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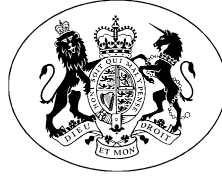

EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Mr K T Abbequaye	**AND**	HSBC Bank Plc

Heard at: London Central **On**: 20 July 2018

Before: Employment Judge Sharma

Representation

For the Claimant: Miss N. Frobisher, of Counsel

For the Respondent: Mr C. Rajgopaul, of Counsel

REASONS

These are my reasons for the decision set out in my judgment dated 20 July 2018 and sent to the parties on 27 July 2018,in deciding that in relation to the Claimant's complaint that he had been directly discriminated , which had been presented outside the statutory time frame set out in Section 123 (1) (a), Equality Act 2010, it was not just and equitable to extend time pursuant to Section 123 (1) (b) , Equality Act 2010.

A. BACKGROUND

1. The Claimant brought claims for unfair dismissal and direct discrimination on the grounds of race and religion or belief, by issuing his ET1. The ET1 was received by this

tribunal on 12 January 2018. The Claimant's contract of employment was terminated on 3 July 2013. The Claimant was dismissed by the Respondent for gross misconduct.

2. I reminded the parties that this tribunal hearing would be conducted in accordance with the overriding objective and their cooperation to achieve this was sought; the parties both confirmed that this would be given (and indeed it was).

3. At the start of the tribunal hearing the Claimant withdrew his claim for unfair dismissal which, under Rule 51, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, bought an end to this claim.

4. Miss Frobisher and Mr Rajgopaul both confirmed that the bundle of documents presented to me, which comprised 89 pages, was agreed. The numbers below in brackets refer to pages of the bundle.

5. The Claimant submitted a witness statement which was accepted as his evidence in chief. Mr Rajgopaul informed me that this witness statement was handed to him just twenty minutes before the tribunal hearing commenced; this witness statement referred to the Claimant not having savings or receiving benefits, a point not previously raised by the Claimant. Mr Rajgopaul stated that he would not be seeking an adjournment as a result of such matter not being previously raised and he would deal with such matters in cross examination, which he duly did.

6. The Claimant gave oral evidence under oath.

B. THE ISSUES

7. Does the tribunal have jurisdiction to hear the Claimant's claim for discrimination on the basis that this was presented out of time? Specifically, should time be extended on the basis that it is just and equitable to do so?

8. It was the Claimant's case that he was prevented from serving a claim on the basis that the employment tribunal fees prevented him from doing so.

9. It was the Respondent's case that: -

   (a) The Claimant's employment terminated on 3 July 2013, 26 days before the fee regime was introduced on 29 July 2013 by the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 SI 2013/1893 .

   (b) The fees regime was revoked on 26 July 2017 when the Supreme Court declared the fees to be unlawful in its decision in R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51 . The Claimant 's claim form was not received by the Tribunal until 12 January 2018, more than five months after such Supreme Court declaration.

   (c) On 17 October 2017, ACAS advised the Claimant that his claim was out of time and thus, he would not benefit from early conciliation. ACAS suggested that they issue the early conciliation certificate and the Claimant proceed to the employment tribunal. From that point on, it took the Claimant more than two months to bring his claim.

10. It was the Claimant's case that:-

   (a) The Claimant was clearly out of time for bringing his claim.

(b) The reason why the Claimant did not lodge his claim in the employment tribunal within the 3 month limitation period was because he could not afford to pay the fees at that time.

(c) When the fees were deemed unlawful by the Supreme Court, the Claimant then sought to bring his claim out of time by presenting his claim form, received by the Tribunal on 12th January 2018.

C. BURDEN OF PROOF

11. As the Claimant brought his claim outside the primary time limit, the burden of proof was upon the Claimant to persuade me that it would be just and equitable to extend time .

D. FINDINGS OF FACT

12. The Claimant was employed by the Respondent from 1 December 1997 to the date of his dismissal on 3 July 2013 as a retail branch manager.

13. In the Claimant's claim form, he referred to events which took place between 2008 and March 2013, which he alleged to be discriminatory. The last event referred to as allegedly discriminatory was therefore March 2013.

14 On 29 July 2013, the employment tribunal fees were introduced.

15. From 20 September 2013 to 10 October 2013 the Claimant was involved in an appeal hearing with the Respondent.

16 On 26 July 2017, the employment tribunal fees were abolished.

17. On 5 October 2017, the Claimant ‘s solicitor applied for ACAS early conciliation.

18. On 17 October 2017 (18), the Claimant’s solicitor was advised by ACAS that as the claim was already out of time, the Claimant would not benefit from early conciliation or stop the clock. ACAS stated that this process would push the Claimant a further month out of time. Thus, ACAS suggested that they issue the early conciliation certificate and that the Claimant proceed to the employment tribunal. ACAS issued an early conciliation certificate on 19 October 2017 (16).

19. The Claimant’s solicitor presented the Claimant’s claim form, the ET1, which was received by this Tribunal on 12 January 2018.

20. In giving his evidence, the Claimant explained that the reason why the claim had not been presented earlier was because he had not been advised to do so by his solicitor. The Claimant stated in evidence and in response to my question that although he could not recall given the passage of time, he believed that he had been advised by his solicitor since July 2013.

21. I find that in relation to the period of delay: -

(a) From the date of the last alleged act of discrimination (March 2013) until the actual presentation of the Claimant’s claim (12th January 2018), the delay

was exceptionally considerable in that the claim was out of time by approximately four and a half years. (In relation to his complaint that he had been discriminated, although a list of discriminatory incidents had not been provided (and at this hearing I was not deciding the issue of whether or not the Claimant had been discriminated), nevertheless I noted that the earliest alleged incidents set out in the Claimant's ET1 took place as far back as 2008. If such incidents were to be relied upon by the Claimant as constituting discriminatory acts carried out by the Respondent, these would have taken place approximately ten years ago. If the most recent incidents set out in the Claimant's ET1 was to be relied upon by him as constituting discriminatory events, then these took place between 2011 and March 2013.Taking therefore the best case i.e. the last alleged discriminatory incident taking place in March 2013 and thus, the time frame for presenting this would have been June 2013, then the least amount of delay would have been approximately four and a half years. The length of this delay, on the best case analysis, was substantial.

(b) Looking then at the period of delay from when the employment tribunal fees were abolished (26 July 2017) until the date of presentation of the claim (12th January 2018), it took the Claimant just over five months to present his claim once the fees had been abolished. Once the fees had been abolished, it took the Claimant over two months to apply to ACAS (from 26 July 2017 to 5th October 2017) for early conciliation. It then took the Claimant over two months from the date ACAS suggested the Claimant proceed to the

Employment Tribunal (17 October 2017) until it was in fact presented (12th January 2018).

(c) I find these periods of delay to be substantial. The delays were not just substantial from the approximate date of the last alleged discriminatory incident (March 2013) but also from the date when the fees were abolished on 26 July 2017 .There was further delay from the date ACAS suggested that the Claimant submit his claim to the employment tribunal. Therefore, I find that given the periods of these delays ,it is not just and equitable to extend time as the delays from the date (i) of the last alleged discriminatory act (March 2013) , (ii) when the fees were abolished and (iii) from when ACAS suggested a claim be submitted, were all extensive.

(d) Even when the Claimant's solicitor was informed by ACAS that he should present the ET1 , he did not act promptly; there was a delay of over two months.

(e) The Claimant confirmed that he had been advised by a solicitor since July 2013 (although he was not sure as he stated, in giving evidence, that he could not quite remember). I find that against the background of the Claimant receiving legal advice, the Claimant's delay in presenting his ET1 was excessive. In these circumstances, it is not just and equitable to extend time.

(f) Although it was not clear from the ET1 which events the Claimant would rely upon as discriminatory events, even if the most recent event was to be relied upon (March 2013), the delay in presenting a claim would be over approximately 4 and a half years. This is a considerable period of delay . I am concerned that the cogency of the evidence is likely to be affected adversely

by this delay . There may be difficulties in locating witnesses both for the Claimant and the Respondent given this period of time. Even if such witnesses can be located, it may be difficult for them to provide evidence of events which took place more than 5 years ago. Indeed, the Claimant at the hearing before me could not remember for how long he had been advised by his solicitor. This was indicative of the difficulties which may arise in a full merits hearing to determine the claim.

22. During his evidence under oath, the Claimant explained that the reason for not making the claim was because of the tribunal fees. In his witness statement and under oath, the Claimant stated that he could not afford the tribunal fees, which were in excess of £1,200.

23. Mr Rajgopaul submitted for the Respondent that the Claimant could have made a claim from the date of dismissal (3 July 2013) until 28 July 2013 (in relation to the unfair dismissal claim) , the date before the fees came in to force. Miss Frobisher submitted that the Claimant should not be penalised for this when he had until 2 October 2013 to make his claim.

24. The Claimant received a salary of approximately £48,000.

25. In the minutes of the disciplinary hearing which took place twelve days before his dismissal on 21 June 2013, minutes which the Claimant stated he did not agree with and which he did not sign (although there was nothing in his witness statement to state that he

disagreed with the minutes), matters were discussed in the meeting where the following statements were made: -

(a) The Claimant had provided a third party known as UCCL, with £20,000 so that UCCL would provide the Claimant with a van (49);

(b) A payment of £3,660 was made by the Claimant to a company known as Freight Agency Limited (63);

(c) £7,200 was sent to the Claimant's account (63);

(d) £13,000 was given to "Uncle Charles" (63);

(e) £13,000 was withdrawn by the Claimant on 14th December, then on 18th December , the sum of £4,950 and another £19,000 was paid in at HSBC Lakeside (65); and

(f) The Claimant gave a Mr Bekoe the sum of £9,800 (65).

In re-examination, the Claimant stated that he was not able to recover this money.

26. I make the following findings: -

(a) I accept Miss Frobisher's position that the Claimant should not be criticised for not bringing in a claim before the period allowed by law.

(b) Although I note that the Claimant stated under oath that he did not agree with the minutes, this point was not made in his witness statement. On the basis of the various payment transactions, the Claimant had, on a balance of probabilities, access to cash.

(c) The Claimant was on a gross salary of £48,000, taking home a monthly gross sum of £4,000.In these circumstances, it is difficult to understand why

the Claimant would not have the funds for the tribunal fees; the salary he earned of £48,000 (gross) was not a low sum;

(d) The Claimant stated in his witness statement that he did not have savings but there was nothing in the bundle by way of bank statements or otherwise to support this position.

I therefore find that , on a balance of probabilities, the Claimant did have access to sufficient sums to enable him to pay the tribunal fees of approximately £1,200. In these circumstances, it is not just and equitable for me to exercise my discretion to extend time

27. In giving his evidence, the Claimant stated that he was advised by his solicitor who he had engaged since approximately July 2013 that the tribunal fees were approximately £1,200. The Claimant stated that his solicitor was paid for by his mother and a sum of £50.00 was paid to his solicitor by his mother.

28. In his witness statement , the Claimant stated that after the Supreme Court ruling had abolished the tribunal fees, he wrote to his MP seeking clarification on the position on the payment of fees .The MP did not respond quickly so he tried to see her .As he could not see her in her surgery , he tried to call her without success.

29. The Claimant then went to the Citizens Advice Bureau and received advice that tribunal fees were no longer payable. He also telephoned the radio station, LBC, where free advice was given that fees were no longer payable. The Claimant then went to see his solicitors, who contacted ACAS.

30. The Claimant was asked on cross examination as to why he had not applied for remission. The Claimant stated that his solicitors had not advised him of remission.

31. I find that: -

(a) The Claimant had been supported by legal advice from the very outset. If his solicitor had advised him as to the level of fees but had failed to advise him on the possibility of applying for remission (which would have relieved the Claimant from paying the tribunal fees if his earnings and savings dropped below the relevant level), then a potential action for the Claimant lay against his solicitor.

(b) It did not make it just and equitable to extend time on the basis that the Claimant had not been advised of remission and this had caused him delay in him submitting his ET1

E: SUBMISSIONS

32. Both Mr Rajgopaul and Miss Frobisher made very helpful submissions and I summaries the key points arising from their submissions as follows:

Mr Rajgopaul Submissions

33. Mr Rajgopaul made the following submissions

(a) The Claimant's lack of particularisation of his claim: Mr Frobisher on this said that further and better particulars would be provided if I determined that time should be extended, granting the tribunal jurisdiction to determine the discrimination claim. Mr Rajgopaul submitted that the ET1 should have fully set out the Claimant's discrimination claim.

(b) Referring to the ET1, the Claimant presumed that the Respondent would hold records including those dating back eleven years, notwithstanding the Respondent's obligations under the data protection legislation.

(c) There is no presumption that a tribunal will exercise its discretion to extend time and "*the exercise of discretion is the exception rather than the rule* .": **Robertson v Bexley Community Centre (2003) IRLR 434, para 25.** Parliament had imposed a three months' time limit for a reason and there must be a good reason to depart from this time limit.

(d) In exercising its power to extend time, a tribunal may treat as a checklist the matters set out in the Limitation Act 1980 at section 33 (3), as modified by the case of British Coal Corporation v Keeble (1997) IRLR 336,EAT.In this case, Mr Justice Smith said that in considering the prejudice which each party would suffer and all the circumstances of the case, a tribunal may in particular have regard to the (i) length and reasons for delay (ii) the extent to which the cogency of the evidence is likely to be affected (iii) the promptness with which the Claimant acted once he knew the facts giving rise to the cause of action and (iv) the steps he took to obtain appropriate advice.

(e) In relation to the length and the reasons for the delay, Mr Rajgopaul submitted that the delay here was extraordinary between eleven years and four and a half years. No reason at all was given for failing to bring any of the discrimination claims relating to the period up to March 2013 (the period which appeared to apply to virtually all the discrimination claims) in time. Those claims could all have been brought in time without the Claimant having to pay

any fee as they occurred prior to the date (29 July 2013), when the payment of fees came into force.

(f) In relation to the extent to which the cogency of the evidence was likely to be affected by the delay, Mr Rajgopaul submitted that the passage of time will always affect the cogency and recollection of the evidence; so the Claimant's failure to lodge his claim in time plainly prejudices the Respondent's ability to collate and put forward a cogent and well recollected evidence. That is of particular concern where the delay is as lengthy as the one in this case. Here a number of individuals involved in these matters had left the Respondent's employment, for example, the disciplinary decision maker (Edward Till) and the appeal decision maker (Fintan Canavan); both left the Respondent's employment in 2015 and are no longer in contact with the Respondent.

(g)In relation to the promptness with which the Claimant acted once he knew of the facts giving rise to the cause of action, Mr Rajgopaul submitted that the Claimant knew all of the facts by, at the latest, 3 July 2013, and in respect of many of his discrimination claims, long before that. He failed to act promptly throughout , even when his solicitor was informed on 17 October 2017 that delay was likely to cause an issue , waiting a further two and a half months before submitting the ET1.

(h) In relation to the steps taken by the Claimant to obtain appropriate professional advice, Mr Rajgopaul submitted that the Claimant has been professionally represented since (at least) 5 October 2017.(The Claimant

confirmed in response to my question that he believed his solicitor had been engaged since July 2013.

34. I accept Mr Rajgopaul's submissions and comment specifically as follows: -

(a) In relation to records being kept by the Respondent, Mr Rajgopaul submitted that the Respondent's records may not date as far back as March 1997. Mr Rajgopaul submitted that seven years is the Respondent's policy of keeping documents but that this may have been different (and could have been less) at other periods of time. Given the delay in bringing the claims, I find that it may be difficult to retrieve the information and records. If this is the case then the prospect of having a fair trial , of importance to both the Claimant and the Respondent, is prejudiced. If I was to exercise my discretion to extend time ,I would have grave concerns as to whether a fair trial is achievable, given that the shortest period of delay of alleged discriminatory incidents is four and a half years. I believe it to be unjust and inequitable for the Respondent to be required to attempt to defend claims which are so far out of time .

(b) Cogency of evidence: Some of the key witnesses have now left the Respondent's employment. If such witnesses can be located , then this tribunal has power to order such witnesses to attend. Even in that case, however,I am concerned as to how effectively such witnesses will be able to recall their evidence given the passage of time. On this basis, it may not be possible to have a fair trial. This point indeed applies equally in relation to both the Claimant and the Respondent. In response to my questions, the Claimant was struggling to recall for how long he had appointed his

solicitor. Given this struggle, I am concerned as to his ability to recall other matters at a full merits hearing.

35. Miss Frobisher submission were helpful and I summarise the following key points made in her submissions:

(a) The tribunal should be reluctant to decline jurisdiction or otherwise dismiss a discrimination claim at a preliminary stage; instead the tribunal should consider the issue of the time limit after hearing all evidence in the case when they are properly able to weigh what is just and equitable in those circumstances.

(b) This case of **Kaur v City of Edinburgh and others [2011] UKEAT 0015** concerned an appeal from the Edinburgh employment tribunal where the employment tribunal struck out aspects of the Claimant's case for being out of time because, in that case, the employment judge did not consider that there was a continuing state of affairs. The EAT stated at paragraph 14: "*It was said to be important not to strike out discrimination cases, except in the most obvious and plainness of cases, because they were liable to be fact sensitive, and the bias should, in the public interest, be towards examining the claim on its merits only after having heard evidence because, if evidence is heard, the risk of injustice is minimised and the Tribunal can base its decision on facts found after having heard evidence."*

(c) The principle that discrimination cases should not be struck out until the evidence is properly heard applies in all discrimination cases. The tribunal cannot properly assess whether it would be just inequitable to allow it to

progress until it has heard all the evidence. The tribunal should therefore decline to make a determination at this preliminary stage.

(d) It is not a matter of whether the fees could have been afforded in theory but whether they could have been reasonably afforded (the Supreme Court decision, Lord Reed). It is submitted that this is an entirely reasonable reason not to have brought his claim at that time. The tribunal should place significant weight on this. Further the tribunal has allowed claims to progress out of time as a result of the fees in the past and it is urged to do so in this case (Dhami v TescoStores Limited, 1401606/2016,PH Order 04/09/17)..

(e) Subsequent decisions have made it clear that there must be some consideration of the balance of prejudice to the parties including the overall merits of the case**: Bahous v Pizza Express Restaurant Limited UKEAT/0029/11/DA para 19.**

(e)In relation to balancing any prejudice caused by the delay against prejudice caused by declining jurisdiction, there is little evidential prejudice in this matter given the Respondent has retained all disciplinary records and notes as served for this Hearing.

(g)In weighing the prejudice to both parties, the balance tips in the Claimant's favour given the severity of the allegations made; such allegations should be duly considered at a full final merits hearing. The tribunal is again reminded of the general danger in disallowing discrimination claims to proceed past the preliminary stages for reasons of time limits. This is significant public interest in having such claims fully considered.

(h) After the Supreme Court ruling holding that the fees were unlawful, the Claimant approached his MP and began the ACAS process resulting in him issuing his claim just under 6 months after the Supreme Court ruling.

(i) Lay people do not appreciate changes in the law as quickly as legal professionals. The Claimant immediately took steps to gain clarity on the position when he became aware of the sudden change in law.

(j) The Respondent will have retained all disciplinary records and notes.

(k) Any prejudice suffered by the Respondent as a result of the delay will be equally suffered by the Claimant, if not more so, given that he is unlikely to have a paper record to the same extent.

(l) The Tribunal is reminded of the general danger in disallowing discrimination claims to proceed past the preliminary stages for reasons of time limits. There is significant public interest in having such claims fully considered, particularly in cases involving large national companies.

36. I now comment on Miss Frobisher’s submissions:

(a) I accept that a tribunal should be reluctant to decline jurisdiction in a discrimination claim until all the evidence is heard: I have a duty, however, to consider whether it is just and equitable to extend time on a claim which is substantially out of time. The three months’ time frame imposed by law was done for a reason. Where a claim is substantially out of a time as is the case before me, I cannot be confident that there can be a fair trial because the cogency of the evidence is likely to be severely affected.. Discrimination is a serious matter as indeed is the confidence and ability to have a fair trial. A fair trial is very much in the public interest.

(b) It is in the public interest that claims are statute barred after the period specified in law (in this case after the end of three months starting with the date of the act complained of (in this case the last act being March 2013)). The reason behind limitation periods is essentially 'public policy'. Under the laws of England and Wales, it is unfair and contrary to public policy for individuals or organisations to be perpetually exposed to litigation. When a significant time has passed as is the case before me, , witnesses' recollections and memories may fade, documentary evidence may be lost and other evidence may be weakened. This means it can become difficult or impossible to ensure that justice is being served and to have a fair trial.

(c) On the consideration of the balance of prejudice referred to in the Bahous v Pizza Express Restaurant case, given the length of delay (which at worst is approximately 10 years and at best is approximately 4 and a half years), both parties are prejudiced where the cogency of the evidence is seriously in doubt .This was demonstrated at the hearing before me when the Claimant was being cross examined. He could not remember since when he had employed his solicitor . Even though the Respondent is a large national bank, it does not necessarily follow that it will have the information and records dating back to 10 years ago or less. Mr Rajgopaul submitted that the Respondent had a policy of keeping records for 7 years but this may have changed with data protection legislation (and thus, could be less).

(d) The ability to call witnesses is going to be challenging and even more challenging will be such witnesses' recollection of events which took place in 2013 or earlier. The Respondent will suffer prejudice by trying to defend claims which occurred at the very earliest 4 and a half years ago.

(e) In relation to other tribunals allowing claims to progress because of fees, in the claim before me, the delay is exceptional. The least delay is

approximately four and half years which is substantial and the most delay is approximately ten years, which is an extremely extensive period of delay.

(f) The Claimant was a retail bank manager with a gross salary of £48,000 per annum and a monthly pre-tax salary of £4,000. This is not a small sum. In the minutes of the disciplinary meeting, it was noted that various sums of money were received by the Claimant. (I note that only whilst giving evidence did the state that he did not agree with the disciplinary notes) .I determine that, on a balance of probabilities, the tribunal fees were reasonably affordable by the Claimant. The Claimant did not provide any bank statements to show that he did not have the means .

(g) After the tribunal fees were held to be unlawful on 26 July 2017, even thereafter, the Claimant did not act promptly to submit his claim form. There was a delay of more than 5 months.

(h) The Claimant is a lay person but by his own admission he had engaged a solicitor since around July 2013 and thus, would have had the benefit of legal advice.

The Law

37. Section 123(1) (a) sets out the time frame for bringing claims for discrimination which is “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 to be just and equitable. “

38. Section 123 (3) (a) states that for the purpose of this section conduct extending over a period is to be treated as done at the end of the period.

39. The factors set out in the case of **British Coal Corporation v Keeble** are also relevant and I bore these in mind in making my decision. Such factors include the conduct of the parties, the reason for the delay, the length of the delay, the prejudice which each party would suffer, to what extent the cogency of the evidence would be affected by the delay and thus whether a fair trial is possible, the extent of the cooperation by the Respondent for any request for information (which was not relevant in this case as there were no such requests), the promptness in which the Claimant acted and the steps taken by the Claimant to get advice.

Conclusion

40. In summary , I accept the Claimant's position that discrimination claims should not, in general be disallowed at the preliminary stages for reasons of time limits. I accept further that there is a significant public interest in having such claims fully considered.

41. This is one such case however where it is not just and equitable to extend time. This case has, as is necessary, been decided on the facts before me.

42. Based upon my findings of fact, I conclude that:-

(a) The delay in this case is substantial; at best the latest incident of alleged discrimination took place just under 5 years ago (namely in March 2013) prior to the claim form being submitted. If earlier incidents of alleged discrimination are to be relied upon, then the delay could be anything upto approximately 10 years. Taking the best case of a delay of just under 5 years, such a delay in exceptional. I cannot have confidence that there can be a fair trial as the cogency of evidence is likely to be adversely affected. Even at the hearing before me, the Claimant was

struggling to remember for how long he had engaged his solicitor. This struggle could be indicative of struggling to remember matters at a full merits hearing.

(b) Compared to other claimants before the Tribunal, the Claimant was on such a salary which, on the balance of probabilities, made the fees “reasonably affordable”.

(c) Even when the fees had been abolished on 26 July 2017, it took the Claimant just over 5 months to submit his claim to this tribunal.

(d) By his own admission, the Claimant has been legally represented by a solicitor since July 2013.

41. It is for the aforementioned reasons that I have given that I determine that it is not, in this case, just and equitable to extend time to allow the Claimant’s claim that he was discriminated on the grounds of race and religion or belief .

The Tribunal therefore has no jurisdiction to hear this case.

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Employment Judge Sharma

Dated: 21 August 2018

Judgment and Reasons sent to the parties on:

22 August 2018

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For the Tribunal Office