EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss Amy Hocking	AND	**Mr Paul Isherwood and Mrs Sue Isherwood Trading as Four Seasons Cafe**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin **ON** 21 October 2020

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person
For the Respondent: Did Not Attend

JUDGMENT

The judgment of the tribunal is that the claimant's claims were presented out of time and are dismissed.

RESERVED REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not the claimant's claims were presented in time.
2. I have heard from the claimant. The respondent did not attend, and did not notify the tribunal of any reason why they could not attend. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to any factual and legal submissions made by and on behalf of the respective parties.
3. The respondents own and run a cafe known as the Four Seasons in Camelford in Cornwall. They purchased that business on 18 October 2018. The claimant was employed as a waitress and cook from 22 April 2016. Her employment was protected when the respondent purchased the business. On Friday 10 May 2019 the respondent terminated the claimant's employment summarily. The respondent says that this was for misconduct, which the claimant denies. The claimant has issued these proceedings alleging unfair dismissal, breach of contract in respect of her lost notice pay, accrued but unpaid holiday pay, and

for discrimination on the grounds of her age. The claimant was born on 25 October 1983, and asserts that she was on the full rate of the national minimum wage, and was dismissed so that the respondent could re-employ someone much younger on a lower rate of the national minimum wage.

4. The claimant is a single mother without transport and was distressed by her dismissal and the loss of income. Within about three weeks a friend of hers persuaded her to consider some sort of compensation claim. I accept the claimant's evidence that she does not have a television and is not on the Internet, and was unaware at that stage of the Employment Tribunal process, and unaware of any time limits and/or the need to make contact with ACAS under the Early Conciliation provisions. Within about another week she had made enquiries of Citizens' Advice ("the CAB"), and attended their office in early June 2019. She was told that she would have to write a letter of grievance to the respondent and to await a reply, presumably with the intention of receiving further advice at that stage.
5. The claimant acted upon that advice and wrote a letter dated 10 June 2019 to the respondents which was expressed to be a formal grievance concerning her dismissal on 10 May 2019. It complained about the unfairness of her treatment. There was then a dispute between the parties about the return of a mobile phone which the respondents had lent to the claimant.
6. The claimant did not receive a formal reply to her letter of grievance and therefore arranged an appointment with the CAB either at the very end of July 2019, or more probably within the first week of August 2019. It was at this meeting that the claimant received advice about the Employment Tribunal process. She was given a pack of information concerning a potential claim, which included advice about how to issue proceedings, the relevant time limits, and the need to make contact with ACAS under the Early Conciliation provisions. At that time the claimant was still within the normal three months' limitation period.
7. The claimant took no further action until 4 September 2019 when she telephoned ACAS to commence the Early Conciliation process. ACAS issued the relevant certificate on the same day (4 September 2019). The claimant then waited a further two weeks until 16 September 2019 before she presented these proceedings.
8. Having established the above facts, I now apply the law.
9. <u>The Law</u>:
10. One of the relevant statutes is the Employment Rights Act 1996 ("the Act"). Section 111(2) of the Act provides that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination, or 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.
11. The claimant's claim for breach of contract is permitted by Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order") and the claim was outstanding on the termination of employment. The relevant time limit for bringing a claim in Article 7 effectively replicates the provisions of section 111(2) of the Act.
12. The claimant also claims in respect of holiday pay for accrued but untaken holiday under the Working Time Regulations 1998 ("the Regulations"). The relevant time limit for bringing a claim in Regulation 30(2) also effectively replicates the provisions of section 111(2) of the Act.
13. This is also a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination. The protected characteristic relied upon is age, as set out in sections 4 and 5 of the EqA.
14. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three 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. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

15. With effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.
16. Section 207B of the Act provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.
17. I have been considered the following cases, namely: Palmer and Saunders v Southend-on-Sea BC [1984] ICR 372; Porter v Bandridge Ltd [1978] IRLR 271 CA; Wall's Meat Co v Khan [1978] IRLR 499; London Underground Ltd v Noel [1999] IRLR 621; Dedman v British Building and Engineering Appliances [1974] 1 All ER 520; Cullinane v Balfour Beattie Engineering Services Ltd UKEAT/0537/10; British Coal v Keeble [1997] IRLR 336 EAT; Robertson v Bexley Community Service [2003] IRLR 434 CA; Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT; and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.
18. The Timing of the Relevant Events:
19. In this case the claimant's effective date of termination of employment was 10 May 2019. The three months' time limit therefore expired at midnight on 9 August 2019. The claimant commenced the Early Conciliation process with ACAS on 4 September 2019 (Day A), and the Early Conciliation Certificate was issued on the same day on 4 September 2019 (Day B). The claimant presented these proceedings on 16 September 2019. The three months' time limit had therefore already expired before the Early conciliation process, and the claimant does not benefit from any extension of time under those provisions.
20. The Unfair Dismissal, Breach of Contract and Holiday Pay Claims:
21. The claimant has not been able to assert any grounds for suggesting that it was not reasonably practicable to have issued proceedings within the relevant time limit. Although the claimant was initially unaware of the Employment Tribunal process and any relevant time limits, and the need to make contact with ACAS, she was made fully aware of this process in late July or more probably very early August 2019, within the relevant three months' time limit.
22. The question of whether or not it was reasonably practicable for the claimant to have presented the claim in time is to be considered having regard to the following authorities. In Wall's Meat Co v Khan Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the claimant, see Porter v Bandridge Ltd. In addition, the Tribunal must have regard to the entire period of the time limit (Elbeltagi).
23. In Palmer and Saunders v Southend-on-Sea BC the headnote suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the Industrial Tribunal taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, in determining whether or not it was reasonably practicable to present the complaint in time, an Industrial Tribunal may wish to consider the substantial cause of the

employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit. The Industrial Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used. Contrary to the argument advanced on behalf of the appellants in the present case and the obiter dictum of Kilner Brown J in Crown Agents for Overseas Governments and Administrations v Lawal [1978] IRLR542, however, the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time. The views expressed by the EAT in Bodha v Hampshire Area Health Authority on this point were preferred to those expressed in Lawal:-

24. To this end the Tribunal should consider: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.
25. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) concluded that "reasonably practicable" does not mean reasonable (which would be too favourable to employees), and does not mean physically possible (which would be too favourable to employers) but means something like "reasonably feasible".
26. Subsequently in London Underground Ltd v Noel, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing so. As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of practicability … the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204).
27. Underhill P as he then was considered the period after the expiry of the primary time limit in Cullinane v Balfour Beattie Engineering Services Ltd (in the context of the time limit under section 139 of the Trade Union & Labour Relations (Consolidation) Act 1992, which is the same test as in section 111 of the Act) at paragraph 16: "The question at "stage 2" is what period - that is, between the expiry of the primary time limit and the eventual presentation of the claim - is reasonable. That is not the same as asking whether the claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted - having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months."
28. In my judgment it was reasonably practicable for the claimant to have presented these proceedings within time. Although she was initially unaware of the process and the time limits, she was given advice and assistance as to the same within the relevant time limits. The claimant then took another four to five weeks before commencing the Early

Conciliation process with ACAS. The claimant has not discharged the burden of proof to suggest that it was not reasonably practicable to do so within time. In addition, the claimant did not do so within a reasonable period thereafter. She waited approximately four weeks before making contact with ACAS, and a further two weeks before issuing these proceedings.

29. In conclusion therefore the claims for unfair dismissal, breach of contract, and for accrued but unpaid holiday pay, were all presented out of time and are hereby dismissed.
30. The Age Discrimination Claim:
31. The claimant has not adduced any grounds for for suggesting that it would be just and equitable to extend the time limit.
32. I have considered the factors in section 33 of the Limitation Act 1980 which is referred to in the Keeble decision. I deal with each of these in turn.
    a. The first is the length of and the reasons for the delay. This the period of delay some four to five weeks. The claimant has been unable to give any reason to suggest why she was prevented issuing proceedings within time.
    b. Secondly, I have considered the extent to which the cogency of the evidence is likely to be affected by the delay. Given the period of delay some four to five weeks, it is unlikely that the cogency of the evidence will be prejudiced by this period of delay
    c. Thirdly I have considered the extent to which the parties co-operated with any request for information. There are no relevant factors in this respect in this case.
    d. Fourthly, I have considered the promptness with which the claimant acted once she knew the facts giving rise to the cause of action. The claimant initially acted relatively promptly, but then failed to act promptly even though she was advised as to the appropriate steps to take in order to issue proceedings.
    e. Finally, I have considered the steps taken by the claimant to obtain appropriate professional advice. The claimant was able to take advice from the CAB within the relevant time limit, and there is no suggestion that the claimant was prevented from issuing proceedings within time because of any inaccurate advice or substantial fault from her advisers.
33. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important 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". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.
34. Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan before the Employment Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was.
35. However, As Sedley LJ stated in Chief Constable of Lincolnshire Police v Caston at paragraphs 31 and 32: “In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a

question of fact sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it."

36. There is no presumption that an extension of time should be granted on the basis that it would be just and equitable to do so. The claimant has not made out any grounds in support of the contention that it would be just and equitable to extend time. Accordingly, the claimant's claim for age discrimination was presented out of time, and is also hereby dismissed.
37. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 3 to 7; a concise identification of the relevant law is at paragraphs 9 to 17; how that law has been applied to those findings in order to decide the issues is at paragraphs 19 to 36.

Employment Judge N J Roper

Dated: 21 October 2020

Judgment sent to Parties: 12 November 2020

FOR THE TRIBUNAL OFFICE