wholly contained in the written documentation on the basis of her claims about the work she carried out there in the summer of 2016. The Claimant herself accepted that her contract at Brookfield started on 1 September 2016. I do accept however Ms Hodgetts' submission that the terms of the Brookfield contract were ambiguous. This is so in at least two respects. First, it referred to 31 August 2017 being an "approximate end date", conditional on pupil numbers, thus introducing material uncertainty as to the end date of the purported fixed term. Secondly, there was also the provision for notice to be given, which again casts doubt on whether it could properly be said that the contract was clearly to expire, without the need for anything more, on 31 August 2017. Both of those terms mean that the contract was not unequivocal as to its end date. In determining the termination date, I am therefore entitled to consider other material, as Ms Hodgetts submitted. My focus in doing so should be on what was actually communicated between the parties rather than on either party's retrospective understanding or contemporary unstated expectations.

63. When I consider such other material, it becomes clear in my judgment that the Claimant's contract of employment did not terminate on 31 August 2017. First, the Respondent's letter regarding maternity leave, sent on 25 April 2017, referred to a return date of 5 June 2018. That legitimately raised doubt, or as it may have been further doubt, in the Claimant's mind as to when her employment at Brookfield would actually come to an end. Secondly, she continued to be paid after 31 August 2017, though of itself that could not be said to be determinative given the legislative requirement to continue paying statutory maternity pay even when employment has come to an end. Thirdly, unlike what happened at Whitwell, when the Claimant was clearly told towards the end of her first period of work there that her contract would not be renewed, no such conversation took place at Brookfield. Ms Hodgetts submitted that the Claimant knew on the basis of that earlier contract that her contract at Brookfield would not be renewed if there was no further work, but of course in 2015, in addition to the discussions which took place, she was not on maternity leave. The situation in 2017 was therefore materially different to that which pertained in 2015.

64. I therefore reject the submission that there was a clear shared understanding between the parties that the Claimant's employment would terminate on 31 August 2017. In my judgment the Respondent cannot argue for a date of termination earlier than 30 September 2017, given that this was the termination date it entered on the internal leaver form and on the P45. The leaver form gave as the reason for termination of employment, "Temporary contract ended"; it could quite easily have said that the temporary contract had ended on 31 August 2017 given, as made clear in **Ward**, that issuing the P45 is not necessarily of one piece with terminating employment, but it didn't. The Claimant's employment cannot have terminated on 30 September, given that she had not been informed that this was the case. She in turn cannot argue for a later date than 21 October 2017 when she received the letter enclosing the P45, which she accepts was unambiguous communication of dismissal. That in my judgment was the termination date. I am fortified in that view by how the Claimant's pay was dealt with, the final payslip being issued in November 2017 and the balance of her statutory maternity pay being paid in a lump sum thereafter.

65. The Claimant was thus continuously employed from 1 September 2014 until 21 October 2017.

Time limits

66. Turning to the question of time limits, I begin by noting that the burden of establishing a case for extension of time, whether under the ERA or the EQA, falls on the Claimant. Accounting for ACAS Early Conciliation, the latest date on which the Claim Form could have been presented in time was 29 January 2018. It was in fact presented just over three months later than that, on 7 May 2018.

67. I begin by looking at the first part of the limitation period. The Claimant's essentially unchallenged evidence was that she was told by ACAS that she had to commence Early Conciliation within three months, less one day, from the effective date of termination, which she says she was informed by ACAS was in their view 31 August 2017. Whilst I cannot be entirely sure what advice she received, I readily accept that she could well have reasonably misunderstood what she was told even if what she had been told was the correct legal position. The impact of Early Conciliation on time limits is far from simple even for lawyers to understand, and the Claimant's unchallenged evidence was that her conversations with her union were not helpful. What she says she was told is moreover entirely consistent with what she in fact did, in that she commenced Early Conciliation on 27 November 2017 just three days before the expiry of a three-month period commencing on 31 August 2017. I accept therefore that she was labouring under a reasonable misapprehension as to when her Claim Form had to be presented, up to the completion of Early Conciliation on 6 December 2017. She was by this point approaching halfway through the limitation period.

68. I have no reason to doubt her further evidence that she was informed by ACAS that she should present her claim to the tribunal as soon as possible after Early Conciliation was completed. That was on 6 December 2017. The Claimant seeks to explain the delay from the beginning of December until the beginning of May by reference to her health, more specifically her daughter's health and the associated impact on the Claimant's own mental health and wellbeing.

69. The Claimant's case is that it was the stress of what submitting the Claim Form would set in motion, rather than just the actual preparation and submission of the Form, that was a cause for considerable concern on her part. That is not in my judgment a flimsy or unworthy explanation for a delay in presenting a claim form, when one takes into account the context that the Claimant was a new mother with justifiable concerns for her very young child, which compounded the ordinary – though no less difficult – issue of sleep deprivation associated with being a first-time parent. The Claimant said that her baby had surgery in both January and March 2018. That was uncontested evidence. The medical records in relation to the baby show that she significantly improved over the seven or eight weeks to the middle of February 2018.

70. As to her own health, the Claimant says that she found it difficult to leave the house in December 2017; the documentary evidence shows that she first contacted her GP in the middle of that month about her health concerns, though the health visitor did not see her until 12 January 2018. By this time the Claimant was coming towards the end of the limitation period. The health visitor's report makes clear that the Claimant's lack of sleep, arising from the difficulties being experienced by her baby, was having a not insignificant impact on her mental health. The report describes the Claimant as exhausted, recommending a review of her medication which was increased a few days later. There was a further increase in medication in February 2018, which can properly be said to demonstrate continuing struggles on the Claimant's part despite the improvements in her child's health. She continued to take her medication, though as early as 1 March 2018 she was reporting an improved mood which is consistent with the GP's letter at page 133r. The Respondent refers to the Claimant's willingness to consider returning to work, but I attach little significance to that. The documentary evidence in this respect appeared at a time when the medical evidence clearly shows the Claimant experiencing serious difficulties. She did not actually start work until June 2018, after her Claim Form had been presented.

71. With that assessment of the facts in mind, taking the unfair dismissal complaint first, I am satisfied that it was not reasonably practicable for the Claimant to present that complaint in time. Taking the approach required by **Schultz**, the medical records suggest the most profound difficulties experienced by the Claimant fell in the last few weeks of the limitation period. The question is not whether it was physically possible for her to complete her Claim Form at this point and thus pursue her claim, but whether it was reasonably feasible for her to do so. Although certain aspects of the medical picture are not wholly clear, in my judgment it was not, given the serious difficulties she was encountering in January, both in relation to her daughter's health – though this had just begun to improve – and the documented difficulties in relation to her own.

72. The second question in relation to the unfair dismissal complaint is whether the Claimant presented it within such further period after 29 January 2018 as was reasonable. I conclude that she did not. Whilst again I note that the medical picture is not wholly clear, it does seem tolerably clear that from some point in March 2018 things were improving materially both for the Claimant's daughter – though I note there was a further operation during that month – and, as the GP records show, for the Claimant herself. Whilst of course the Claimant could be expected, once things began to improve, to take some time to gather her thoughts and decide on her course of action, the impediment which had prevented presentation of the claim in time had essentially been removed. In

those circumstances it is my judgment that something like a further six weeks or so was not a reasonable period within which to present the unfair dismissal complaint. With Early Conciliation already completed, the Claimant already being clear in her own mind that she was unhappy about her treatment (see her email to the headteacher at Brookfield) and the impediment to pursuing a claim being removed, a period of two or three weeks from, say mid-March, would have been a reasonable period in which to file her claim. The complaint of unfair dismissal is therefore struck out.

73. Turning to the complaint of discrimination, the decision in **Morgan** makes clear that I have the widest possible discretion in deciding whether to extend time. In determining whether to do so, I am not required to assess whether the Claimant was in a position to present her complaint within the normal time limit, which in any event I have decided – assessed reasonably – she was not, nor when it was reasonable for her to do so thereafter. My focus is to be on the reason for the delay in presenting the claim, the length of the delay and any prejudice to the Respondent.

74. Ms Hodgetts submitted that the Claimant had not given a full, by which she meant frank, explanation for the delay. Whilst as I have said there are some loose ends in the medical records, I do not accept that characterisation of the Claimant's evidence. She volunteered that she had been told by ACAS that it believed the date of termination of her employment was 31 August 2017, a point which could only have been harmful to her attempt to persuade the Tribunal to extend time. Reviewing her evidence overall, the Claimant was to my mind doing her best to explain her experiences in the period from December 2017 onwards as she recalled them. I accept her case that written medical records do not always tell the full story.

75. The substance of the Claimant's explanation for the delay in presenting her claim is, as I have said, the combination of her daughter's ill health and the consequent impact on the Claimant herself. As I have indicated, these are material and not trivial explanatory factors. In deciding not to extend time in respect of the unfair dismissal complaint, I have made clear that this was a largely improving situation from, as best as I can judge, some point in March 2018. The Claimant thus delayed by a matter of a few weeks from that point before she presented her claim. That is not by any measure a substantial delay. The crucial question therefore becomes whether the delay creates any prejudice for the Respondent. I conclude that it does not.

76. The Respondent cites two matters. First, it submits that memories fade. That is also true for the Claimant of course. Moreover, on the substance of the issues between the parties, although I have not examined them in detail in the context of this Preliminary Hearing, the Respondent does seem to have given a detailed account in its Response of why it says it terminated the Claimant's employment, and doubtless if there are reasons why, for example, it restructured the teaching arrangements at Brookfield School which it says are unrelated to the Claimant's absence on maternity leave, those reasons are – or at least should be – well-documented. Further, there can certainly be no criticism of the Claimant for the delay in getting to a substantive hearing created by the need to determine these preliminary points. The second concern expressed by the Respondent was the fact that Ms Greenough retired at the end of December 2018. When examined however, it became clear that there is no particular concern about her being unavailable. Ms Hodgetts mentioned in submissions that, having left the

School, Ms Greenough would not have access to school records in order to prepare to give evidence; that can very obviously be easily remedied.

77. Taking into account the relatively short delay as I have analysed it, the not unworthy or in any sense trivial explanations given by the Claimant for the delay, and the absence of any material prejudice to the Respondent, in my judgment the Claimant's complaint of discrimination was presented within such time after the normal time limit as was just and equitable in all circumstances. Her complaint of discrimination will therefore proceed to a final hearing.

78. I will ask the Tribunal office to arrange a Telephone Preliminary Hearing to identify the issues in the case and provide Case Management Orders.

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Employment Judge Faulkner

Date: 15 February 2019

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE