Case No: 2602456/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mr D Martin**

Respondent: **Roundleaf Ltd**

Heard at: **Leicester**

On: **Friday 12 July 2019**

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

Representation: **Claimant – in person**
Respondent - Mr C Edwards (of Counsel)

PRELIMINARY HEARING

JUDGMENT

1. By consent, the Respondent is ordered to pay to the Claimant such sum as will result in a net payment to him of £918.70 following an unauthorised deduction from wages.

2. Subject to proper determination at a final hearing of the question of whether the Claimant's complaints of discrimination concern conduct extending over a period, such as to be treated as done at the end of it, whilst brought after the expiry of the normal time limit the Claimant's complaints of discrimination were brought within such other period as the Tribunal thinks just and equitable.

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

4. The Respondent's application for deposit orders in respect of the Claimant's complaints of discrimination is refused.

5. The complaints of discrimination will be considered at the Final Hearing scheduled for 2 to 4 March 2020. Case Management Orders will be issued accordingly.

REASONS

Complaints

1. The Claimant seeks to pursue the following complaints:

1.1. That he was unfairly dismissed because the reason or principal reason for his dismissal was that he made a protected disclosure (section 103A of the Employment Rights Act 1996 ("ERA"));

1.2. That he was racially harassed contrary to section 40 of the Equality Act 2010 ("the Act") as defined by section 26 of the Act;

1.3. That he was directly discriminated against because of his race contrary to section 39 of the Act as defined by section 13;

1.4. That he was victimised contrary to section 39 as defined by section 27.

2. The Claimant also sought to pursue a complaint of unauthorised deductions from wages. Mr. Edwards confirmed however that the Respondent agrees that the amount claimed is due. It was agreed that I should enter judgment accordingly.

Issues

3. Following a Telephone Preliminary Hearing on 5 April 2019 before Employment Judge Clark, this Hearing was fixed to determine the following issues:

3.1. Given that it is agreed the complaints were presented out of time:

3.1.1. whether the complaints of race discrimination, harassment and victimisation were brought within such other period as the Tribunal thinks just and equitable;

3.1.2. whether it was not reasonably practicable for the Claimant to present the complaint of unfair dismissal in time and if it was not, whether that complaint was presented within such further period after expiry of the normal time limit as the Tribunal considers reasonable.

3.2. Whether the Claimant should be required to pay a deposit as a condition of continuing to advance certain of his allegations (identified by Mr Edwards in his closing submissions and detailed below in my analysis) on the ground that they have little reasonable prospect of success.

4. In his closing submissions, Mr. Edwards very sensibly did not seek to persuade me to strike out any of the complaints on the grounds they have no

reasonable prospect of success, and therefore I need say nothing further about that.

Facts

5. The parties agreed and presented to the Tribunal a small bundle of documents. I heard oral evidence from the Claimant on the question of why he did not bring his complaints within the normal time limits and on the question of his financial means. Both parties had an opportunity to make closing submissions both on the time limit and deposit points. Based on all of that material, I make the following findings of fact to a sufficient extent to enable me to decide issues before me, but not of course to the extent and level of detail that would be relevant for a Final Hearing. Page references are references to the bundle.

6. The Claimant was employed by the Respondent initially as restaurant attendant, then as duty manager, at the Ramada Hotel in Loughborough, from 17 October 2016 to 6 January 2018. He describes his race as black.

7. Chronologically, his first complaint is that on or around 22 April 2017 he was undermined by his manager, Mr Craig Philips, when he tried to deal with what he believed to be conduct issues with a colleague employed as a housekeeper, Ms Solteszova. Mr Philips cancelled the disciplinary hearing the Claimant had sought to arrange. The Claimant says that was an act of direct race discrimination. The Respondent says the Claimant had no authority to institute disciplinary action.

8. The next complaint is that on 23 September 2017, Ms Solteszova placed a picture of a monkey on the workstation the Claimant was using. The Claimant says that this was an act of racial harassment. The Respondent does not deny the incident took place. Its case is that if it is vicariously liable for the actions of Ms Solteszova on this occasion, it took all reasonable steps to prevent her from doing what she did or from doing anything of that description – section 109 of the Act. It appears from police documentation in the bundle that Ms Solteszova says that she did not realise that what she did was unacceptable, as it would not be viewed in the same light in her country of origin.

9. Shortly after reporting this incident to the Respondent, and being invited to submit a written complaint, the Claimant went off sick. This was around 29 September 2017. He says that he also reported the incident to the police, to the IPCC, Victim First, ACAS and the CAB. The Claimant says that all of these reports, including to the Respondent, constituted protected acts for the purposes of section 27 of the Act (victimisation) and indeed protected disclosures under the ERA. He says that on his return to work, around 28 November 2017, Mr Philips said, “If you thought you had problems before, it will be worse now”, specifically referring to “the girls” (some of the Claimant’s colleagues and no doubt including Ms Solteszova) being unhappy that the Claimant had reported the matter to the police. The Claimant says Mr Philips’ comment was an act of victimisation. The Respondent denies this was said.

10. The next complaint is that the Claimant was, on returning to work around 28 November 2017, put on antisocial shifts. The Claimant says that this too was an act of victimisation. The Respondent says the allocated shifts were part of

normal patterns and that others, including Mr Philips, worked similar or more onerous shifts at around the same time.

11. On Christmas Day 2017, Mr Philips informed all on duty that they could have an alcoholic drink as a thank you for their work. The Claimant says the invitation was to have a drink "because it's Christmas". He declined. He did however have a drink on or around 28 December – he says this was still Christmas, that he had told Mr Philips on Christmas Day that he would probably have a drink later, and that in any event there was a generally accepted culture within the hotel that staff could have the occasional drink whilst on duty. He also says that there were no guests in the hotel on that evening. He was then accused of theft and subjected to disciplinary proceedings. This too he alleges was an act of victimisation. The Respondent says the Claimant was not authorised to have a drink on that date, that he was caught on CCTV helping himself to alcoholic drinks, which was inappropriate because he was on duty and because the drinks were taken without payment.

12. The Claimant's next allegation is that shortly thereafter Mr Philips told him that if he did not resign, he would be sacked for theft. He says that this was an act of direct discrimination and/or victimisation. The Respondent says no such comment was made.

13. The next allegation is that the Claimant was told by Mr Philips that unless he resigned or agreed not to bring a claim he would not be paid. He says that this was a further act of direct discrimination and/or victimisation. The Respondent accepts that it offered him his final pay, including holiday pay, provided he agreed to accept it in full and final settlement of all and any claims against it – see page 58. It denies that this was an act of direct discrimination or victimisation; Mr Edwards said it is his understanding that it is the Respondent's standard practice in such cases.

14. Finally, the Claimant says his dismissal, with effect from 6 January 2018, was an act of direct discrimination and victimisation. The Respondent says the reason for the dismissal was gross misconduct, that the Claimant did not deny the allegations at the disciplinary hearing, and did not appeal.

15. For all complaints of direct discrimination, the Claimant relies on a hypothetical comparator.

16. As noted, the Claimant also complains of unfair dismissal. He says he made protected disclosures in the various complaints he made (which he also says were protected acts for victimisation purposes) and that this was the reason or principal reason he was dismissed.

17. The Claimant saw an adviser at the CAB on 9 November 2017 regarding the incident with Ms Solteszova in September – see page 33 for the adviser's note of that meeting. It records that the Claimant was told of the 3-month time limit "to take an employer to a tribunal" and was advised that he must not leave it too long. The Claimant says that he understood the time limit but did not assume that the same applied for an unfair dismissal complaint following his dismissal some time later.

18. ACAS Early Conciliation commenced on 10 November 2017 and concluded on 10 December 2017, prior to the Claimant's dismissal. The Claimant spoke to

ACAS after his dismissal, with a view to presenting a claim to the Tribunal. On 3 February 2018 however, he was arrested and subsequently imprisoned on remand in relation to matters unrelated to his work for the Respondent.

19. The Claimant was somewhat reluctant to provide details of the circumstances which led to his incarceration, though he did say he had no idea that he was going to be arrested and that what led to his arrest and incarceration was a domestic incident – what he described as an argument – involving his ex-partner and brother in law. After being arrested he was remanded in custody from 5 February to 24 September 2018. His evidence was that there is a total of six charges against him, five of which the Crown Prosecution Service has offered to drop if he pleads guilty to the other, which he says he has no intention of doing. He says that his solicitors are optimistic about his defence.

20. The Claimant said that he could "not say categorically" whether he took any steps to progress his claims between 10 December 2017 when the Early Conciliation period expired and 3 February 2018 when he was arrested. He says that he was focused on trying to resolve the Respondent's non-payment of statutory sick pay (the Respondent denies it failed to pay it) and also met with the owner of the Respondent to see if matters could be resolved amicably but did not make any progress.

21. The Claimant says that whilst he was in prison, he tried to get a friend of his, who works in human resources and has variously worked for British Gas and HSBC, to contact ACAS on his behalf, but was told that ACAS needed to speak with him directly. He says that he had no access to any documentation relevant to his case whilst he was in prison and could not telephone ACAS himself. Naturally, he had no access to the Internet. He was aware that the time limit for his complaints, at least those which had been expressly contemplated during the Early Conciliation period, would expire whilst he was in prison. He says that he wrote to ACAS and to his friend to see if anything could be done, but did not have those letters to hand at this Hearing, for which he apologised. He had solicitors advising him on the criminal matter whilst he was imprisoned, but did not discuss the employment claim with them, as he did not see why it would be relevant to do so.

22. The Claimant says that after he came out of prison, he contacted ACAS again. His evidence is that there appears to have been some confusion within ACAS around whether he needed a further Early Conciliation certificate to pursue the complaints arising out of his dismissal. Eventually, someone at ACAS got back to him to tell him that he could simply issue proceedings and should explain to the Tribunal that he had been incarcerated. This, he says, is the explanation for why there was a further delay, of just over a month, after leaving prison before the Claim Form was submitted.

23. The Claimant also sought to get further advice from the CAB. It seems clear from the adviser's notes at pages 33 and 34 that he did not manage to meet with them again, having initially met with them in November 2017, until after his Claim Form was submitted. He said it was very difficult to get an appointment with the employment specialist who he saw on both those occasions. Whilst he spoke to other advisers, they did not have the same expertise. The Claim Form was eventually submitted on 29 October 2018.

24. As to the Claimant's financial means, he does not own his own property; he rents his accommodation. He is not currently working, which he says is due to the impact on him of the criminal process described above. He has been medically signed off since he was remanded and is therefore living on State benefits. He has no savings. He has rent and council tax arrears, totalling approximately £700. Mr Edwards indicated that the Respondent would be paying the outstanding wages referred to above within a day or so of this Hearing and in fact may have already done so.

25. The Claimant was ordered by EJ Clark after the Hearing on 5 April 2019 to provide further particulars to the Respondent and the Tribunal of the disclosures he says he made and how they amounted to protected acts under section 27 of the Act and/or qualifying disclosures under section 43B of the ERA. It is clear that the Claimant understood that his providing various documents to the Tribunal was sufficient to comply with that Order, and I make no criticism of him as an unrepresented person for that. With Mr Edwards' agreement I therefore took the Claimant through an outline of why he says he made protected disclosures and/or did a protected act.

26. All of the disclosures, save one, were that the Claimant believed he had been racially abused in the incident in September 2017. The parties to whom the Claimant says he made disclosures were the Respondent, the police, ACAS, Victim First, the IPCC and his MP.

27. The Respondent was informed verbally on 23 September 2017 and in writing on 27 September 2017 (see page 52), which was also the date on which the police were informed – see page 62. ACAS was informed verbally at around the same time, as was Victim First. The IPCC was informed some time later and the MP in October 2017.

28. The Claimant accepted that as the Respondent did not know at the time it had dismissed him that he had disclosed the information to his MP or to Victim First, those alleged disclosures could not be relied upon in support of his unfair dismissal claim. Equally, the disclosure to the IPCC expressed his concerns about the police rather than about the incident of racial abuse as such. That too therefore is not a disclosure he can rely upon. It is plain from page 52 that the Respondent knew the matter had been referred to the police and the Claimant says it was also aware he had contacted ACAS.

29. As to what the Claimant says he reasonably believed the disclosures tended to show, he relies on section 43B(1)(a) and/or (b) of the ERA, in that he says what he disclosed about the incident in September tended to show that a criminal offence had been committed and/or that a person had failed to comply with a legal obligation to which they were subject. He says that he reasonably believed his disclosures were in the public interest because they demonstrated a culture within the Respondent company and, as he put it, he "cannot help the colour of his skin" and has the right to go to work without abuse. For the purposes of his victimisation complaints, the Claimant relies on section 27(2)(d) of the Act, namely that he made an allegation of a contravention of the Act.

30. The Claimant's case as to how the protected acts led to the detriments which followed and/or the protected disclosures led to his dismissal is that the Respondent was embarrassed by what had taken place in September and did not want it brought to public attention. In other words, it did not like the fact that

the Claimant had complained. He cannot accept that anyone else would have been dismissed for taking a drink from the bar; in other words, in his view that was not the reason or principal reason for dismissal.

31. The Final Hearing of this matter is scheduled for 2 to 4 March 2020.

Law

Deposits

32. Rule 39 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides an alternative to striking out complaints, and states, "*Where at a preliminary hearing ... the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ... to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument*". If the deposit is not paid by the required date, the complaint is struck out. If it is paid, and then the Tribunal – usually at the Final Hearing – finds against a claimant for substantially the reason given in the deposit order, the claimant is treated as having acted unreasonably in pursuing it, unless the contrary is shown, and the deposit is paid to the other party. Otherwise it is refunded.

33. In deciding whether to make a deposit order, as well as considering any legal difficulties with a claimant's case the Tribunal may consider the likelihood of a party being able to establish the essential facts on which they rely, thereby forming a provisional view of the strength of the case. The decision of the Employment Appeal Tribunal in **Wright v Nipponkoa Insurance (Europe) Ltd UKEAT/0113/14** makes clear that separate deposit orders can be made in respect of various arguments or allegations in a particular case. This is subject to an overall assessment of the proportionality of the total sum, given the requirement in rule 39 to have regard to the financial means of the person paying the deposit(s) before such an order is made. In **Hemdan v Ishmail [2017] IRLR 228,** Simler P described the purpose of rule 39 as being to identify complaints with little reasonable prospect of success and discourage their pursuit by requiring a sum to be paid and creating a risk of costs if the complaint is nevertheless pursued but fails on the ground identified in the deposit order. The purpose is "emphatically not" however to "make it difficult to access justice or to effect a strike out through the back door". In other words, the deposit order must be one which the claimant can comply with.

34. It is necessary to say something about the substantive law in relation to each of the Claimant's complaints, to put into context the considerations of prospects of success. I summarise below therefore the key features of each such complaint; the summaries are of course only a brief statement of the law.

Direct discrimination

35. Section 39 of the Act provides, so far as relevant, "*(2) An employer (A) must not discriminate against an employee of A's (B)— … (c) by dismissing B; //(d) by subjecting B to any other detriment*". Section 13 of the Act provides, again so far as relevant, "*(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*". The protected characteristic relied upon in this case is race, which according to section 9 of the Act includes nationality and ethnic or national

origins. Section 23 provides, as far as relevant, "*(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case*".

36. The fundamental question in a direct discrimination complaint is the reason why the Claimant was treated as he was. As Lord Nicholls said in the decision of the House of Lords in **Nagarajan v London Regional Transport [1999] IRLR 572** "this is the crucial question". Lord Nicholls also observed that in most cases answering this question will call for some consideration of the mental processes (conscious or otherwise) of the alleged discriminator. Establishing the decision-maker's mental processes is not always easy. What tribunals must do is draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances. In determining the reason why the alleged discriminator acted as they did, the tribunal does not have to be satisfied that the protected characteristic was the only or main reason for the treatment. It is enough for the protected characteristic to be significant in the sense of being more than trivial (again, **Nagarajan**). These are all matters which it is of course enormously difficult to assess at the preliminary stage in the absence of witness evidence on the substantive issues.

37. Section 40 of the Act renders harassment of an employee unlawful. Section 26 defines it as follows:

"*(1) A person (A) harasses another (B) if - //(a) A engages in unwanted conduct related to a relevant protected characteristic [here, race], and //(b) the conduct has the purpose or effect of //(i) violating B's dignity, or //(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B …*

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account - //(a) the perception of B; //(b) the other circumstances of the case; //(c) whether it is reasonable for the conduct to have that effect".

Victimisation

38. Section 39(4) of the Act says that, "*An employer (A) must not victimise an employee of A's (B): … (c) by dismissing B; (d) by subjecting B to any other detriment*". Section 27 defines victimisation as follows:

"*(1) A person (A) victimises another person (B) if A subjects B to a detriment because - //(a) B does a protected act, or //(b) A believes that B has done, or may do, a protected act.*

(2) Each of the following is a protected act - //(a) bringing proceedings under this Act; //(b) giving evidence or information in connection with proceedings under this Act; //(c) doing any other thing for the purposes of or in connection with this Act; (d) making an allegation (whether or not express) that A or another person has contravened this Act".

39. No comparator is required for the purposes of a victimisation complaint, but the protected act must be the reason or part of the reason why the Claimant was treated as he was – **Greater Manchester Police v Bailey [2017] EWCA Civ. 425.** Again therefore, the alleged discriminator's mental processes are a vital

part of the assessment, and again this assessment is notoriously difficult to undertake at the preliminary stage when the Tribunal is doing more than taking an overall view of the case.

Burden of proof

40. In determining discrimination complaints, Tribunals typically adopt a two-stage approach, reflecting section 136 of the Act. The first stage involves asking whether the Claimant has established facts from which the Tribunal could decide, in the absence of any other explanation, that there has been discrimination. The second stage asks, if so, whether the Respondent has established that it did not discriminate. As was held in **Madarassy v Nomura International plc [2007] IRLR 246** "could conclude" refers to what a reasonable tribunal could properly conclude from all evidence before it. In considering what inferences or conclusions can thus be drawn, the tribunal must assume that there is no adequate explanation for those facts. It is important however for the Tribunal to bear in mind that it was also said in **Madarassy** that "the bare facts of a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which an employment tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination". The something "more" which **Madarassy** says is needed may not be especially significant and may emerge for example from the context considered by the Tribunal in making its findings of fact. Again, at the preliminary stage, a Tribunal can only make an overall assessment of whether a claimant has a reasonable prospect of satisfying the evidential burden he faces.

Unfair dismissal

41. As a precursor to being able to pursue his unfair dismissal case, the Claimant would of course first have to establish that he made a protected disclosure. Section 43B ERA provides:

> *(1) In this Part a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –*
>
> *(a) that a criminal offence has been committed, is being committed or is likely to be committed, [or]*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject…*

42. If there is a qualifying disclosure as defined above, then section 43C makes it a protected disclosure if it is made to the worker's employer. Disclosure to a "prescribed person" can also be a protected disclosure, but neither the police nor ACAS are "prescribed persons" for the purposes of section 43F. The Claimant could only rely therefore in relation to the disclosures to them on section 43G, which provides as far as possibly relevant:

> *(1) A qualifying disclosure is made in accordance with this section if –*
>
> *(a) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,*

(b) he does not make the disclosure for purposes of personal gain,

(c) any of the conditions in subsection (2) is met, and

(d) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(d) are -

(c) that the worker has previously made a disclosure of substantially the same information –

(i) to his employer …

43. Section 43G(3) then sets out a number of matters to take into account in determining whether it was reasonable for the worker to make the disclosure. These include to whom the disclosure was made, the seriousness of the relevant failure, and any action which the employer has taken or could reasonably have been expected to take as a result of the previous disclosure.

44. Section 43H deals with disclosures of exceptionally serious failures. The worker must reasonably believe that the information disclosed, and any allegation in it, are substantially true; must not make the disclosure for the purposes of personal gain; the relevant failure must be of an exceptionally serious nature; and in all the circumstances of the case, particularly having regard to the person to whom the disclosure was made, it must be reasonable for him to make the disclosure.

45. Section 103A ERA provides that "*An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for dismissal is that the employee made a protected disclosure*".

46. In his submissions, Mr Edwards focused on a submission that there is little reasonable prospect of the Claimant establishing that he reasonably believed his disclosures were in the public interest. In **Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979**, the Court of Appeal confirmed that the relevant test is whether the Claimant genuinely believed it was, and whether that belief was objectively reasonable, which connotes a range of possible reasonable views. It indicated that generally, a private workplace dispute will not attract the protection of the legislation, though in practice a number of factors might mean that it will. These include whether a large number of people are affected by what was disclosed; the nature of the interests affected and the extent to which they are affected, such that a very important interest is more likely to be a public interest; the nature of the wrongdoing, distinguishing deliberate and inadvertent wrongdoings; and the identity of the alleged wrongdoer, so that the larger or more prominent it is, the more likely a disclosure will be in the public interest.

Time limits - discrimination

47. 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. Section 123(3) says that for the purposes of this section conduct extending over a period is to be treated as done at the end of the period, and failure to do something is to be treated as occurring when the person in question decided on it.

48. Although I must record that the Respondent does not accept that the various allegations of discrimination constituted conduct extending over a period, Mr Edwards sensibly accepted that in the context of this Preliminary Hearing the Claimant has a reasonably arguable basis (**Aziz -v- FDA [2010] EWCA Civ. 304**) for the contention that his complaints of discrimination are so linked as to be continuing acts or such as to constitute an ongoing state of affairs. I need say no more about that.

49. 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 time will be extended – **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 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 knew of the possibility of taking action.

50. More recently, the Court of Appeal in **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640** 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 the Court 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, whether any explanation or reason is offered and the nature of them are relevant matters to which the Tribunal should have regard.

Time limits – unfair dismissal

51. 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 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 he has, the second is whether he presented it in such further period as was reasonable.

52. 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 his disputes with the respondent using the latter's procedures, whether (and if so when) the claimant knew of his rights, whether the claimant had been advised and any fault on the part of the adviser. Where there is an impediment which 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 what was in that case a disabling illness will be greater where it falls during the crucial later weeks of the overall limitation period.

53. 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.

Analysis

Time limits

54. I will deal first with the question of time limits, adopting the order taken by Mr Edwards in his submissions and so beginning with the complaints of race discrimination (including victimisation and harassment) and then dealing with unfair dismissal. Mr Edwards made clear that no point is taken by the Respondent regarding the fact that the ACAS Early Conciliation Certificate was issued before a number of the Claimant's complaints now before the Tribunal had arisen. Further, as already noted, the Respondent concedes that there is a reasonably arguable basis for saying that all of the complaints of discrimination, including victimisation and harassment, constituted conduct extending over a period, though it reserves the option of arguing at a Final Hearing that there was no conduct extending over a period. For the purposes of this Judgment therefore, I proceed on the basis that the time limit for submission of the claim to

the Tribunal began to run from 6 January 2018 when the Claimant was dismissed.

55. There is no presumption that the usual time limit will be extended, but as the test set out in section 123 of the Act suggests and as the decision in **Morgan** confirms, I have the broadest discretion in deciding whether the claim was brought within such further period as was just and equitable. The principal issue for consideration is the prejudice to the parties, and I must of course consider all the other relevant circumstances of the case.

56. I begin with Mr Edwards' submission that the Claimant has not provided a complete explanation of the delay in submitting his claim and that accordingly it would not be just and equitable to allow the discrimination complaints to proceed out of time. The basis of that submission was that the Claimant had not given a full account of the criminal charges and the incident leading to them which in turn led to his imprisonment.

57. It is true that the evidence in the bundle supporting the Claimant's account of his incarceration is scant and provides no details of the circumstances leading to his arrest. Nevertheless, such documents as there are and his largely unchallenged oral evidence show that four weeks after his dismissal he was arrested and that he was then in prison until 24 September 2018. The Claimant has been open with the Tribunal about that. As to the background, as I have noted above in my findings of fact, he gave a broad account of what happened and of the criminal proceedings. I do not think that my being told more about the domestic incident and the precise criminal charges would add anything to my analysis of the factors which are relevant in deciding how to exercise my discretion. The Claimant was vague on the steps he took, if any, towards progressing a claim between 10 December 2017 when the Early Conciliation certificate was issued and 3 February 2018 when he was arrested. I note however that most of the allegations he now seeks to bring before the Tribunal had not arisen by the time the certificate was provided so that, given that he has a reasonably arguable basis for saying that all of the alleged acts of discrimination constituted a continuing act ending with his dismissal, any inaction during that period and any lack of clarity in the Claimant's evidence at this point cannot count against him.

58. As I have noted, the crucial question is the balance of prejudice. Mr Edwards rightly and helpfully conceded that there was little he could offer by way of submission that the Respondent would be prejudiced by the discrimination complaints being allowed to proceed, beyond the fact that it would be called upon to defend them substantively. Of course, the converse is true for the Claimant. If the complaints were not allowed to proceed, he would be prevented from seeking a decision and, if successful in any of his complaints, compensation in respect of what he regards as serious issues of discrimination. Whilst it is not my place to reach any conclusion on the evidence at this preliminary stage, and whilst the Claimant's complaints may fail in their entirety once the evidence is tested in detail, it must be said that the allegations, or at least some of them, do raise serious issues of discrimination, in particular the alleged incident of racial harassment and the fact that the Claimant says there was discrimination involved in the decision that he should be dismissed. In my judgment therefore the balance of prejudice very much lies in favour of time being extended.

59. Mr Edwards was also refreshingly candid in his submission that there is nothing specific he could submit regarding the impact of a delay in the claim being heard on the cogency of the evidence, except the usual issue of witnesses' memories being less clear with the greater than normal passage of time. Again of course that is a matter that is equally true for the Claimant, who as noted above will bear the burden of proof in relation to all of his discrimination complaints. It is never ideal when there has been a delay in a case being heard, but not least because the Respondent appears to have had the opportunity to investigate the Claimant's complaints about his treatment prior to his dismissal and of course the circumstances leading to his dismissal, I am satisfied that there is no impediment to a fair hearing notwithstanding the delay.

60. In analysing all the other circumstances of the case, the length of and reasons for the delay are the principal matters to consider. As to length of delay, the claim was presented almost seven months out of time, or around six if a standard one-month ACAS Early Conciliation period had applied after the Claimant's dismissal. For most of that seven-month period the Claimant was incarcerated. He had only two months outside of prison after his dismissal before the Claim Form was submitted. The Claimant's explanation of the correspondence and dealings he had with his friend who works in human resources and with ACAS whilst he was in prison was admittedly general in nature and he did have solicitors working on the criminal matter on his behalf. Nevertheless, being in prison was in my judgment a substantial impediment to his bringing his claim within the usual time limit, given the restrictions on his ability to make telephone calls, access any relevant documentation, and go online. At the very least it is a satisfactory explanation for the delay. There was a one-month delay once the impediment was removed, i.e. on his release from prison, which the Claimant explains by saying that he was seeking to clarify the position on Early Conciliation. I will return to this point in considering the question of time limits for unfair dismissal, but in the context of the discrimination complaints this is not an unworthy explanation for the further delay and, by any measure, the further delay was not substantial and so does not materially affect the issue of prejudice as assessed above.

61. Taking account of the explanations for the delay, and in particular assessing the question of prejudice to the parties, it is plain in my judgment, for all the reasons I have given, that the Claimant brought his complaints of discrimination within such period beyond the normal time limit as was just and equitable. It is just and equitable that his complaints should be allowed to proceed, subject to considerations below relating to prospects of success. Mr Edwards referred to two other matters which I will consider briefly. First, before he was imprisoned the Claimant knew of the 3-month time limit and the importance of not delaying in presenting his claim. That is correct, but this is by no means sufficient in my judgment to tip the balance the other way. The other matter referred to by Mr Edwards was that in his submission the Claimant's complaints have little merit. That is a factor I am permitted to take into account in broad terms in determining time limit issues. As will appear below however, I have concluded that it is not possible for me to say that the complaints have little reasonable prospect of success. Again therefore, this does not weigh the balance against my decision to extend time for these complaints to proceed.

62. As stated above, the test for determining whether to extend time in respect of the unfair dismissal complaint is very different. I deal first with whether the

Claimant has shown that it was not reasonably practicable for him to present the complaint within the normal time limit.

63. As I have already made clear, I am wholly satisfied that the Claimant's imprisonment was a substantial impediment to prompt presentation of a claim. The question is what was reasonably feasible, not what was physically possible. The Claimant could have instructed his friend to seek to present a complaint on his behalf and he could have instructed his criminal lawyers to do so. Those things were possible, but that is not the question. The question is whether it was reasonably feasible to present the complaint on time. With the restrictions I have referred to relating to access to documentation and means of communication, I am satisfied that the Claimant has established that there was a substantial cause preventing him from presenting his complaint in time. In my judgment, the case is not dissimilar to those where there is a physical disablement which prevents prompt submission. The Claimant was not in prison in the first month of the limitation period. He was in prison however for the whole of the crucial later stages of that period. Given that it is certainly not for me to determine whether the Claimant's arrest and imprisonment were justified, and noting that his evidence before me as to the reasons for his arrest were understandably unchallenged by the Respondent and that they were unrelated to his employment, there was in all the circumstances no substantial fault on the Claimant's part in bringing his complaint after the normal time limit. I am satisfied that it was not reasonably practicable for him to bring the claim in time.

64. That is not the end of the matter however. The second question is whether the Claimant submitted the claim in such further period beyond the usual time limit as I consider reasonable. The question is not whether the claim could have been submitted sooner, but whether it was submitted within a reasonable period. It should also be said that this is not the same question as in relation to the discrimination complaints, in relation to which the length of and reasons for the delay, including after any impediment was removed, are just two of the factors in the overall assessment of justice and equity.

65. At least in broad terms, the Claimant knew of the importance of not delaying in bringing matters before the Tribunal and he knew whilst in prison that time was passing for these purposes. His principal explanation for the delay of just over a month once he came out of prison is that there was uncertainty and confusion in what he was told by ACAS about the need for a further period of Early Conciliation, allied to which he found it difficult to get an appointment with the employment adviser at the CAB. Although Mr Edwards expressed considerable doubt as to whether ACAS would have been anything other than crystal clear on the point, I accept that some confusion could have arisen and therefore as I have said in relation to the discrimination complaints this is not in my judgment an unworthy explanation; the details of how ACAS Early Conciliation works are not always straightforward. I note in particular however that it was clear to the Claimant that time was pressing and that the question of submitting a claim was at the forefront of his mind whilst in prison given his communications with his friend. Doubtless the Claimant had other matters to attend to on his release from prison, but even allowing for that and for some doubts arising from the discussions with ACAS, in my judgment it would have been reasonable to submit the complaint of unfair dismissal within two weeks of the impediment to his doing so being removed. Accordingly, the complaint of unfair dismissal was not presented to the Tribunal within such period beyond the expiry of the time limit as was reasonable and the complaint is therefore dismissed.

Deposit orders

66. Turning to the question of whether the Claimant should be ordered to pay deposits, I should begin by briefly making clear that even had I allowed the unfair dismissal complaint to proceed on the question of time limits, I would have found that it had little reasonable prospect of success and would have ordered the Claimant to pay a substantial deposit as a condition of proceeding with it. The Claimant would have had more than little reasonable prospect of success of showing that he reasonably believed his disclosures regarding Ms Solteszova's conduct tended to show that a criminal offence had been committed and/or that there was a breach of a legal obligation. His disclosure to the Respondent would have meant that any qualifying disclosure was protected, and if it were relevant he would have had more than little reasonable prospect of success in establishing that his disclosures to the police and to ACAS fell within section 43G of the ERA so that they too were protected. As to whether the disclosures were the reason for dismissal, that would have been a matter that could not have been determined without full consideration of the evidence which is not possible at this preliminary stage. The serious difficulty for the Claimant would have been in establishing that he reasonably believed his disclosures were in the public interest. I would have found he had little reasonable prospect of success in that regard.

67. It is of course broadly accepted that discrimination is a great social evil and I have already made clear that the allegation made by the Claimant was serious in nature, but essentially, as serious as it was, this was a workplace dispute. The Claimant – quite understandably – was concerned about the impact on him. Without diminishing that impact, for these purposes it would be highly relevant that there was one person affected (the Claimant) and an individual perpetrator who was in a junior position. Further, even though the Claimant says that what happened reflected a broader culture in the Respondent's business, that would not in my judgment be likely to be of interest to the public, not least because the Respondent is not a public body or otherwise a particularly high-profile business. For these reasons the unfair dismissal complaint would have had little reasonable prospect of success.

68. I turn next to the discrimination complaints. The Respondent submits that in respect of the complaint about the dismissal and those related to it (the Claimant being accused of theft and being subjected to disciplinary proceedings, being told that if he did not resign he would be sacked and the withholding of wages unless he resigned or agreed not to bring a claim) it is obvious that there is little reasonable prospect of success. This, it is said, is essentially because the Claimant was shown on CCTV to have been drinking whilst on duty, did not contest this at the disciplinary hearing and did not appeal against his dismissal.

69. These are matters which, if established on the evidence, may mean that the Respondent succeeds in defending these complaints. There was however, no record of the disciplinary hearing in the bundle for this Hearing, and nothing which suggests the Claimant accepted that what he had done merited dismissal. It is simply not possible for me to say therefore that there is little reasonable prospect of him establishing that his race, or a protected act, was the reason for his dismissal and the Respondent's related actions. He says he believed he had permission to drink and also refers to the culture within the hotel whereby it was generally acceptable for staff to drink, appropriately no doubt, whilst on duty. Combined with the Claimant's assertion of concerns about race discrimination

generally within the hotel, that is a factual matrix which on the face of it, if established on the evidence, could found complaints of direct discrimination. He also says that the Respondent did not like the fact that he had complained, particularly to the police, alleging racial harassment. On the face of it, that could establish a complaint of victimisation, with the Claimant relying on his complaint of racial harassment as the protected act. Factually, all of these are matters which have to be tested by the detailed assessment of evidence at a final hearing, not least to determine what it was that operated on the minds of the decision-makers in acting as they did. There is a document in the bundle (page 56) which shows that the Claimant asked if he had the option to resign before the disciplinary hearing which led to his dismissal, but there could be more than one interpretation of what the Claimant meant and therefore by itself this is by no means sufficient to indicate that there is little reasonable prospect of success in relation to the complaints regarding the dismissal. Again, this has to be assessed on proper testing of the evidence.

70. I make clear that I am not saying the Claimant will succeed in these complaints; it may turn out that he is wholly unable to establish his case on the evidence. Rather, I cannot say on the basis of what was before me at this preliminary stage that it is possible to make a provisional assessment of the evidence and find the Claimant has little reasonable prospect of success. The case is plainly not as simple, before the evidence is tested, as establishing that the Claimant was caught drinking on duty. His evidence about the context in which he did so, and the reasons informing the Respondent's subsequent actions, have to be fully considered.

71. I can deal with the remaining points of Mr Edwards' submissions more briefly. In relation to the complaint about withholding of pay, Mr Edwards says that because this is the Respondent's standard procedure there is little reasonable prospect of the Claimant establishing that his race or a protected act featured at all. That is plainly a matter of evidence to be tested in detail at the final hearing.

72. In respect of what Mr Philips is alleged to have said to the Claimant on his return from sick leave, Mr Edwards says it was a reasonable conversation – in other words the Claimant's colleagues were bound to be upset with what had happened and Mr Edwards was essentially preparing the Claimant for that. Quite apart from the fact that this is not what the Respondent says in its Response, this too is a matter of evidence that it is not possible for me to take a view on at this preliminary stage.

73. As to the allocation of shifts on the Claimant's return from sick leave, Mr Edwards says that the Respondent had to allocate the Claimant different shifts to Ms Solteszova and so again the Claimant's race or protected act did not feature in the decision. Again, I note that this is not what is said in the Response; it is moreover a matter of evidence, in particular of what was in Mr Philips' mind, for consideration at the final hearing.

74. That deals with the complaints of direct discrimination and victimisation. It will be plain that, without any indication of how the case will be decided, I reject the Respondent's applications for deposit orders, for the reasons I have given. For completeness, I add that, even if it had been requested, I would not have ordered a deposit to be paid in respect of the complaint of harassment, arising out of the events of 23 September 2017. Subject of course to questions of time limits, there is no question of this complaint having little reasonable prospect of success,

though it is entirely for the tribunal at the final hearing to assess it on its merits, including the Respondent's section 109 defence.

75. The matter will now proceed to final hearing for substantive consideration of the complaints of discrimination. In case this were necessary, dates were agreed by the parties in respect of the substantive preparations for that hearing. Case Management Orders will be issued separately.

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Employment Judge Faulkner

Date: 5 August 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE