EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4123835/2018 Preliminary Hearing at Edinburgh on 11 June 2019

Employment Judge: M A Macleod

Ms Caroline Waterloo	Claimant In Person
National Library of Scotland	Respondent Represented by Mr R Turnbull

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claims are dismissed for want of jurisdiction, being time-barred.

REASONS

1. In this case, the claimant complains of automatically unfair dismissal, dismissal in breach of contract, breach of health and safety obligations and victimisation by way of dismissal following a protected act.

2. She had raised earlier proceedings before the Employment Tribunal against the same respondent (case nos: 4105348/2017, 4105406/2017 and 4105409/2017), which proceeded to a full hearing, following which a Judgment was issued on 7 January 2019 dismissing the claims of age discrimination and unfair dismissal in that case. That Judgment is now the subject of an appeal before the Employment Appeal Tribunal following a Notice of Appeal dated 19 February 2019.

3. Following a Preliminary Hearing on 15 March 2019, during which Employment Judge Porter, who was hearing the case, recused herself from these proceedings, Mr Turnbull submitted an application dated 15 March for a Preliminary Hearing in order to decide whether or not to strike out the claimant's claims under Rule 37 of the Employment Tribunal Rules of Procedure 2013, failing which a deposit order in respect of each head of claim as a condition of the claimant being permitted to continue with her claim.

4. The claimant opposed that application by email dated 20 March 2019. In responding, she submitted that the Tribunal should sist these proceedings pending the outcome of the appeal before the Employment Appeal Tribunal.

5. On 16 April 2019, the Tribunal wrote to the parties to advise that it was noted that the respondent had made application for a PH on the question of strike out or deposit order, and had also raised issues relating to jurisdiction and time bar. The Tribunal advised parties that a PH should be fixed in the case in order to determine the following matters:

    1. Whether the claims under case no: 4123835/2018 should be dismissed on the basis that the Tribunal has no jurisdiction to hear them, on the grounds of time bar; and

    2. Whether the claims under case no: 4123835/2018 should be sisted pending the EAT appeal in 4105348.2017 and others.

6. It was also noted that the issues of res judicata and strike out should be held over to a separate hearing, and that the res judicata issue may well be affected by the appeal to the EAT in particular.

7. The PH was fixed to take place on 11 June 2019. The claimant appeared on her own behalf, and the respondent was represented by Mr Turnbull, solicitor.

8. The claimant confirmed that parties are awaiting a date for the hearing to be fixed before the EAT. Initially, she said she had suggested that these proceedings should be sisted until the EAT hearing was complete, but she

did say that even if the EAT were to decide that the appeal should not proceed, that would not mean that the facts as pled did not happen, and since the unfair dismissal claim was not heard in the original case this should go ahead to a hearing on the merits.

9. Mr Turnbull confirmed that the parties are in agreement over that issue. The case should, however, proceed to a hearing on the preliminary issues first as it would not be in accordance with the overriding objective to sist the proceedings in general to avoid delay. By determining the issue of time bar, the Tribunal could deal with that part of the case.

10. He went on to identify the different preliminary which are for determination by the Tribunal, unaffected by the EAT decision.

11. Firstly, he argued that the issue of whether the claims have already been determined by the Tribunal will not be decided by the EAT; secondly, that the EAT will not decide whether or not the claimant has acted unreasonably; thirdly, that the EAT will not determine the time bar issues in relation to this case; and fourthly whether the claim has no reasonable prospect of success will not be decided by the EAT.

12. It was therefore determined, and agreed by the parties, that the hearing should then focus on the arguments in relation to time bar. The claimant offered to give evidence, but Mr Turnbull helpfully confirmed that he was content to proceed by way of submissions only, taking into account what the claimant said in her submissions.

13. The claimant made her submission first.

14. She said that the Employment Judge had “ordered” her to amend her claim. It went against her views to have such a new claim as she was concerned that this would distract from the original claim. She submitted that she did not have the chance to speak about her unfair dismissal in the original Tribunal hearing, the right witnesses having not been called to give evidence about the unfair dismissal. She focused her questions on the discrimination claim which was the most important claim to her. The unfair

dismissal was less important and she did not have the opportunity to go into the automatic unfair dismissal claim.

15. At the end of the hearing, the claimant said that she was asked to withdraw those claims. She did not mean to do so but she was very confused on the last day of the hearing, and did not understand what was happening. She was representing herself and found the hearing very stressful. Cross examining witnesses took its toll on her.

16. The claimant said that she asked the Employment Judge to confirm that her claims had not been withdrawn, but was told that they had been, and was told that while it was not possible to restore them it was possible for her to raise them again. They were not dismissed. The Employment Judge did mention that they might be time barred. The claimant said that she "does not know how the law works in these circumstances".

17. If the Tribunal decides that the claim is time-barred, she requested that discretion should be exercised because it would be just and equitable to allow the case to proceed to hearing.

18. She made reference to the fact that the claims the Tribunal has decided upon are not the same as the new claims she wished to raise.

19. The claimant then referred to her breach of contract claim. She said she could not understand why the respondent had dismissed her in breach of contract, and noted that her employment contract clearly stated that she was entitled to 6 months' notice of termination.

20. She said that she wanted to understand what the effect of the lack of notice period would be upon her pension entitlement. She was told by her pension providers that no payments were made into her pension from 14 June 2018. She said she was told on 16 October 2018 that she had been paid £4,032.83 in compensation for pension loss, but could not understand that. She raised her claim for dismissal in breach of contract in September or October 2018, having realised by August that the respondent simply wanted to break the relationship as soon as possible. Towards the end of October,

the respondent was opposing her application to amend those claims in and threatening her with postponements and costs applications, and so she decided to use another route to pursue that claim, in the Sheriff Court.

21. The claimant reactivated her claim by presenting it to the Tribunal on 24 December 2018. She could not find where any payment relating to this was made, and concluded that she had not been told the truth. That claim was not dismissed, either, and was therefore ongoing.

22. The breach of health and safety obligations was the main reason for raising the claim of automatically unfair dismissal. She said that they took away her dignity and said things which were not true, a very serious matter in an organisation such as the respondent's.

23. With regard to her victimisation claim, the claimant said that in April 2018, during the previous proceedings, this claim was included within her list of issues but for some reason it seemed to have disappeared at the later stages of the case. On the first day of the hearing, the Employment Judge asked her to submit an application to amend her claim of victimisation, a request which the claimant did not understand. At the end, the Tribunal dismissed the claim due to jurisdiction. Not knowing what had happened, the claimant decided to raise the claim again.

24. She said that she had received new evidence in response to subject access requests which she had made.

25. She asked that the Tribunal should find that the claims are not time-barred, but that if they are, the Tribunal should find that it is just and equitable to allow them to proceed.

26. For the respondent, Mr Turnbull said that the claimant's claims should be dismissed, having been submitted outwith the statutory deadlines.

27. He sought to address the three claims separately being claims for automatically unfair dismissal for health and safety reasons, breach of contract and victimisation.

28. Mr Turnbull tendered a written submission, to which he spoke.

29. With regard to the claim of automatically unfair dismissal, Mr Turnbull referred to section 111(2)(a) and (b) of the Employment Rights Act 1996 (ERA). The claim was brought on 25 December 2018, significantly more than 3 months after the effective date of termination of the claimant's employment, on 14 June 2018. It is a matter of agreement that she was dismissed on that date. The claimant's ET1 confirmed this. Her dismissal was confirmed by letter, emailed to her on that date, and acknowledged by her on that date.

30. The act relied upon under this heading is dismissal, and there can only be one dismissal. Accordingly, the act complained of, said Mr Turnbull, took place on 14 June 2018. The claimant, he observed, appears to rely upon an act on 27 September 2018, but for a claim of automatically unfair dismissal, there can only be one date of dismissal, and one decision to dismiss.

31. The respondent wrote to the claimant on 27 September advising her that her appeal had been unsuccessful. Reinstatement would have been futile as the relationship had broken down, in both the claimant's and respondent's views. The claimant was told she would have been dismissed anyway for gross misconduct, for having telephone organisations pretending still to be an employee of the respondent.

32. The claim is therefore, he submitted, outwith the limitation period. The next question he addressed was then whether it was not reasonably practicable for the claim to have been presented within the statutory timescale. It was, he said, reasonably practicable, because she presented that very claim on 6 August 2018, but withdrew it at the hearing, and in the Judgment the Tribunal dismissed all her claims. The claimant now says, he pointed out, that the reason for withdrawal was her confusion about the process, but that is not a sufficiently good reason to allow her to bring these claims again.

33. In the event that the Tribunal were to find that it was not reasonably practicable to have presented the claims within the limitation period,

Mr Turnbull submitted that the Tribunal should find that the claims were not presented within such further time as was reasonable. The claimant was aware of the time limits. The respondent reminded her of the time limits in emails around the time of the amendment application. The claimant took two further months to raise these claims, notwithstanding the Tribunal allowing her application to amend in a claim of victimisation on the first day of the hearing.

34. With regard to the breach of contract claim, Mr Turnbull referred to Article 7(a) of the 1994 Order. The test is the same as in relation to unfair dismissal.

35. The claimant's effective date of termination was 14 June 2018. The claimant asserts that the breach of contract took place on 14 June, and the claim was brought outwith three months, on 24 December 2018.

36. He then raised the question of whether it was not reasonably practicable for the claim to have been raised within three months. He submitted that it was reasonably practicable for the claimant to have done so. She applied to amend her claim within the three month period but then made the choice not to proceed with it, for her own reasons. The claimant, he submitted, had the benefit of the support of the PCS Trade Union who accompanied her to a hearing in April 2018 and also to her appeal hearing on 27 September 2018. She also confirmed that she had previously sought advice from an insurance company lawyer, from the Citizens' Advice Bureau, from Chris Phillips, Harper Macleod and Morton Fraser. She was aware that she had to raise a claim within three months.

37. She sought to amend her claim on 13 September to include a claim of automatically unfair dismissal, and on 12 October to include a claim of breach of contract, the grounds of which are broadly similar to those claims now raised, and the Tribunal granted that application to amend. On 1 August and 23 October, the respondent reminded the claimant of the time limits by email.

38. On 9 November 2018, the claimant chose no longer to insist on her application to amend her claim to include a breach of contract claim, and that claim was then dismissed in the Tribunal's Judgment.

39. If the Tribunal decided that it was not reasonably practicable for the claim to be presented within the statutory timescale, Mr Turnbull submitted that the claim was not presented within such further time as the Tribunal should consider reasonable. Having withdrawn the earlier claims, it is not clear why the new claims are being presented.

40. With regard to the victimisation claim, Mr Turnbull referred to the different test set out in section 123(1)(a) and (b) of the Equality Act 2010. The claim must be presented within three months of the date of the act complained of or such other period as the Tribunal considers just and equitable.

41. He submitted that this claim should have been presented by no later than 25 September 2018, but here was clearly outwith the three month period. The claimant could not have been subjected to detriment after dismissal. In any event, the claim should not be permitted to proceed, as it would not be just and equitable to allow this in the circumstances.

42. The claimant knew or suspected facts on which she could have based a claim for victimisation at a much earlier stage, and she attempted to amend her claim to include such a complaint in March 2018, as well as twice more in May 2018. The fault for the delay lies entirely with the claimant herself and this should be the principal reason for refusing the request to extend time.

43. The claimant, having been invited to do so by the Tribunal, took the opportunity to respond to Mr Turnbull's submission. She denied that she had had the support of her trade union, though she accepted that they did attend meetings with her prior to her dismissal. They sifted her case out and confirmed that they would not be prepared to advise her in relation to raising a claim before the Tribunal, and therefore she did not have any advice from the trade union about the legal issues relating to the Tribunal.

44. With regard to the victimisation claim presented in May 2018, she said that she did not what had happened to that claim, which seemed to have been evacuated.

45. With regard to the breach of contract, the claimant submitted that the respondent said that they rectified the breach by paying six months' pay in lieu of notice. She only realised in September 2018 that the payment had not been made to rectify the breach and therefore it was not reasonably practicable to have raised the claim in time.

46. With regard to the issue of dismissal, she argued that the respondent has confused matters because the reason for dismissal in September appeared to be a breach of trust and confidence, whereas that was not the reason given in June. The second dismissal is therefore incorporated into the first dismissal by the respondent.

47. Following the PH, the claimant submitted an email dated 12 June 2019 for my attention, enclosing a chronology of events. The respondent was given the opportunity to respond to that chronology and did so by email dated 9 July 2019. Essentially, the respondent disputed some of the facts in the claimant's chronology, which they found very hard to follow.

The Relevant Law

48. The Tribunal referred to the different statutory provisions relative to the different claims.

49. Section 111(2) of ERA provides:

"Subject to the following provisions of this section, 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."

50. The Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 provides, at Article 7:

"Subject to articles 8A and 8B, an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented –

(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or…

(b) …

(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of these periods is applicable, within such further period as the tribunal considers reasonable."

51. Section 123(1) provides:

"Subject to sections 140A and 140B, proceedings on a complaint within section 120 may not be brought after the end of –

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable."

52. Reference was made by Mr Turnbull to a number of authorities which the Tribunal took into account in reaching its decision.

Discussion and Decision

53. It is important to determine, firstly, the claims which the claimant has raised in this case (4123835/2018) before reaching a conclusion as to whether or not such claims are time-barred.

54. In the ET1, which was presented to the Tribunal on 25 December 2018, the claimant ticked the box marked unfair dismissal, the boxes noting that she was making a claim in respect of holiday pay, and also that she was making another type of claim, which she identified as unfair dismissal in breach of contract, and breach of health and safety obligations.

55. In the paper apart attached to the ET1, the claimant set out, at some length, a narrative forming her factual averments, but at the outset of that narrative, defined her claims as:

- Automatic unfair dismissal;
- Dismissal in breach of contract;
- Breach of Health and Safety obligations and
- Victimisation by dismissing because of a protected act.

56. It is important to note, at this stage, that the Tribunal is not considering the issue of res judicata, in relation to some or all of these claims, but requires to consider the history of this matter in order to determine whether or not the claims are time-barred.

57. In her claim form, at the paper apart, the claimant stated: *"During the Hearing of my claims in November 2018 I withdrew the above mentioned claims in error. I was unrepresented and confused about the process on the day. I did not mean to withdraw these claims. These claims are very important to me and therefore I raise these as separate new proceedings as advised by Judge Porter on 20 December 2018."*

58. The Judgment of the Employment Tribunal, chaired by Employment Judge Porter, was issued on 8 January 2019, following a hearing which was held from 13 to 19 November 2018 and 7 January 2019. It is useful to note what

was said by way of introduction in that Judgment by the Tribunal, at paragraphs 6 to 9:

6. The claimant introduced a claim of unfair dismissal timeously in September 2018.

7. At the outset of the proceedings the claimant presented an amendment to include a claim of victimisation under section 27 of the Equality Act 2010 in respect of her dismissal. The amendment was unopposed and was allowed by the Employment Judge, subject to the issue of jurisdiction.

8. In the course of the proceedings the claimant withdrew her claims of harassment.

9. In the course of submissions, the claimant confirmed that, after hearing the evidence, her claims were confined to claims of direct discrimination on the grounds of age under section 13 of the Equality Act 2010; breaches of sections 111 and 112 of the Equality Act 2010; victimisation in respect of her dismissal under section 27 of the Equality Act 2010 and unfair dismissal under section 98 of the Employment Rights Act 1996. The claimant's other claims were withdrawn."

59. At the conclusion of the Judgment, the Tribunal stated, at paragraph 120, that *"It is for all these reasons that the Tribunal dismisses all the claimant's claims in these proceedings."*

60. The final day of the hearing was 19 November 2018. The additional date noted by the Tribunal was a date upon which the Tribunal members met in order to discuss and finalise their decision.

61. It is appropriate then to consider each of the claims according to the different tests to be applied by the Tribunal.

Unfair Dismissal/Automatic Unfair Dismissal

62. The claim should have been presented to the Tribunal within three months of the effective date of termination, in terms of section 111 of ERA. The effective date of termination in this case is 14 June 2018. The claimant

accepted this on her ET1, and the respondent confirmed this date to be agreed by them.

63. As a result, the claim was presented out of time, on 25 December 2018. The claim should have been presented by no later than 13 September 2018, or at least drawn to the attention of ACAS in the Early Conciliation process by that date. The Early Conciliation Certificate notes that ACAS was first notified of the claim on 22 December 2018, and that the certificate was issued on 24 December 2018. Accordingly, the claimant does not benefit from any extension of time thereby.

64. The question for the Tribunal is whether it can be said that the claim of unfair dismissal or automatically unfair dismissal could not reasonably practicably have been brought within the three month statutory time limit.

65. What is reasonably practicable is essentially a question of fact and the onus of proving that presentation in time was not reasonably practicable rests on the claimant. "That imposes a duty upon him to show precisely why it was that he did not present his complaint." (**Porter v Bandridge Ltd [1978] ICR 943**).

66. The best-known authority in this area is that of **Palmer & Saunders v Southend-on-Sea Borough Council 1984 IRLR 119**. The Court of Appeal concluded that "reasonably practicable" did not mean reasonable but "reasonably feasible". On the question of ignorance of the law, of the right to make a complaint to an Employment Tribunal and of the time limits in place for doing so, the case of **Porter (supra)** ruled, by a majority, that the correct test is not "whether the claimant knew of his or her rights, but whether he or she ought to have known of them." On ignorance of time limits, the case of **Trevelyans (Birmingham) Ltd v Norton EAT 175/90** states that when a claimant is aware of their right to make a claim to an employment tribunal, they should then seek advice as to how they should go about advancing that claim, and should therefore be aware of the time limits having sought that advice.

67. In my judgment, it is plain that it was reasonably practicable for the claimant to have presented a claim for unfair dismissal within the statutory timescales. The claimant has some experience in litigation, notwithstanding that she is not a qualified lawyer and does not benefit from legal or other specialist representation in the course of these proceedings, or previous proceedings. It is clear that she has an understanding of the need to raise complaints timeously before the Employment Tribunal, having done so in her earlier proceedings, and having presented amendments to the Tribunal within the necessary time limits.

68. The claimant's principal argument seems to be that she did raise claims previously but withdrew them by mistake. While the previous claim did include, to its conclusion, a complaint of unfair dismissal, that claim was dismissed in the Judgment following hearing. That she seeks now to raise a complaint of automatically unfair dismissal, a different but related species of claim, requires her to show that it was not reasonably practicable (or feasible) for her to have done so in time. In my judgment, the Tribunal cannot find that it was not reasonably practicable for her to have done so. Even if she felt that it were necessary to raise the claim in a separate process rather than by way of addition to her existing claims, her familiarity with the Tribunal process and understanding of time limits should have alerted her to the need to do so at the earliest possible opportunity.

69. There is no reason – far less any good reason – to explain why the claimant did not raise these proceedings within the statutory time limit. There was nothing to prevent her doing so. The respondent appears to be blameless in this, having suggested to her in correspondence that she should be aware of time limits if she wished to expand her claim.

70. The claimant's next argument seems to be that in fact she was subjected to a "second dismissal", at the point when the appeal hearing issued its decision, on 16 October 2018, since she interpreted the appeal decision as setting out a new reason for her dismissal. On any view, this is a misinterpretation. The appeal panel reviewed the dismissal decision and upheld it. They had to consider what the claimant put forward in her appeal.

She herself notes that the appeal panel said that *"What was of fundamental importance in deciding to dismiss was that for whatever reason, you would not return to work unless certain changes were made."* In my judgment, that plainly demonstrates that the appeal panel upheld the terms of the dismissal decision already made. In any event, there is no basis for a finding that the respondent took two decisions to dismiss the claimant. Her contract was terminated with effect from 14 June 2018; it could not then be terminated again in October.

71. Finally, the claimant appears to suggest that her employment continued, in fact, until 14 December 2018, because on termination of her contract of employment, she was contractually entitled to six months' notice. This argument is undermined by the fact that the claimant accepts in her ET1 that she was terminated on 14 June 2018, with effect from that date; and that in her paper apart she avers that *"I should still have been employed by them until 14 December 2018 if they had not breached my contract.."* She sought to argue that she "should still have been employed", rather than that she "was employed" by the respondent.

72. That aspect of the case may give rise to a breach of contract claim – and indeed, the claimant seeks to raise such a claim in these proceedings – but the fact is that the claimant's employment ended on 14 June 2018, and that is the effective date of termination of her employment with the respondent.

73. The claimant asserts that on 25 September 2018 she realised that she had been paid in lieu of notice by the respondent, which she said was a breach of contract. In my judgment, this was a payment in respect of the notice of which the claimant had been deprived, and the contract did not continue beyond 14 June 2018.

74. It is therefore my decision that it was reasonably practicable for the claimant to have presented a claim for unfair dismissal to the Tribunal within the statutory time limit. The claimant knew all of the facts relating to her dismissal at the point when she received her dismissal letter, and there was nothing new which prevented her from raising the proceedings in time. She

raised, and then withdrew, a claim of unfair dismissal, and therefore it cannot be said to have been not reasonably feasible for her to have done so in time; she had already done so.

75. Accordingly, the claim for unfair dismissal is out of time and must be dismissed.

Breach of Contract

76. The same test applies to the breach of contract claim as to the unfair dismissal claim, and indeed, in my judgment, the same issues arise.

77. The claim of breach of contract relates only to the dismissal of the claimant. The point from which the three month statutory time limit begins to run is 14 June 2018, and accordingly the claim is out of time. Again this is a claim which the claimant made in the previous proceedings, having amended her claim on 12 October 2018 to introduce a complaint of breach of contract.

78. The claimant's primary argument, it seems to me, is that she mistakenly withdrew this claim because she misunderstood her position and felt under pressure to do so.

79. However, the issue before me is whether it was not reasonably practicable for her to have presented her claim in time. Again, it must follow that it was reasonably practicable for her to present her breach of contract claim in time, because she already did so, but then withdrew it. Why she withdrew it is of no account in determining this issue; the fact that it was reasonably practicable for her to have raised it timeously, as she did, fatally undermines her argument now that it was not reasonably practicable for her to have done so.

80. Accordingly, it is my judgment that the claimant's breach of contract claim fails for want of jurisdiction, and must therefore be dismissed.

Victimisation

81. Section 123 of the 2010 Act sets out the test to be applied in considering whether the claim of victimisation is time-barred.

82. Again, it is necessary to consider whether the claim was presented out of time. The claimant complains that the act of victimisation was that of dismissal by the respondent, which, we have established, took place on 14 June 2018. She has made reference to her first and second dismissal, and appears to suggest that there is a series of continuing acts which would extend the point from which the time limit would start to run.

83. The claimant raised a claim of victimisation by amendment during the earlier proceedings, and did so timeously on 14 September 2018. That claim was dismissed in the course of the Judgment in relation to those proceedings. However, the facts clearly demonstrate that by 14 September 2018 the claimant was able to, and did, submit a claim for victimisation under the 2010 Act to the Tribunal. She persisted with that claim (as the Tribunal has noted above) to the conclusion of that hearing, though unsuccessfully.

84. It is clear that the act of victimisation in this case was the respondent's decision to dismiss the claimant. She argues that there was a series of continuing acts beyond that date, including the "second dismissal" (meaning the decision not to uphold the appeal) and, in her submissions attached to her email of 12 June 2019, victimising her in the appeal hearing by "trumping up the phone call in July 2018 as a dishonest act by me".

85. The claim as pled by the claimant does not clarify exactly that there is any other act of victimisation relied upon than the dismissal decision.

86. Mr Turnbull, in his written response to this submission, draws from the submission that the claimant is seeking to argue that there were continuing acts, but that she seeks to rely on additional acts which do not form part of her claim and on an entirely different basis, reminding the Tribunal that it can only consider the claimant's claim as pled.

87. There can be no dismissal, he said, in the period beyond 14 June 2018, and none in October 2018. He said that what the claimant is relying upon is not a continuing act but the continuing consequences from the decision to dismiss, which happened to be affirmed by a different decision maker.

88. In my judgment, the claimant's claim is related to the decision to dismiss her. That decision was made in June 2018. What happened thereafter was that she challenged the decision, but unsuccessfully. In my judgment, based on the claim before me, there is no basis for suggesting that this amounted to a continuing act. I accept Mr Turnbull's characterisation of this as an act (her dismissal) with continuing consequences. The time limit for a claim which argues that the decision to dismiss the claimant runs from 14 June 2018, and accordingly, the claim was presented out of time.

89. It is therefore necessary for the Tribunal to consider whether the claim was presented within such time as the Tribunal thinks just and equitable. The claim was presented some three months out of time.

90. Mr Turnbull referred to the well-known case of **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434**, in which the court confirmed that it is of importance to note that time limits are exercised strictly in employment and industrial cases. "When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

91. I had reference, further, to the case of **British Coal Corporation v Keeble [1997] IRLR 336**, which is authority for the proposition that the Tribunal should consider the prejudice which each party would suffer. There is very little prejudice for the respondents in receiving the claim two days after the deadline, and there is no prejudice in terms of the collection of evidence or witnesses. There would be significant prejudice if the claims were held to be out of time. Factors which the Tribunal require to consider are set out in that case, including the length and reason for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party sued had cooperated with any requests for information, the promptness with which the plaintiff had acted once he or she knew of the facts giving rise to the cause of action and the steps taken by the

plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

92. A very unusual feature of this case is that this is a claim which has been raised before, and, unlike those considered above which were withdrawn, was judicially determined, albeit on the basis of jurisdiction. Although the claimant said that this particular head of claim was not covered by the ongoing appeal to the EAT, the issue for this Tribunal is simply to establish whether it would be just and equitable for the claim to be allowed to proceed, leaving aside any issue of res judicata for the present.

93. In my judgment, it would not be just and equitable for this claim to proceed. The claimant seeks to raise a claim, out of time, in circumstances where she has already raised such a claim and had a decision reached by the Tribunal. Leaving aside, as I have said, the question of res judicata, it can hardly accord with the principles of justice and equity, which require the Tribunal to balance and consider not only the interests of the claimant but also of the respondent, to permit her to raise, out of time, a claim in the same or very similar terms to that already dealt with.

94. The prejudice to the respondent of allowing such a claim to proceed would outweigh considerably the prejudice to the claimant of not being permitted to proceed with her claim of victimisation. In the event that her appeal is successful, it may be that she will be permitted to proceed with that claim which has already been dismissed; but the respondent has already been put to the expense and inconvenience of seeking to defend that claim, and should not, in my judgment, be obliged to endure further expense and inconvenience in defending it again.

95. Accordingly, I am persuaded that this claim should not be allowed to proceed, and that the Tribunal, lacking jurisdiction to hear it, must dismiss it.

96. The claimant's claims are therefore all dismissed for want of jurisdiction.

Date of Judgment: 22 August 2019

Employment Judge: Murdo Macleod

Entered Into the Register: 28 August 2019

And Copied to Parties