Case Number 1304182/2018
1304259/2018
1305449/2018

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
(1) Mrs D Brookes		**Department for**
(2) Mrs J Woodburn		**Work & Pensions**
(3) Mr A Hadlington		

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
ON A PRELIMINARY HEARING
(RESERVED JUDGMENT)

HELD AT Newcastle-under-Lyme **ON** 4 July 2019

EMPLOYMENT JUDGE GASKELL

Representation

For the Claimants	**(1):**	**In Person**
	(2):	**Mr I Woodburn (Claimant's Husband)**
	(3):	**Mrs K Hadlington (Claimant's Wife)**
For the Respondent:		**Mr A Serr (Counsel)**

JUDGMENT

The Judgment of the tribunal is that: -

1 Pursuant to Rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013, the claimants' claims for unlawful deductions from wages; breach of contract; and unlawful discrimination on the grounds of age and/or disability are dismissed as having no reasonable prospect of success.

2 The claimants' applications for permission to amend their claims to include claims of unfair dismissal are refused.

REASONS

Introduction

1 The three claimants are all former employees of the respondent, the Department for Work and Pensions. The first claimant is Mrs Diane Brookes who commenced employment on 7 February 1994: she took partial retirement on 1 May 2013; and was dismissed on efficiency grounds on 23 May 2018. The second claimant is Mrs Jennifer Woodburn whose employment commenced on 12 March 1984: she took partial retirement on 24 August 2015; and was dismissed on efficiency grounds on 22 May 2018. The third claimant is Mr

Anthony Hadlington who commenced employment on 25 January 1993: he took partial retirement on 15 September 2015; and was dismissed on efficiency grounds on 24 August 2018.

2 Upon dismissal, each of the claimants received compensation calculated under the provisions of the **Civil Service Compensation Scheme 2010** (the 2010 Scheme). They received payments of £4946; £4019; and £2291 respectively.

3 By a claim form received at the tribunal on 10 September 2018, the first claimant claims that her compensation was incorrectly calculated and that it should have been calculated under the provisions of the **Civil Service Compensation Scheme 2016** (the 2016 Scheme). She claims that it is an act of unlawful indirect age discrimination to calculate reckonable service for the purposes of such compensation from the date of her partial retirement rather than from the date of commencement of her service.

4 The second claimant's claim form was received at the tribunal on 17 September 2018. Broadly speaking, she pursues the same claim as the first claimant: but, in addition, she claims disability discrimination; arguing that she had taken partial retirement in order to extend her working life despite numerous health problems and that to reduce her compensation in any way amounts to disability discrimination. Her claim as presented alleged discrimination in the approach taken to the calculation of compensation - it was not part of her original claim that the decision to dismiss her on efficiency grounds was an act of discrimination.

5 The third claimant's claim was presented on 12 November 2018. His claims broadly replicate those of the second claimant; his argument for disability discrimination is that, if he had been dismissed on efficiency grounds without having earlier taken partial retirement, he would have been entitled to compensation based on the full length of his service. But, because he was partially retired, the compensation payment had been calculated by reference to service since partial retirement. He too opted for partial retirement because of health problems: and his argument is that to disadvantage him thereafter in the calculation of reckonable service amounts to disability discrimination.

6 The claims are resisted: it is the respondent's case that compensation has been calculated correctly in accordance with the 2010 Scheme; the application of the scheme is not discriminatory on grounds of either age or disability. The respondent has applied for the claims to be struck-out on the grounds that they have ***no*** reasonable prospect of success (**Rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013**) or, in the alternative, that, as a condition of proceeding with the claims, the claimants should be ordered to pay a deposit on the grounds that the claims have ***little*** reasonable prospect of success (**Rule 39**).

7 There was a Preliminary Hearing for Case Management purposes conducted by Employment Judge Hindmarsh on 8 April 2019. Judge Hindmarsh directed that the respondent's application for strike-out/deposit should be determined at an Open Preliminary Hearing today.

8 At the Hearing before Judge Hindmarsh, the claimants indicated an intention to apply to amend their claims to include claims for unfair dismissal and, in the case of the second claimant, the dismissal as an act of discrimination. Judge Hindmarsh directed that any applications to amend should be made promptly so that they may be considered at today's Hearing. The written applications to amend were received on 9 and 10 April 2019.

9 Today's Hearing is to determine two issues: -

(a) The respondent's application for strike-out/deposit, and
(b) The claimants' applications for permission to amend their claims.

Evidence & Procedure

10 I did not hear any oral evidence. I determined the case on the basis of written and oral submissions together with reference to an agreed bundle running to some 686 pages. I have considered the documents within the bundle to which I was referred by the parties during the course of the hearing.

The Issues & The Parties Submissions

The Basis of the Calculation

11 The principal issue between the parties is whether the applicable Rules for the calculation of benefits payable to the claimants under the Civil Service Compensation Scheme were the 2010 Scheme or the 2016 Scheme. It appears to be common ground between the parties (subject to the claimants assertions that the operation of the Rules are potentially discriminatory on grounds of age and/or disability) that applying the 2010 Scheme the claimants have been paid the maximum amount available to them upon their dismissal on efficiency grounds. The claimants claim that the applicable Rules were the 2016 Scheme and that under that scheme the compensation payable to them would be very significantly more. The respondent does not accept this to be the case even if the 2016 Scheme applied.

12 The 2010 Scheme is explicit at Paragraph 1.15: where a person has become entitled to a payment of the pension and/or lump sum under the relevant provisions of the **Principal Civil Service Pension Scheme** and **the Public Service (Civil Servants and Others) Pensions Regulations** (payment of

pension and/or lump sum on partial retirement), then any period of service used to calculate that pension and/or lump sum will not be included when calculating benefits payable under the 2010 Scheme. In other words, reckonable service restarts on partial retirement.

13 The claimants' case is founded upon **Employers Pension Notice 471**, which was issued coincident with the introduction of the 2016 Scheme: it suggests that the calculation of inefficiency compensation is to be aligned with the calculation of voluntary redundancy terms - which would include the entirety of an individual's length of service both before and after partial retirement. Hence it is the claimants' case that, when calculating inefficiency compensation, the entirety of their length of service should have been used and not merely the period after partial retirement.

14 The respondent has referred me to the case of ***PCSU & Others -v The Cabinet Office*** **2017 EWHC 1787 (Admin)**: the 2016 Scheme was quashed in its entirety; this being the case, then the operative scheme for the purposes of the calculation of the claimants' inefficiency compensation would be the 2010 Scheme.

15 The **Efficiency Compensation 2016 Guidance** was not quashed by the High Court: but the respondent argues that this Guidance in no way changes the basis of calculation for inefficiency payments to include service prior to partial retirement. The Guidance itself clearly states at Paragraph 3 that the maximum level of compensation is set out in the applicable Civil Service Compensation Scheme and, following the quashing of the 2016 Scheme, that can only be interpreted as a reference to the 2010 Scheme.

15 It is the respondent's case that the appropriate method of calculation under the 2010 Scheme has been fully considered and determined by an Employment Tribunal in the case of ***Walsh -v- Home Office*** **2400803/2016 (ET)**. The judgement of the tribunal was provided to me it is, of course, of persuasive authority. It fully supports the proposition that the claimants compensation has been calculated correctly under the 2010 Scheme. The claimant's case is that the case is of no assistance to the tribunal as it was considering the 2010 Scheme whereas the claimants argue that the 2016 Scheme (or at least the Guidance issued under it) is applicable to them.

16 Finally, on this point, the respondent relies on a decision of the Pensions Ombudsman in the case of ***X -v- The Cabinet Office*** **PO–24650** where the applicant, Mr X, had been given misleading information as to the amount of his inefficiency compensation prior to the quashing of the 2016 Scheme and then received a lesser amount thereafter. The decision of the Ombudsman was that Mr X was only entitled to receive the sum correctly calculated under the

applicable Scheme – which, following the quashing of the 2016 Scheme, could only be the 2010 Scheme.

Jurisdiction

17 The respondent argues that, absent any viable claim for discrimination, the amount of inefficiency compensation of itself is not in fact justiciable by the tribunal. Such a claim can only be framed as a claim for breach of contract and, even if the 2010 Scheme can be argued as contractual in its effect, it is clear that payments under the Scheme are entirely discretionary. No employee has a contractual entitlement to any payment under the Scheme (the respondent's position in these cases being that the employees in such cases are fairly by reason of capability). If there is no contractual entitlement, then payment cannot be enforced by an action in the tribunal or elsewhere for breach of contract.

Discrimination Claims

18 The claimants articulate their discrimination claims as follows: -

Indirect Discrimination

(a) The PCP relied on is the 2010 Scheme. It is suggested that the application of the Scheme causes particular disadvantage to older and/or disabled employees because they are inherently more likely to have previously taken partial retirement; thus, restarting the clock for the calculation of reckonable service under the Scheme.
(b) The respondent asserts that it is wholly unarguable that the application of the Scheme creates such disadvantage because the argument ignores the significant advantage given to those who have taken partial retirement in securing early payment of their pension and applicable lump sum.

Direct Discrimination

(c) In the alternative, the claimants argue that the application of the 2010 Scheme is directly discriminatory: the comparator for this purpose would be either an employee in good health with no need to take partial retirement (but who nevertheless later became liable for dismissal on efficiency grounds); or younger employees not eligible for partial retirement (but who again later become liable for dismissal on efficiency grounds).
(d) The respondent's response is the same in each case: to claim less favourable treatment than the chosen comparator on grounds of either disability or age is to ignore the earlier benefits conferred by partial retirement. It is clear that the reason for the limitations on the amount of

inefficiency compensation is not the employee's age or disability but the fact of the earlier benefits paid to them.

Amendment Applications

19 The claimants wish to amend their claims to challenge the dismissals themselves - either on the basis of disability discrimination (second claimant) or on the basis of ordinary unfair dismissal (all claimants).

20 The respondent objects to the amendments being allowed principally on the grounds that such claims are substantially out of time.

21 The relevant dates applicable for each claimant are as follows: -

First Claimant

(a) The Effective Date of Termination (EDT) for the first claimant was 23 May 2018: accordingly, the primary limitation period for the commencement of an unfair dismissal claim expired on 22 August 2018; she contacted ACAS on 6 August 2018 and the Early Conciliation Certificate (ECC) was issued on 5 September 2018. Accordingly, time for the presentation of an unfair dismissal claim expired on 5 October 2018.

Second Claimant

(b) The EDT for the second claimant was 22 May 2018: accordingly, the primary limitation period for the commencement of an unfair or discriminatory dismissal claim expired on 21 August 2018; she contacted ACAS on 11 August 2018 and the ECC was issued on 11 September 2018. Accordingly, time for the presentation of an unfair or discriminatory dismissal claim expired on 11 October 2018.

Third Claimant

(c) The EDT for the third claimant was 24 August 2018: accordingly, the primary limitation period for the commencement of an unfair dismissal claim expired on 23 November 2018; he contacted ACAS on 20 October 2018 and the ECC was issued on 1 November 2018. Accordingly, time for the presentation of an unfair dismissal claim expired on 5 December 2018.

In each case there was an oral intimation of a wish to present such a claim given at the Preliminary Hearing on 8 April 2019. Written applications to amend were received on 9 April 2019 from the first and third claimants and on 10 April 2019 from the second claimant. The first and second claimants were approximately six months out of time and the third claimant four months.

22 In oral submissions, each of the claimants confirmed that at the time of the termination of their employment they had no particular misgivings at the decision. It was only when they became aware that the compensation payment would be less than they were expecting that they being came concerned as to the fairness of the situation. None of the claimants raised any appeal against the decision to dismiss them; and all of them were aware of the applicable compensation calculations before presenting their claim forms in September and November 2018.

23 The claimants advanced no case as to why it may not have been reasonably practicable to include claims for unfair dismissal when their claims were presented. Mrs Woodburn advanced no case as to why it would now be just and equitable to extend time to allow her to pursue a claim that her dismissal was an act of discrimination.

The Law

24 I have set out above the rules regulations and applicable case law which I have considered in my determination as to the applicable scheme and the correctness or otherwise of the compensation calculations

The Law on Strike-Out/Deposit

25 **The Employment Tribunals Rules of Procedure**

Rule 37: Striking out

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) That it is scandalous or vexatious or has no reasonable prospect of success;
(b) That the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
(c) For non-compliance with any of these Rules or with an order of the Tribunal;
(d) That it has not been actively pursued;
(e) That the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in Rule 21 above.

Rule 39 Deposit orders

(1) Where at a preliminary hearing (under rule 53) 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 ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

25 **Decided Cases – Strike Out/Deposit**

Anyanwu –v- South Bank Students' Union **[2001] ICR 391 (HL)**

Highlighted the importance of not striking out discrimination claims except in the most obvious cases - as they are generally fact sensitive and require a formal examination of the evidence to make a proper determination.

Ezsias –v- North Glamorgan NHS Trust **[2007] ICR 1126 (CA)**

A similar approach should generally inform whistleblowing cases, which have much in common with discrimination cases, in that they involve an investigation into why employer took a particular step. It will only be in an exceptional case that an application will be struck out as having no reasonable prospect of success when central facts are in dispute.

Shestak –v- RCN **EAT 0270/08**

An example of an exception may be where the facts sought to be established by the claimant are totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The tribunal was upheld when undisputed documentary evidence in the form of emails which could not, taken at their highest, support the claimant's interpretation of events. This justified a departure from the usual approach that discrimination claims should not be struck out at a preliminary stage

Balls –v- Downham Market High School and College **[2011] IRLR 217 (EAT)**

The test is not whether the claim is "likely to fail".
The test is not whether it is "possible that the claim will fail".
The test cannot be satisfied by consideration of the respondent's case.
The tribunal must take the claimant's case at its highest.

The Law on Amendment

26 The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a Case Management Order: Rule 29. Although there is no specific reference to amendment in the Rules, no doubt such an order may include one for the amendment of a claim or response.

27 In ***Selkent Bus Co Limited v Moore*** **[1996] ICR 836**, the EAT gave the following general guidance, each part of which is dealt with in more detail below.

(a) Whenever the discretion to grant an amendment is invoked, the tribunal should consider all the circumstances and should balance the injustice

and hardship of allowing the amendment against the injustice and hardship of refusing it. What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant.

(b) **The nature of the amendment:** Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal must decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(c) **The applicability of time limits:** If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that application is out of time, and, if so, whether the time limit should be extended under the applicable statutory provisions.

(d) **The timing and manner of the application:** An application should not be refused solely because there has been a delay in making it. There are no time limits laid down for the making of amendments. The amendments may be made at any time – before, at, or even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery.

(e) Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, because of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.

28 ***The nature of the proposed amendment***

(a) Amendments that involve mere re-labelling of facts already fully pleaded will in most circumstances be very readily permitted: ***T&GWU v Safeway Stores Limited*** **UKEAT/0092/07**. An amendment may be allowed to correct the name of the claimant where an incorrect version of the surname was used by her solicitor: ***Cummings v Compass Group UK & Ireland Limited*** **UKEAT/0625/06**

(b) Generally, too a party wishing to amend to add new facts in support of an existing claim will be allowed to do so. However, "one can conceive of circumstances in which, although no new claim is being brought, it would, in the circumstances, be contrary to the interests of justice to allow an amendment because the delay in asserting facts which have been known for many months makes it unjust to do so*":* ***Ali v Office of National Statistics*** **[2005] IRLR 201 (CA) (**per Waller LJ)**.**

(c) In deciding whether a claim form contains a particular claim, it is necessary to look at the document as whole. The prescribed form of claim document lists the most common jurisdictions of the tribunal and required the claimant to identify those he claims by ticking a box. A Judge is likely regard as significant, when determining what claims are asserted, which boxes have been ticked. Direct and indirect discrimination are two different types of unlawful act, and a claim which asserted discrimination on racial grounds did not include a complaint of indirect race discrimination, and such a complaint required an application to amend: ***Ali v Office of National Statistics***. "The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say-so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. … a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a tribunal may have lost jurisdiction on time ground; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand-in-hand with it, can be provided for both by the parties and by the tribunal itself, and [to] enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings": ***Chandhok v Tirkey*** **UKEAT/0190/14**.

(d) It is relevant to the exercise of the discretion that the new claim is closely related to the existing one, and depends on facts which are substantially already alleged; it is also relevant that it is a claim that the respondent "would reasonably have anticipated … as the natural, one might almost say inevitable, concomitant of [the original claim]" and that it was omitted "through a lawyer's blunder" (since a remedy against the claimant's solicitors is not equivalent to the primary remedy): ***T&GWU v Safeway Stores Limited***.

(e) The discretion is wide enough to enable the tribunal to allow a claimant to add or substitute a cause of action not available at the date of the claim form, since it had accrued later: ***Prakash v Wolverhampton City Council*** **UKEAT/0140/06.**

29 ***Time Limits***

(a) Time limits arise as a factor only in cases where the amendment sought would add a new cause of action. If a new claim form were presented to the tribunal out of time, the tribunal would consider whether time should be extended, either on the basis of the "not reasonably practicable" test (for example, for unfair dismissal) or on the basis of the "just and equitable" test (for example, for unlawful discrimination). If time were not so extended, the tribunal would lack jurisdiction to entertain the complaint, and it would fail.

(b) In ***T&GWU v Safeway***, the EAT reviewed the authorities and observed that, apart from authority, it might be thought wrong in principle for a Judge to exercise his discretion to allow a new claim by amendment where it would not have been allowed if a new claim form had been presented: "to allow a claimant to – in effect – get round the statutory limitation period". It noted that in the civil courts a new claim may under CPR 17.4 (2) be introduced out of time by amendment if it "arises out of the same facts or substantially the same facts" as the existing claim but pointed out that this depends on Limitation Act 1980 s. 35 (2), whose terms are not repeated in the legislation governing Employment Tribunals. It went on to say that "however attractive that line of argument may be to a purist, the cases seem to be against it. The position on the authorities is that an Employment Tribunal has a discretion in any case to allow an amendment which introduces a new claim out of time". The EAT further noted that, read out of context, the ***Selkent*** guidance might be read as implying that if a fresh claim would be out of time, and time is not extended, then the application to amend must be refused, but then said that this was not what ***Selkent*** had decided. "The reason why it is "essential" that a tribunal consider whether the fresh claim in question is in time is simply that it is a factor –albeit an important and potentially decisive one – in the exercise of the discretion". The EAT said that the authorities, including ***British Newspaper Printing Corporation (North) Limited v Kelly*** **[1989] IRLR 222** in the Court of appeal, were consistently to the above effect, save for ***Harvey v Port of London (Tilbury) Limited*** **[1999] ICR 1030**. In ***Kelly*** the original claim had evidently been intended to be for redundancy payments, and the claim sought to be added out of time was for unfair dismissal. The Court of Appeal agreed with the EAT that the tribunal at first instance had given undue emphasis to the time limit, and that the amendment should be allowed. In ***Harvey*** the original claim was for unfair dismissal and the claim sought to be added out of time was for disability discrimination. The EAT held that the fact that the claim was out of time was not merely an important factor for the exercise of discretion but was an absolute bar to the amendment. It acknowledged that this appeared to be inconsistent with ***Kelly***, but criticised the reasoning in that case, and purported to distinguish it, chiefly on the

basis that the "just and equitable" test for extending time for a discrimination claim was different from the "reasonably practicable" test for unfair dismissal. In ***T&GWU v Safeway*** the EAT doubted whether it was possible to distinguish ***Kelly***. Since ***T&GWU v Safeway*** is the more recent EAT authority, it is submitted that (so far as it conflicts with the decision in ***Kelly***) a tribunal at first instance should follow it.

30 ***Timing of Applications to Amend***

(a) It should be noted that the tribunal Rules in force at the time of ***Selkent*** did not prescribe a time for applications to amend (or for interim applications generally). Subsequent Rules (including those of 2004) did prescribe a time but Rule 30 of the 2013 Rules does not.

(b) If a party considers that an application to amend should be made to add a new cause of action, even as late as during the hearing, it is right to make that application, since otherwise the opportunity to raise the claim may be lost entirely: ***Divine-Borty v Brent LBC*** **[1998] ICR 886 (CA)**: an issue estoppel case in which all three members of the Court considered that it was possible for the claimant to have applied at the hearing to amend his claim form to add race discrimination to unfair dismissal, rather than (as he did) presenting a fresh claim).

31 ***Consequences of Amendment***

It will often be possible for an amendment to be allowed and the prejudice to the other side offset by allowing further time for preparation and/or making a costs order. Indeed, in appropriate cases the Judge may only allow an amendment on condition that the party seeking it agrees to pay costs caused by it: ***Cocking v Sandhurst (Stationers) Limited*** **[1974] ICR 650**.

The Substantive Law on Time Limits

32 **The Employment Rights Act 1996 (ERA)**

Section 111: Complaints to Employment Tribunal

(2) .....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.

33 I have considered a number of decisions of the appellate courts: ***Capita Health Solutions Ltd -v- McLean*** **[2008] IRLR 595*; Wall's Meat -v- Khan*** **[1978] IRLR 499*; Dedman -v- British Building and Engineering Appliances Ltd*** **[1974] ICR 53*; Croydon Health Authority -v- Jaufurally*** **[1986] ICR 4*; London International College Ltd. -v- Sen*** **[1993] IRLR 333*; Riley -v- Tesco Stores Ltd & Another*** **[1980] ICR 323*; Northumberland County Council & Another -v-Thompson*** **UKEAT/0209/07/MAA; *Marks & Spencer Plc -v- Williams Ryan*** **[2005] ICR 1293; *Chohan -v- Derby Law Centre*** **[2004] IRLR 685; *Royal Bank of Scotland Plc -v- Theobald*** **UKEAT/0444/06; *Octopus Jewellery Limited -v- Stephenson*** **UKEAT/0148/07; *Palmer and Saunders -v- Southend on Sea Borough Council*** **[1984] 1 All ER 945; *Schultz -v- Esso Petroleum Ltd*** **[1999] 3 All ER 338**

(a) That *'reasonably practicable'* means nothing more than '*reasonably feasible'*.
(b) What was reasonably feasible is a matter of fact for the tribunal to decide.
(c) Ignorance of the facts or of one's rights and obligations can render it not to be reasonably practicable to meet a deadline but the ignorance itself must be reasonable. The tribunal must consider what the claimant could or should have known with reasonable diligence.
(d) It follows that that the claimant must have taken such advice as was reasonably available.
(e) There are of course claimants who have come before the tribunal who have not been able to take advice because of funding problems, language problems, other communication problems, ill-health and many other reasons, all of which, in different cases, which turn on their own facts, have been found to render it not reasonably practicable for the proceedings to have been commenced in time.
(f) In a case where a professional adviser has accepted a retainer which includes the presentation of a claim on behalf of a client, if the failure to meet the deadline or the other default is attributable to the negligence of the adviser, then this must defeat in the claim that it was not reasonably practicable; quite simply because, but for the adviser's neglect the deadline would have been met.
(g) In a case where a claimant has taken legal advice but has retained the responsibility to present the claim in person, if the legal advice is erroneous - particularly as to the time limit for presentation or the date of expiry thereof, and the claimant has reasonably followed such advice, this may render it not reasonably practicable for the claimant to present the claim in time. The same applies if erroneous advice is given by tribunal staff.
(h) If the claimant has a genuine and reasonable misunderstanding as to the facts, this too may render it not reasonably practicable to present

the claim in time. This is particularly the case, if the claimant has been given inaccurate or inconsistent information as to the effective date of termination.

(i) Finally, when looking at the role of advisers the tribunal should have regard to the nature of the adviser who was actually giving the advice and in what circumstances.

(j) Where ill-health is relied upon the tribunal must make specific findings regarding the claimant's health and its impact on reasonable practicality.

34 **The Equality Act 2010**

Section 123: Time limits

(1) Subject to section 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.

(3) For the purposes of this section—

(*a*) conduct extending over a period is to be treated as done at the end of the period;

(*b*) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(*a*) when P does an act inconsistent with doing it, or

(*b*) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

35 ***Robertson -v- Bexley Community Centre*** **[2003] IRLR 434 (CA)**

An Employment Tribunal has a very wide discretion in determining whether or not it is just and equitable to extend time. It is entitled to consider anything that it considers relevant. However, time limits are exercise strictly in employment 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. On the contrary, a tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable to extend time. The exercise of discretion is thus the exception rather than the rule.

Discussion & Conclusions

Strike-Out/Deposit Application

36 Having considered the arguments advanced by the parties and summarised at Paragraphs 11 – 16 above, I am in no doubt that the applicable rules for the calculation of inefficiency compensation due to the claimants were contained in the 2010 Scheme. The 2016 Scheme was quashed in its entirety: and, even if it had not been, the provisions for the calculation of compensation after partial retirement were the same as in the 2010 Scheme.

37 Accordingly it follows (and it is conceded), that the inefficiency compensation paid to each of these claimants was correctly calculated. Any contractual claim which may arise has no reasonable prospect of success. (It should be noted that each of the claimants was paid, on the exercise of the decision maker's discretion, the maximum amount of compensation payable under the Scheme.)

38 As to the discrimination claims, the claimants argue that either as an indirect discrimination claim or a direct discrimination claim they were subject to disadvantage either individually or as a group by comparison with employees whose employment was to be terminated on grounds of inefficiency but who had not previously taken partial retirement and therefore had not received the benefits of such. No evidence is available to the claimants as to either individual or group disadvantage if one takes account of the substantial advantages already received by the claimants when they are elected for partial retirement. At the time of the termination of their employment they were already in receipt of pensions and lump sums calculated by reference to their service prior to partial retirement. The scheme is clear that any calculations of compensation due at a later date were to be based on service after partial retirement.

39 For the purposes of the indirect discrimination claim, no evidence of group disadvantage is available if the balancing advantages are considered.

40 For the purposes of the direct discrimination claims, it is clear that any differential treatment between the claimants and their chosen comparators was not on grounds of age or disability but on grounds of having previously taken partial retirement and enjoyed the associated benefits.

41 Accordingly, in my judgement, the discrimination claims have no reasonable prospect of success.

42 The claims as presented in the claim forms are therefore dismissed pursuant to Rule 37(1)(a) of the **Employment Tribunals Rules of Procedure 2013**.

Amendment Applications

43 I have applied the ***Selkent*** principles: -

(a) The nature of the proposed amendments are such as to introduce entirely new claims totally unheralded before 8 April 2019. At no time before then had any of the claimants raised any complaint or issue as to the decision to dismiss them on efficiency grounds.
(b) The application to amend was not made until many months after the presentation of the claim and no explanation for this delay was advanced by any of the claimants. They all conceded that they had no issue with the decision to terminate their employment; their concerns related only to the amount of compensation payable.
(c) The principal objection to the amendment is the claims relating to the dismissal are substantially out of time. Whether I apply the test of *reasonable practicality* for the unfair dismissal claims, or the *just and equitable* test applicable to the discrimination claim, the burden clearly falls on the claimant to establish either that it was not reasonably practicable or that it is now just and equitable to extend time. As stated above, the claimants have not advanced any case at all relating to reasonable practicality or justice and equity.

44 The claimants were aware of their compensation calculations before they presented their claim forms. They were clearly able (with the benefit of advice or otherwise) to formulate complex claims at that time. They have advanced no explanation as to why they did not include unfair dismissal claims if such were to be pursued.

45 In these circumstances, my judgement is, that it was reasonably practicable to present unfair dismissal claims within time and it is not just and equitable to consider a discrimination claim out of time. Accordingly, I refuse the application to amend as the Employment Tribunal lacks jurisdiction to consider the amended claims.

46 The applications to amend the claims are accordingly refused.

Employment Judge Gaskell
25 September 2019