EMPLOYMENT TRIBUNALS

Claimant: **Ms D Green**

Respondent: **CBRE Managed Services Limited**

Heard remotely on CVP **On:** **22 July 2020**

Before: Employment Judge Henderson

Representation:

Claimant: Mr E McDonald (Counsel)

Repsondent: Ms C Jennings (Counsel)

JUDGMENT

1. **The claims lodged by the claimant on 10 March 2020, for detriment and automatically unfair dismissal are out of time and the Tribunal has no jurisdiction to hear those claims.**

2. **The Final Hearing dates of 1 to 4 December 2020 should be vacated.**

REASONS

The hearing

1. This was an Open Preliminary Hearing (OPH) to determine the question of whether the Tribunal should exercise its discretion to extend time to allow the claimant's claims for detriment and automatically unfair dismissal on the grounds that she made the protected disclosures (sections 48 (3) and 111 (2) of the Employment Rights Act 1996 (ERA)).

2. The hearing was a remote public hearing, conducted using the cloud video platform (CVP). The parties agreed to the hearing being conducted in this way. In accordance with Rule 46 (of the Tribunal Rules of Procedure

2013), the Tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended. No requests were made by any members of the public to inspect any witness statements or for any other written materials before the Tribunal.

3. From a technical perspective, there were no difficulties. The participants were reminded that it was an offence to record the proceedings.
4. Following the Case Management Order made on 8 July 2020, the parties had provided the Tribunal on 20 July 2020 with an agreed bundle of documents for the OPH, which included the respondent's submissions. Claimant's counsel provided his written submissions and both parties provided copies of their legal authorities on 21 July.
5. At the end of the hearing I reserved my decision. I also agreed with the parties a provisional date (5 August) for a further CPH, which would be needed only if the claimant's application was successful.

Background

6. At a Case Management Preliminary Hearing (CPH) on 8 July 2020 the claimant had agreed to work with her then, recently instructed, counsel (Mr G Self) to provide Further and Better Particulars (FBPs) of the Grounds of Complaint lodged with the ET1 on 10 March 2020. The Grounds of Complaint ran to some 20 pages of extensive narrative but did not sufficiently particularise the alleged protected disclosures made by the claimant, nor the alleged detriments upon which she relied. The dismissal was not disputed. Those FBP's were provided by the claimant on 17 July 2020 and set out (in tabular form) ten public interest disclosures and related detriments, the latest alleged detriment cited being on 19 June 2019.
7. At the CPH, the following was accepted by both parties: the claimant had been employed as a Space Utilisation Manager by the respondent from 28 February 2018 until her dismissal on 23 August 2019. Following a period of early conciliation with ACAS from 17 November to 17 December 2019 (when the EC certificate was issued) the claimant lodged an ET 1 with the Tribunal on 10 March 2020. Mr Self accepted at the CPH that the ET 1 should have been lodged no later than 17 January 2020 and that the claims were out of time. He confirmed that the claimant was seeking an extension of time relying on the Tribunal's discretion.
8. This state of affairs was reflected in the submissions of both parties' counsel, which were lodged with the Tribunal on 20 July (respondent's submissions) and 21 July (claimant's submissions). However, at the commencement of the OPH on 22 July, Mr McDonald said that having spoken to the claimant late on the evening of 21 July, the claimant was now alleging two further detriments which, he accepted, had not been raised previously.
9. The first was on 14 October 2019. The claimant made a brief reference to this in the FBPs in the concluding paragraphs, under the heading of "Appeal to CBRE and disclosures". The claimant referred to disclosures being made to the respondent's HR Director and to CBRE Ethicspoint "up to 14 October 2019" and said that she had received no support from the respondent at any time.

10. The second alleged detriment was on 17 November 2019 when the claimant said that she had been contacted by the respondent's representative Mr Patmore who offered her work under a new contract. The claimant noted that this was a few hours after she had contacted ACAS with regard to early conciliation. Mr McDonald accepted that this detriment had not been mentioned in the FBP's; when I asked the reason for the omission, he said this must been an oversight. He was unable to assist further as he had not drafted those FBP's.
11. Mr McDonald noted that the detriment on 14 October would still be out of time; however, the 17 November detriment would be within the time limits and he would then rely on earlier detriments as being a series of continuous acts.
12. Ms Jennings objected to the late introduction of this issue noting that it had not been referred to in the claimant's submissions. I had some sympathy with Ms Jennings' observations with regard to the timing of the further detriments being raised. However in the interests of justice and applying the overriding objective, I agreed to include these issues as part of today's OPH, in order to deal with the matter expeditiously, so as not to require any further interlocutory hearings.

Claimant's evidence

13. I heard evidence from the claimant, who had produced two witness statements: one provided prior to the CPH on 8 July; the other dated 17 July. The claimant gave her evidence on oath and confirmed the content of both witness statements, which was taken by the Tribunal as her evidence in chief. There were supplemental questions cross-examination, questions from the Employment Judge and re-examination.
14. The claimant stressed that she had no legal advice or representation until 7 July 2020. She had prepared the ET 1 and the Grounds of Complaint herself. She said that she had been told by one of her former colleagues (who had also brought claims against the respondent) about the concept of "whistleblowing". She had also been told about this by a friend. She had then looked at the website of an organisation called Protect and then carried out Internet research looking at several whistleblowing cases. She said until then she had not been aware of the relevant terminology, but having read the cases she realised that she had a claim for whistleblowing. The claimant said that having carried out this research, she understood that she would need to provide a full and detailed statement of her claims. However, she said that as she had never been to an Employment Tribunal before, she was not "fully aware" of the time limits.
15. One of the claimant's former colleagues had also told her that she had to contact ACAS prior to bringing a claim in the tribunal and she did this on 17 November 2019, which the claimant recalled was a Sunday, and was given an ACAS reference number. She was then contacted by an ACAS conciliator on 26 November who said he had tried to contact the respondent but they had not replied. The claimant then received the EC certificate on 17 December 2019 and on 18 December she had a conversation with and received an email from an ACAS conciliator. The claimant had not provided a copy of that email in the bundle of documents

before the Tribunal. The claimant was unable to provide a copy of that email at the hearing.

16. However, the claimant was able to recall her conversation and to read from that email as part of her evidence. She said that in the email, the ACAS conciliator had told her that she would have “at least one month” to lodge a claim with the Employment Tribunal and that the conciliator would “be in touch to advise”. There was no challenge in cross examination to the content of that email. The claimant said that she interpreted the reference to “at least one month” to mean that there was no final deadline or ultimate time limit to her bringing a claim in tribunal.
17. The claimant said that she had checked the ACAS website and the Citizens Advice Bureau (CAB) website which also used the terminology of “at least one month”. In cross-examination, the claimant was shown a screenshot of the CAB website by Ms Jennings (which was agreed with Mr McDonald). The claimant confirmed that this was the website she had viewed in December 2019/January 2020.
18. It was pointed out to the claimant that the relevant section went on to say that there may be more time within which to lodge a tribunal claim and then set out the method by which the time limits could be calculated. The claimant said that she had stopped reading the website after the reference to “at least one month” because this supported what she had been told by ACAS. She had not thought it necessary to read the rest of the relevant section about bringing tribunal claims.
19. Given the fact that the claimant referred to the extensive research she had done on whistleblowing claims and her reading of the relevant cases and about her being meticulous with the detail of preparing the Grounds of Complaint, I do not find it plausible that having taken the trouble to find the CAB website she would not read the relevant section thoroughly. In any event, even if the claimant’s evidence is correct, I do not find it reasonable that she did not continue to read the information provided as to calculating the time limits for lodging her claim in the Employment Tribunal.
20. The claimant also said in her first witness statement that as she had not heard anything further from ACAS following the email conversation on 18 December, she contacted the ACAS conciliator on 19 January 2020 and spoke to him on 21 January. He told her that he had been chasing the position but had received no response from the respondent. The claimant said that she understood at this point that Early Conciliation had failed and said that the conciliator advised her to submit a Tribunal claim as the EC certificate had already been issued.
21. I asked the claimant why she had not acted on this advice and issued a tribunal claim in or around 21 January 2020. She said that she had not been ready at that stage. Her research had indicated to her that she must submit a full and detailed statement with regard to her protected disclosures and she needed time to produce this. I also note that in her second witness statement the claimant referred to obtaining a short-term contract with the LSE on 9 December 2019 which meant that she had been working during evenings and weekends on collating relevant documents and preparing her tribunal complaint. This suggests that the claimant needed more time because of her other work commitments and not necessarily because she believed that there were no time limits applicable.

22. The claimant confirmed in her cross-examination that there was no specific date by which she believed her tribunal claim should be lodged. She believed that this was open-ended. She only realised when she received case management documentation from the tribunal on 20 March 2020 that there may be an issue with regard to time limits. I do not find this evidence to be plausible, for the reasons set out above.

Alleged detriment on 14 October 2019

23. This alleged detriment related to the fact that the respondent's representatives failed to attend a meeting which had been arranged for 14 October. The claimant had waited for 1 hour 20 minutes before leaving. The respondent had said that this had been as a result of a mistake as regards the location of the meeting, but the claimant said she felt humiliated by this incident. The claimant also said that she had been given no support from the respondent's Ethics team.
24. The claimant accepted that this had not been cited as a detriment in her original Grounds of Complaint, and had been included as a coda in the FBP's and not specifically cited as a detriment along with the others set out in the table. She said that she had been assisted by Mr Self in the preparation of the FBP's so could not comment as to why this was the case.

Alleged detriment on 17 November 2019

25. This related to the fact that following the claimant contacting ACAS on Sunday 17 November, she was contacted by Mr Patmore of the respondent offering her new work. The claimant said she had not included this as a detriment in the original Grounds of Complaint in the FBP's because she had only realised on the evening of 21 July how bizarre it was that respondent should contact her a few hours after she had contacted ACAS. She said that she now believed that this was an attempt to "pump" her for information following her contacting ACAS, and was not a genuine offer of work. The claimant said she felt that her trust had been betrayed.
26. I note that this incident was well after the claimant's dismissal 23 August 2019, and after she said that she had felt humiliated by the respondent on 14 October 2019. Therefore on the claimant's own evidence there was minimal trust between her and the respondent in any event as at 17 November.
27. I do not accept as plausible the claimant's account that she only appreciated the coincidence as regards the timing of the November incident on 21 July. She had been through her Grounds of Complaint in detail when preparing the FBPs with Mr Self, it does not seem likely (on a balance of probabilities) that the coincidence would only occur to the claimant the night before a tribunal hearing to determine whether her claims were out of time.
28. Even if were to accept the claimant's evidence on this point, I do not accept her evidence that this constitutes a detriment. On her own evidence the contact from the respondent referred only to offering new work. The claimant made no reference to Mr Patmore seeking any other information. I also note that given that 17 November was a Sunday, it is

unlikely that ACAS would have notified the respondent within a few hours that the claimant had commenced the early conciliation process.

Relevant Law

29. It was agreed that the relevant statutory provisions were section 111 (2) (b) ERA as regards the dismissal. The relevant test for the Tribunal was: (a) whether it was reasonably practicable for the claim to be presented within the time limit (as extended by early conciliation) namely by 17 January 2020; and (b) if not, whether the claim had been presented within such further period as Tribunal considered reasonable.
30. As regards the alleged detriments, the relevant statutory provision was section 48 (3) ERA which applied the same test as set out above but the relevant time limit of 3 months began with the date "*of the act or failure to act to which the complaint relates, or where that act or failure was part of a series of similar acts failures, the last of them*". In this case, the claimant said that this time period should run from 17 November 2019.
31. The burden of proof to show that it was not reasonably practicable to enter the claims within the relevant time limit was on the claimant and the relevant standard was on the balance of probabilities.
32. Both parties' counsel accepted that the key authorities were **Porter v Bandrigde Ltd [1978] IRLR 271** and **Palmer and Saunders v Southend-on-Sea BC [1984] ICR 372.** It is well established law that Tribunal time limits should be observed unless there are good reasons for not doing so.
33. The relevant test was accepted as that of the claimant's conduct being "reasonably feasible": falling somewhere between pure reasonableness and physical impossibility. Ms Jennings also referred to **Wall's Meat Co v Khan [1979] ICR 52,** and to Brandon LJ's comments as follows:

    "*such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of 3 months if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such enquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him*".
34. In short form, the test is whether the claimant ought to have known about her rights to bring a tribunal claim within the relevant time limits: as Mr McDonald phrased it in his submissions, "whether if ignorance acted as an impediment to presenting the claim within time, that ignorance was reasonable".
35. Mr McDonald further referred in his submissions to the cases of **London International College v Dr RR Sen EAT/334/91; RBS v Theobold UKEAT 0444/06/RN and DHL Supply Chain Ltd v Fazackerley UKEAT/0019/18.**

Conclusions

The additional detriments

36. I do not accept the claimant's submissions that the alleged detriments on 14 October and 17 November 2019 should be included in my deliberations on this application as being continuing acts under section 48 (3) ERA.
37. The 14 October detriment would be out of time in any event. The 17 November alleged detriment was not expressly raised in the Grounds of Complaint nor in the detailed FBP's (produced with the assistance of the claimant's first counsel) on 17 July 2020. In that sense, this would technically be an application for amendment to include the 17 November detriment, which has not been made by the claimant.
38. In any event, based on the claimant's evidence at the hearing, I do not find that the incident on 17 November 2019 would constitute a detriment. The respondent offered her new work. There was no evidence given that they sought any other information from her. The claimant is speculating (as of 21 July 2020) on the motive behind the offer of further work, citing the coincidence of this being several hours after her notifying ACAS of a potential tribunal claim. Given that the notification, on the claimant's own evidence, was on a Sunday, I do not find that the claimant has shown (on a balance of probabilities) that the respondent would be made aware of such notification by ACAS within that time period. As such, there is no detriment to the claimant.

The extension of time

39. I accept that the claimant was, at the time of lodging her tribunal claim, a litigant in person who had no previous experience of employment tribunal claims. Her evidence was that she had spoken to colleagues and friends who advised her that she had a claim for "whistleblowing"; she had then carried out her own detailed research using the Protect website and reading various cases. One of her colleagues also told her that she must contact ACAS prior to bringing a tribunal claim, which she did on 17 November 2019.
40. She was subsequently contacted by an ACAS conciliator on 26 November and received a certificate dated 17 December 2019. The claimant said that at that stage she was not aware of any time limits for making a tribunal claim and that she had not done any research on that point. She had a conversation with the ACAS conciliator and received an email on 18 December 2019. In that email she was told that she had "at least one month" to bring a tribunal claim and also that the ACAS officer was chasing the position with the respondent and would be in touch to advise.
41. The claimant's evidence was that on the basis of that email she believed that her time to lodge any tribunal claim was open-ended, the reference being to "at least" one month. Given the claimant's extensive research on whistleblowing claims generally, I did not find her evidence on this matter to be plausible.
42. However, even if I were to accept the claimant's evidence on this point, she then contacted ACAS again on 19 January 2020. I had asked the claimant why she had waited until this date but she said there was no particular significance to that date. She received a response from ACAS on 21 January confirming that early conciliation had failed and the

claimant accepted that at that point the ACAS officer advised her to put in a tribunal claim. This was four days outside of the three-month time limit.

43. The claimant chose not to accept that advice but to focus on preparing a full and detailed statement which she intended to accompany her ET 1. She said that having read the whistleblowing cases she had realised that this was what was required.
44. The claimant also said in her evidence that she had looked at the CAB website which said, "*because you have been through early conciliation, you will have given yourself more time to bring your tribunal claim. You will have at least one month after the end of early conciliation to make your claim, but you may have more*". She said that this had confirmed her belief that the time limit for her to bring a tribunal claim was open-ended.
45. When it was pointed out to the claimant in cross-examination that the website went on to explain in detail how to calculate the time limit to bring a tribunal claim, the claimant said that she had stopped reading after the sentence quoted above. I do not accept the claimant's evidence on this matter as credible. The whole context of the section in the CAB website relates to the fact that there are tribunal time limits. Given the claimant's own evidence with regard to the extensive research she carried out as regards her whistleblowing claim, it is not plausible that she would have simply stopped reading the information following the reference to "at least one month" as regards time limits.
46. Even, if I am wrong on that and she did stop reading at that point, then I find that it was not reasonable for her to do so and that she ought to have continued reading to confirm the position as regards time limits. Wilful ignorance as regards time limits is not acceptable as part of the reasonably practicable test.
47. I do accept the claimant's evidence (on a balance of probabilities) that she believed the early conciliation process had failed as at 21 January 2020, even though she accepted that certificate had been issued on 17 December 2019. Her evidence was that she was told by the ACAS officer 21 January to submit her tribunal claim. At that stage the claimant was four days over the relevant time limit and this would have been a reasonable period within which she could have brought her claim.
48. The claimant chose to ignore that advice. She says that she continued in her belief that there was no deadline for her to lodge a tribunal claim and waited until she had completed her detailed Grounds of Complaint. I have found that having read the CAB website, she ought to have known that there was such a deadline and indeed ought been able to calculate, what that deadline was, using the information provided on that website. Instead the claimant waited until 10 March 2020 to lodge her tribunal claim. I do not accept that this conduct was reasonable.
49. Mr MacDonald referred in his submissions to the **Fazackerley** case, which he said showed that the claimant was entitled to rely on the advice she had been given by ACAS. In **Fazackerley** , the claimant had been advised by ACAS that he must first exhaust any internal appeal process: no reference had been made to obtaining an EC certificate or bringing a tribunal claim within the 3 month time period. In this case the advice given to the claimant was that, as at 18 December 2019 she had "at least one month" to bring a tribunal claim, which she chose to interpret as meaning that the time limit was open-ended. The further advice given by ACAS on

21 January 2020 was that she should bring a tribunal claim at that point, which advice, the claimant chose not to take, relying on her previous interpretation that there was no deadline to bringing a tribunal claim. I have already found that she was unreasonable to reach that conclusion, given the information she had obtained from ACAS and given the way in which she had chosen to interpret the information on the CAB website.

50. Applying the relevant test I accept (on a balance of probabilities, giving the claimant the benefit of the doubt) that it was not reasonably practicable for the claim to be presented within the time limit (as extended by early conciliation) namely by 17 January 2020. At that stage it was arguably reasonable for the claimant to think that despite the issue of the EC certificate, ACAS had not finally confirmed that conciliation had not succeeded. However, it was not reasonable for the claimant to wait until 10 March 2020 to lodge the claim. She had been told by ACAS to do so on 21 January 2020 and ought to have known that she should bring the claim as soon as possible by following that advice and by reading the CAB website. The claim was not presented within such further period as Tribunal considers reasonable.
51. The claims for detriment and automatically unfair dismissal are out of time and the Tribunal has no jurisdiction to hear those claims. There is no need for a further CPH on 5 August and the Final Hearing dates of 1 to 4 December 2020 should be vacated.

_____

Employment Judge

Date:27 July 2020

JUDGMENT SENT TO THE PARTIES ON

.28/07/2020.....

.....

FOR THE TRIBUNAL OFFICE - OLU