Case Number: 1600563/2017
1600953/2017

EMPLOYMENT TRIBUNALS

Claimant: **Miss A Clenton**

Respondents: **(1) City and County of Swansea**
(2) Mr Phil Roberts

Heard at: **Cardiff** **On: 26 and 27 October 2020 and 30 October 2020**

Before: **Employment Judge P Davies (sitting alone)**

Representation:
Claimant: In person
Respondents: Miss E Grace (Counsel)

JUDGMENT

The Judgment of the Tribunal is that

1. Allegations 1 – 3 as identified in the Respondents written contentions of 30 April 2020 regarding the claims of disability discrimination be struck out as being out of time.

2. Allegations 1 – 19 as identified in the Respondents written contentions of 30 April 2020 regarding the claims of whistleblowing be struck out as being out of time.

REASONS

1. This is a Preliminary Hearing to determine an Application to strike out and/or for payment of a Deposit Order in respect of the claim made by the

Claimant, Miss Andrea Clenton. I will state at the beginning what my conclusions are and then I will give the reasons for my conclusions.

2. My conclusions are that the claim in relation to disability discrimination by reference to the numbers in the Respondents written contentions, namely allegations 1 – 3 should be struck out as being out of time and that in relation to the whistle blowing claim, and again by reference to the Respondents written contention schedule, allegations 1 – 19 should also be struck out as being out of time.

3. The Claimant was employed as a Landscape Architect and Development Planner in the Planning Department of the Respondents from 1 February 1993. The Claimant has a number of academic degrees, honours, she has a BSc Honours in landscaping and a Post Graduate Diploma in landscape architecture, a Masters Degree and Post Graduate Diplomas in leadership management and town and country planning and is a Chartered Landscape Architect who can manage projects from the start to the end.

4. The Claimant raised a grievance in 2000 with the Respondents that was treated as a bullying and harassment grievance against a manager. The Claimant was represented at that time by UNISON. UNISON have given her support during the period of her employment right up to the time of the dismissal which took place in August 2017.

5. The Claimant from at least 2002, if not earlier, received psychiatric treatment from Dr Magg, Psychiatrist and other psychiatrists to assist with the condition of mental stress that she was experiencing during that time. From 2004 to 2006 the Claimant was a Development Planner in the Planning Department. There appears to have been a claim for personal injury arising out of the workplace matters because in 2007 the Claimant received a payment of money of £40,000 in respect of matters raised against the Respondents. No settlement agreement as such has been produced to the Tribunal since the Respondents do not appear to have a copy, neither does the Claimant.

6. As part of the settlement of matters the Claimant moved from the Planning Department to a role as Project and Funding Manager in the Culture and Tourism Department and that was in 2006. In 2011 concerns were raised by the Claimant regarding malicious emails received by the Respondents from a neighbour of the Claimant.

7. The Claimant had been working in offices in Penllegaer until about July 2014 when there was a move back to offices in the Guildhall. About that time the Claimant's Manager and Head of Services changed.

8. On 4 December 2014 a disciplinary investigation started into alleged unauthorised absence by the Claimant and that led to a disciplinary investigation meeting on 15 December 2014. The Claimant was absent from work from 16 December 2014 to 4 September 2015 and it appears that the Claimant was in work from September 2015 to June 2016 although sickness absences document, which is on page 52 of the Supplementary Bundle, is precisely that, it records sickness absence but not any annual leave that had been taken during this period of time by the Claimant.

9. In the event no action was taken on the allegation of unauthorised absence and no formal disciplinary action and that was confirmed on 13 April 2015.

10. On 12 May 2015 there was a meeting with management. The Claimant says that she raised health and safety workplace issues at that meeting. Shortly afterwards, on 19 June, the job that the Claimant was doing was made redundant. Ultimately the Claimant was redeployed to a role of Financial Strategy Officer in Corporate Services said to be initially on a temporary basis and that was 15 September 2015. That post was made permanent in June 2016.

11. The Claimant was absent from work from 1 September 2016 and would appear to have been absent from work for all the period of time from then until her dismissal in August 2017. The process of dismissal was within a framework of 3 meetings on 16 June, 30 June and 3 August 2017 and some of the minutes have been placed in the bundle about the discussions which took place there.

12. On 5 August 2017 a claim was made to the Employment Tribunal. The claim was for disability discrimination and unfair dismissal together with a claim for Interim Relief. At that time there was no requirement, because it was an Application for Interim Relief, for an Early Conciliation Certificate. The hearing for Interim Relief was refused by the Tribunal. The same time that this was taking place within Tribunal the Claimant had appealed her dismissal and there was an internal appeal hearing on 18 September 2017 and the outcome of the appeal, which again is included in the bundle amongst the documents, was given to the Claimant on 5 October 2017. The appeal was unsuccessful.

13. On 23 October 2017 a second claim was issued in the Employment Tribunal which mirrored the first claim insofar as it was for unfair dismissal and disability discrimination, but was against the Respondents the Local Authority. The first claim had been issued against Mr Roberts who was the CEO of the Respondents and that might explain why there was a second claim along the same basis which had been issued. There had been some

discussion at the Interim Relief Hearing as can be seen in the Judgment issued about whether there was a need for amendment or whether a second claim would be issued. In the event a second claim had been issued.

14. This hearing follows on from a number of Case Management and Preliminary Hearings that have dealt with some aspects of the case and in particular the issue about whether the Claimant was disabled within the meaning of the Equality Act 2010 in respect of the period for which the Claimant was claiming was the relevant time for her claims. The gist of the claim, the way that it was put, is perhaps well summarised in a very recent document received by the Tribunal being an Agenda for Case Management for this Preliminary Hearing in which in paragraph 4.1 in answer to the question "what are the issues? Questions for the Tribunal to decide" the Claimant has written "how to stop and remedy a 20 year long persecution campaign of hatred and loathing against me by the Respondents and others after I whistle blew. How to prevent the Respondents and others from causing harm."

15. The Preliminary Hearing in relation to disability, which was not conceded at any material time by the Respondents, took place on 10 and 11 June 2019. Reasons were requested for the Judgment which found that the Claimant was a disabled person at all material times for the purposes of the Equality Act 2010 and that is from 2001 through to 2017.

16. The Disability Judgment speaks for itself, but it may be useful to highlight some paragraphs of that Judgment which encapsulates points which have been made at this hearing on behalf of the Claimant in particular, and I quote now from paragraph 17, "the Claimant's case is that she suffers with a variety of impairments all of which are to be described as mental impairments. The most recent impact statement received from the Claimant refers to the following as being mental impairments from which she suffers, stress, anxiety, panic, low mood, depression, paranoia and suicidal thoughts."

17. Paragraph 18 "There seems to be no dispute between the parties that the Claimant was absent from work between the years 2000 and 2006. The Claimant's medical records that have been provided show a number of matters that are material to the existence of a mental impairment. In September 2003 as set out in a letter from Dr Lervey dated 9 September 2003 there is a clear reference to the Claimant having an underlying problem, namely depression. On the evidence provided to the Tribunal after that time there was some improvement in the Claimant's condition. That improvement appears to have come about as the result of medication being provided to the Claimant and also other treatment in the form of other therapies. My attention has been directed by Mr Huffer during cross

examination, also during submissions, to a further letter dated 23 August 2004 from Dr Richard Maggs, a Consultant Psychiatrist, which indicates by that stage Miss Clenton was essentially in remission of her depressive illness. After that period of time, and according to the summary of absences from work, there were a number of absences from work on the part of Miss Clenton referred to as being due to stress, for various periods during the period 2011 to 2017 including various significant periods of absence from work during the years 2014 to 2017 taking matters right up to the date on which the Claimant's employment was terminated."

18. There is then a reference to submissions made by the Respondents in paragraph 21. "It is clear that the Claimant has suffered a mental impairment with varying levels of severity on a number of occasions since 2001 by reason of anxiety and depression. At times the level of severity has been acute, particularly where the Claimant has experienced what she now knows to be panic attacks. In oral submissions today Mr Huffer quite fairly and quite properly also accepted it was quite possible to be the case that there have always been some kind of mental impairment present with the Claimant throughout the period 2002 to 2007, and then the Judgment, paragraph 23, says that on the balance of probabilities the Claimant has suffered from a mental impairment of varying types with varying symptoms and at varying levels of severity throughout the period 2001 to 2017.

    The Tribunal considers the issue about whether there was a substantial adverse effect on the Claimant's ability to carry out normal day to day activities and there are findings that are made by the Tribunal, for example in paragraph 27, "I also find there is clear evidence from the Claimant in relation to the period from 2014 onwards that she was absent from work for prolonged periods and that position remained for the best part of 3 years. Her evidence set out was clearly in her impact statements is that during that period of time specifically she was unable to think clearly, she went through a period of locking herself in the house when she was unable to even leave the house and she used to hide from people, she was not able to look out of the windows of her property and also her sleep was affected. I am satisfied that there is a wealth of evidence provided by the Claimant to show that the mental impairments were having an effect upon her ability to do normal day to day activities during both of those periods that I have referred to by way of example."

19. In paragraph 28 there is further reference to the Claimant's evidence to the Tribunal about day to day effects, and in paragraph 29 there is a reference to the fact that although there is limited or no reference in medical documents, "medical records are only one source of evidence which the Tribunal is considering when considering the effects of a mental impairment upon the Claimant. The Tribunal places significant weight on

the evidence given directly by the Claimant as to the effects which she has experienced upon her day to day activities even when they are not reflected in references in the medical records. The fact there is no reference in the medial records in the Tribunal's judgment does not undermine the weight to be given to the Claimant's own direct witness evidence about those matters." In paragraph 30 the Tribunal concluded that there had been throughout the period 2000 to 2017 some effect on the Claimant's ability to carry out normal day to day activities.

20. The Tribunal today, dealing with the Preliminary Hearing, is dealing with the Application to strike out all, in effect, of the claim, whether it be disability discrimination or the whistle blowing claim. The case management leading to this hearing, firstly conducted by Judge Beard, in April 2020 directed that the Respondent should provide to the Claimant and the Tribunal written contentions as to why elements within the Claimant's two Schedules should be struck out as having no foundation in law to include arguments on time limits and excluding just and equitable issues. A case management held by myself on 7 August fixed the date and gave further directions, but in relation to the statement of evidence that the Claimant could give in relation to time points there is reference in the Case Management Order to the fact that the Tribunal would also want any submissions in relation to just and equitable. Whether in fact that was a mistake in Judge Beard's Order or by the Tribunals Order the reality is that the Tribunal is dealing with those matters and has heard submissions from both the Claimant and the Respondent about just and equitable points which are relevant, or may be relevant, to the discrimination claim.

21. The reference to two claims having been made, one in August and one in October 2017, have generated some discussion about when some aspects of the claim are in time because it is accepted that the claim for unfair dismissal is in time and that so is the disability discrimination claim, but there is a discreet issue in relation to whether the August 2017 claim should be the date upon which 3 months are effectively calculated back or the October date, particularly for the claims of discrimination. In relation to that I note that the clarification provided by the Claimant at a Case Management on 1 April 2019 regarding whether the first claim in particular is being pursued, was that it was because the Claimant said that Mr Roberts was to remain a party to the discrimination claim, hence why these two claims have continued in tandem and are still relevant claims.

22. Reference was made in the course of the hearing to the Early Conciliation Regulations and to the Employment Tribunal Act concerning Early Conciliation. In the Employment Tribunal Act Section 18(a) the relevant Section which is headed "Requirement to contact ACAS before instituting procedings", sub-section 7 indicates "a person may institute relevant proceedings without complying with the requirement in sub-section 1 in

prescribed cases" and amongst the prescribed cases are included cases where proceedings that are not relevant proceedings are instituted by means of the same form as proceedings that are and the Early Conciliation Regulations 2014 under Rule 3 "Exemptions from Early Conciliation" includes in paragraph 1(d) "proceedings or proceedings under Part 10 of the Employment Rights Act 1996 and the application to institute those proceedings accompanied by an application under Section 128 of that Act", that is in effect an Application for Interim Relief.

23. Insofar as is necessary for the Tribunal to give a decision to assist in computation about whether matters are in time or out of time, the conclusion of the Tribunal is that the disability discrimination claim issued in August 2017 is a claim to which relevant proceedings are included with proceedings which are not relevant proceedings and therefore that is a date properly at which there should be calculated back, for the purposes of time, the disability discrimination claim, and it is not necessary therefore to consider any lesser period by going back from October as being the proper period for the 3 months.

24. The reference to a witness statement from the Claimant was to allow the Claimant to provide oral evidence in support of the written contentions which had been supplied pursuant to the Case Management Orders of the Tribunal regarding the out of time issues, not in relation to other aspects which are much broader and which are included and particularly set out in the Respondents Skeleton Argument about no reasonable cause of action.

25. The summary of the Claimant's evidence is in written form of course, which is the statement that was provided on 27 September. It is divided firstly into the statement concerning the whistle blowing and public disclosure and cross refers to the Scott Schedule comments from the Claimant and Respondents. It might be helpful to summarise some of the points which are made, I am not going to repeat everything, either in the written statement or the Claimant's oral evidence which I will come to in a moment. In the written statement in respect of whistle blowing the Claimant makes a number of points, "I had a duty to raise the workplace issues to the appropriate level of management to enable remedy and resolution not to be litigious. I trusted the Respondent to resolve workplace issues. It was only fair and reasonable for me to allow internal workplace procedures and actions to reach a conclusion and for workplace issues to be resolved before approaching the Employment Tribunal to speak out. I broke down, I did not have confidence or mental health strength to take the issue to an Employment Tribunal within 3 months of speaking out. It was not reasonably practicable for me to do so" In other parts there is reference to a workplace threat that was hidden, not obvious. The workplace issues causing illness, workplace stress, anxiety

and depression could have been resolved. The Claimant says she felt unsafe and there is particular reference on 15 December 2014 to suffering acute stress reaction and a severe panic attack in relation to a meeting and that the Claimant was out of the workplace from 15 December 2014 to 1 September 2015 suffering from acute stress reaction and stress. The Claimant says that workplace issues causing this workplace stress, anxiety and depression could have been resolved and there are various cross references to the Judgment on disability.

26. The second part of the written statement is concerned with the disability discrimination schedule. Again it was not necessary to repeat everything set out there. It is said that the Claimant felt threatened and silenced. She feared for her life and job. She felt humiliated and intimidated, her focus had to be on survival. She was not aware of all of the facts within 3 months in 2013 for example, and it was not reasonably practicable to bring this individual workplace event before the Tribunal within 3 months.

27. The Claimant when she gave oral evidence said that she had raised issues in 2000 internally and that it was not fair to go outside the workplace, she did not have all the facts at that time and she was too ill to bring a claim. There has been a first and second investigation and a third investigation and she indicated that she had collapsed, could not go out of her house, could not even pick up a cup of coffee. The Claimant said she brought the claim to the Tribunal in August 2017 when she did not feel threatened by bringing her claim because she was no longer employed by the Respondents.

28. In the Chronology of Events it is noted on the claim forms and also in relation to other matters that the Claimant, after leaving the employment of the Respondents, obtaining new employment on 30 October 2017.

29. The Claimant in 2004 said she did not know about a personal injury claim having been brought on her behalf and she only was aware of that when she brought a Freedom of Information request in 2016, when that was revealed. The £40,000 in 2007 that was put into a bank account which she said was a mortgage bank account, was an apology from the Respondents. She had not simply Union advice during this time but also solicitors instructed by the Union, Thompsons who were in contact with the Claimant. The Claimant said the advice she received was that it was best for her to go back to the workplace and in 2006 she did go back to the workplace. There were difficulties because of the need for a Counsellor to assist her physically to go into the workplace.

30. Although from 2007 to 2014 the Claimant was physically at work she said she was suffering from stress and that, for example, she took annual leave which covered it up and that some of the absences referred to on page 52

of the Supplementary Bundle which are not said to be stress, for example stomach complaints, were in fact related to stress and that she found it a struggle to be in the office.

31. As a result of experience in 2000 the Claimant said it was impossible to speak out because she was afraid, there was fear, and that in 2015 when she had a meeting and was told to put what she had said into her grievance, she could not do so because she could not do it again. She considered she had been labelled as a person who spoke out, people did not know what to say to her, she was hiding to some extent, but she said her work worked with external organisations to build a job which she described as not being normal in work.

32. In October/November 2014 there were severe panic attacks, she could not go out of her house and at the disciplinary meeting in December she had flashbacks and she was not well enough to put in a claim at that time. When asked about whether the Claimant knew about the existence of Employment Tribunals she said she did, but the focus was on her job. In June and July the Claimant made a number of job applications as well as earlier applications but the Claimant said that was entirely different from making a claim against an employer. She feared if she made a claim that there would be recriminations and described how a claim to an Employment Tribunal exposes you. She accepted that Ben Smith, her Manager, gave her a job for which she was grateful but her confidence was shattered. She was asked about going to the police in 2011 about e-mails. Those e-mails had been supplied eventually by, it would appear, Human Resources and responses had been sent by the Head of Legal Services, Mr Arran, but the Claimant took issue with that because those emails had nothing to do with the workplace and she interpreted those replies by the Respondent as encouraging the person she described as a "stalker". She did not engage with the Employment Tribunal, again she said for fear of losing her job and she referred to the fact that her jobs had disappeared in 2000, 2003 and 2015 and when it was put to her that there had been medical reports indicating that she could come back to work and how she had improved, she said there was a big leap trying to get to the workplace and then bringing matters up in the Tribunal. At times she felt at home, fine and well, but when thinking of these things she was unwell.

33. In 2015 the Claimant set up a company, but that was in name only she said.

34. In January 2016 the Claimant appealed a job evaluation and in October 2016 the Claimant applied for a managerial role.

35. That was the only evidence that the Tribunal heard in relation to the time points, no other evidence was called by the Respondents. The

Respondents relied upon their cross examination and also the submissions that they have made to the Tribunal both in writing and orally at the conclusion of the evidence. I am not going to set out everything that is in the written submissions, or indeed part of the oral submissions. The written submissions are comprehensive, dealing with aspects of law for out of time points, with discrimination and whistle blowing as well as in relation to the wider submissions which were made of no reasonable prospect of success, the law in relation to how that should be approached in cases such as whistle blowing and discrimination and also there is a discreet heading in relation to conduct, the conduct being that the Tribunal should conclude that these claims are totally without merit. Considerable commentary was made about some aspects of the Schedules. It should be said that the Schedules comprised originally some 57 allegations in respect of whistle blowing and some 75 allegations in respect of discrimination.

What the Respondents invite the Tribunal to do is to look at the Schedules and the responses to the Schedules because in the main they are repetitive, as indeed a lot of the Claimant's written contentions in the Schedules are repetitive. As an example looking at allegation 20 in the whistle blowing written contentions, the Respondents say that the allegation has no reasonable prospect of success, should be struck out, it is not clear on the facts provided by the Claimant how this allegation could amount to qualifying disclosure for the purposes of Section 43(b) of the Employment Rights Act 1996, the allegation is time barred, a claim must be brought within 3 months less 1 day. The Claimant submitted her first ET1 on 5 August for Interim Relief, but did not submit an ET1 in relation to the substantive issues until 23 October 2017. This type of comment is contained in the response to a large number of the allegations and some, it should be said, indicate there are no facts which can show that a criminal offence had been committed or the person has failed to comply with the legal obligation or a miscarriage of justice has occurred or their health and safety has been endangered or the environment is being endangered or that anything as falling within those matters are being deliberately concealed. And the reason those matters were put in is because when the Claimant was asked to set out in a Scott Schedule the various allegations in whistle blowing. It is right to say that the Claimant referred to substantial parts of 43(b) sub sections and did not limit herself to particular matters which perhaps is more commonly seen in Scott Schedules which will define issues for the Tribunal to determine.

36. The Respondents emphasised to the Tribunal that there are broadly 3 important matters. Firstly to approach the time matters sensibly, secondly to look at what the content of a number of the allegations which are in effect historical gripes, and thirdly to bear in mind and apply the overriding objective to deal with cases justly and fairly which they say includes putting the Respondents on an equal footing and that is in relation to the

time and effort which will be expended in trying to defend the claims which are being made.

37. In respect of whistle blowing claims there is reference to the settlement in 2006, to the neighbour dispute, the job applications and the fact there is no evidence of a specific illness to prevent the Claimant from filing an Employment Tribunal claim and that there is no good reason under the heading of "fear" and there is no evidence in respect of the whistle blowing that it was not reasonably practicable, either within the 3 months or such further reasonable time.

38. In relation to the discrimination, again there is nothing they say in relation to it being just and equitable to extend the time. Because of the passage of time there is difficulty in defending historical matters that go back many years. In answer to the point made by the Claimant that there were continuing acts, there is in fact no connection between earlier acts and other matters because, amongst other things, allegations are against different departments.

39. The Claimant's submissions emphasised how medical reports showed how she was inflicted with workplace stress by the Respondents and how it was endemic workplace practices which had been covered up and that the disability caused to the Claimant prevented her going to the Employment Tribunal because she just wanted to survive in the workplace. In 2006 the emphasis was on prevention, not being contentious and that there was no settlement in 2006. The Claimant felt fear and felt that she was being punished for being a troublemaker.

40. As far as the discrimination claims, it is just and equitable for time to be extended if necessary because the medical report said she should be redeployed and that at that time the Claimant had no mental capacity to make a Tribunal application, but when dismissed she felt liberated and able to make the claim to the Tribunal. Furthermore, reference was made to Section 123 Equality Act 2010 about continuing conduct and that this was a case where the last act could be linked to other acts which had taken place before, and of course from the Claimant's point of view for 20 years.

41. As far as protected disclosures the Claimant felt strongly about inequality in the workplace in 2000 and would have had a duty to raise those matters and that protected disclosures were made to Occupational Health, the Police and the Respondents. This Application to strike out was described as an act of victimisation, although whether that was within the legal meaning or just in a general lay sense it does not matter, but that is how the Claimant described this Application and therefore it was just and equitable to allow the claims to proceed being a reasonable adjustment.

42. The relevant law in relation to protected disclosures are found firstly in relation to detriment in Section 48(3) of the Employment Rights Act 1996, "an Employment Tribunal shall not consider a complaint under this section unless it is presented (a) before the end of the period of 3 months beginning with the act or failure to act to which the complaint relates or where that act or failure is part of a series of similar acts or failures the last of them, 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 the period of 3 months. For the purposes of sub-section 3 where an act extends over a period the date of the act means the last day of that period."

43. In relation to unfair dismissal Section 111(2)(a) deals with the complaint to the Employment Tribunal for unfair dismissal and in particular repeats, in effect, the reasonable practicability of a complaint being presented to the Tribunal.

44. As to the application of reasonable practicability there have been a number of Tribunal decisions which have looked very carefully at how reasonable practicability should be approached. One of the cases is the case of ***Asda Stores -v- Cowser*** a Judgment of Lady Smith in October 2007 in which in paragraph 12 this is said, "an Employment Tribunal is not vested with the power to allow a claim to proceed through late whenever it considers it just and equitable to do so" and there is reference to discrimination, "the power to disapply the statutory time limit as was commented by Lord Justice Judge in ***London Underground Limited -v- Noel*** is very restricted, in particular it is not to be exercised, for example, in all the circumstances, nor even when it is just and reasonable, nor even where the Tribunal considers there is a good reason for doing so. As Mr Justice Brown-Wilson 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.

And then in paragraph 13 it was not a question of considering what was reasonable, but of considering what was reasonably practicable. "If this appeal must be allowed it is hard on the employee, she it seems to me acted reasonably in not bringing her proceedings until after the offer of a new job was withdrawn, but the test is whether it was reasonably practicable for her to do so." Then there is a reference to ***Walls Meat Company Limited -v- Khan*** "the performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents or interferes with or inhibits such performance. The impediment may be physical for instance, the illness of the complainant in the form of ignorance or mistaken belief with regard to essential matters. Such states of mind can however only be regarded as

impediments making it reasonably practicable to present the 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 make reasonably in all the circumstances are made or from the fault of his own solicitors or other professional advisors in not giving him such information as they should reasonably in all the circumstances given him." Then it goes on to say "the Authorities which have applied the mental impairment concept support the view that the essential matter or matters which the complainant must be mistaken or must relate to the right to bring a claim", and then there is reference to the case of ***Palmer -v- Southend on Sea Borough Council*** in paragraph 16 and in paragraph 17 "a short point seems to me that the Court has been astute to underline the need to be aware that the relevant test is not simply a matter of looking at what was possible, but asking whether on the facts of the case as found, it was reasonable to expect that which was possible to have been done. It also requires to be borne in mind that the ones of establishing that it was not reasonably practicable to commence proceedings within the time limit lies on the Claimant."

These were the principles that the Tribunal required to bear in mind when addressing the issues which were (1) had the Claimant established that it was not reasonably practicable for her to present her complaint timeously (2) if so, was the claim presented within a reasonable period thereafter, and it is emphasised in other decisions that these are in effect are matters of fact for the Tribunal to take into account in all of the circumstances of the case.

45. There is a two stage process as was emphasised in the case of ***Killain -v- Balfour Beatty Engineering Services and NRL Limited*** Respondents, a Judgment of the then President on 5 April 2011 "that the question at Stage 2 is what period that is between the expiry of the primary time 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 and 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 the background where primary time limit is 3 months, if a period is on that basis objectively unreasonable I do not see the fact that the delay was caused by the Claimant's advisors rather than by himself can make any difference to that conclusion."

46. The Judgments set out the proper approach to be addressed in relation to reasonable practicability in relation to the whistle blowing claims.

47. Of course it is the case that the claim was brought in time in respect of the alleged dismissal because of whistle blowing, but the allegations about other whistle blowing claims set out in the Schedules and also the alleged detriments as a result of those claims need to be carefully considered and in particular looking at what is alleged to be the protected disclosure and what is alleged then to be the detriments. Dealing with the first of the claims which are allegations 1 – 19, which as indicated will be struck out, the first allegation was withdrawn, the second allegation was accepted again as being not able to be proceeded with for the same reason that the Public Interest Disclosure Act was not in force as well as the third allegation. The fourth allegation however in 2000, which is what the Claimant complains about, is in relation to a verbal complaint about the Line Manager's behaviour, which was said in evidence to be about inequality in the workplace. A sequence of events which occurred then from 2003, are set out in allegations up to 5 – 7. Then in 2004 further allegations in respect of obtaining confidential documents, 2006 allegation, allegation 9, "negotiation of resolution in 2006 placed me into a non-career job role. Work colleagues told me they thought I had been suspended and removed from my job and placed elsewhere". This is alleged to be a verbal.

48. Just pausing there, as the Chronology shows the Claimant went back to work at this time and I accept that on the findings of the disability Judgment that there were impediments at that time in relation to bringing a claim up to 2006 about matters which relate to what could be described as a protected disclosure in 2000 concerning breach of legal obligations, i.e. discrimination in the workplace.

49. From 2006 however, I do not accept that the Claimant was in such a mental state of mind that it was not reasonably practicable for a claim to be made to the Employment Tribunal and even allowing for almost generous interpretation of when the 3 month limit would have expired, years then proceed, 5 years, until there is a further claim of protected disclosure detriment in 2011. The evidence is not here in any medical report which supports the fact that the Claimant could not properly have made a claim to the Employment Tribunal. What it comes down to is that the Claimant thought it better not to do so, but there was no mental impairment I find that prevented the Claimant from making such a claim, it was a judgment on her part and this failure within that period of time from 2006 to 2011 is objectively a period of time in which a claim could have been made and was not. It is out of time now in August 2017 to try to resurrect this matter.

50. I should observe that although it was urged on me to find that the 2006 settlement of the personal injury claim would have settled any claim that

could possibly have been made for protected disclosure, I am not in a position to do that because no settlement agreement has been put before me and I do not know the terms upon which that agreement was made so I disregard that as a factor in coming to the conclusion which I have in relation to those matters.

51. In 2011 the allegation which is made is an allegation of hate emails sent to work colleagues. As already indicated these were from a neighbour and the Claimant was involved in a neighbour dispute which apparently, according to the Claimant, led to litigation of which she was a party and in which she instructed solicitors. The Claimant's concerns were about the way the Respondents had not expressly told her about the fact that emails had been received or that there had been replies. It is extremely difficult, if not impossible, to read that as a protected disclosure. The allegations which are made flow into the 2013 allegation 11 about a very strong interest in a Court case and being advised by a Manger to enter into a financial settlement and also about Mr Arran refusing to meet with the Claimant or take any action in relation to what the Claimant was concerned about, about how certain information had got into the litigation of that neighbour dispute. Even if it could be said in some way that there was a protected disclosure from the facts which are alleged then, any claim was reasonably practicable to have been brought at that time well before the events which then start to a degree in the autumn of 2014. Again whether the 3 month period is generously allowed to 2011 or anytime in 2013 it is way outside the 3 month period and it is objectively outside any reasonable period by way of any extension as per the statutory framework. Therefore these claims are struck out as being out of time.

52. In relation to the allegations 13 – 20, allegation 13 is dated September 2014 and refers to feeling punished because she felt threatened in the workplace. In October reference to needing a one to one meeting with a manager in October, and November 2014 being informed by the Manager she was on a disciplinary but would go all the way and in November 2014 allegation 16 email documentation sent to UNISON about the matter and 17 again is about "told to look for a job elsewhere" she felt threatened. Allegation 18, December 2014 is in relation to discussions about "took place at a meeting" where the Claimant at a disciplinary meeting experienced a severe panic attack and tried to smash her head and body through glass security doors to try to escape from the building. And allegation 19 is February 2015 where HR advised a further disciplinary absence review. It is impossible to extract from that a protected disclosure which is made as opposed to concerns about certain matters which may be more properly looked at in the light of the disability discrimination claim, but in any event those matters all took place at a time up to February 2015 when a claim could have been made within the 3 month period. I have

taken into account that although the Claimant would have had some stress, it is clear from the Judgment of the disability matter that the stress at various times at various ways had various effects, some more pronounced than at others, but it is difficult to see applying all the circumstances it was not reasonably practicable or within a reasonable period to bring claims.

53. Allegation 20 however, is an allegation that on 12 May 2015 there was a meeting and at that meeting what the Claimant says this "I raised workplace bullying issues. I complained of employers breach of legal obligations. I was advised it is very important but no response would be given at that time. HR advised I could take out a formal grievance against my Line Manager. I explained I was not in any mental state to do so, I could not survive a repeat of 2007. Instead I asked for reconciliation or mediation, but that was never offered. I applied for a job to facilitate mediation and conciliation."

54. In looking at the allegations from allegation 20 onwards, allegations are made about the behaviour of the Respondents and sometimes it is not possible just to look at the first column but there is a need to look at the other column in which it is set out what is the causal link between disclosure and detriment. Sometimes the fact of a disclosure and the detriment and the way the disclosure is made has to be reconciled by looking at those columns. It is necessary to look at the Schedule as a whole. The circumstances are that what the Claimant is alleging in effect that there were a whole series of omissions by way of medical redeployment, job redeployment or by way of consideration of points which were made by the Claimant or acts positively by the Respondents which are all linked. The Claimant describes her perception by others as a trouble maker at that time, but what she did was to raise those matters in a way which could be considered to be a protected disclosure in the May 2015 meeting.

55. In considering whether I should approach this by looking at each individual allegation and then looking to see if the Respondents contentions have any weight or not I am reminded of the approach that should be adopted in relation to the matters that I have struck out, but also the matters I have not struck out. The cautious approach which is required by the Tribunal in relation to those matters and this approach applies equally, although I have not looked at the disability discrimination matters and analysed it yet, but I will do so, but in relation to the principles about striking out. Can the Tribunal properly conclude the claim has no reasonable prospect of success, and is it fair to strike out the claim. It is said this cannot possibly be a protected disclosure and that, for example, the fact that a letter is written by the CEO in response to a request for a meeting saying that there is not going to be such a meeting, cannot possibly be an act of

detriment or discrimination as the case may be. But the question that the Tribunal has to ask often is, what are the reasons for the acts? And this requires findings of fact to be made after a full hearing.

56. The Respondents in their written submissions refer to well-known Authority about the fact that at a Preliminary Hearing it is not a micro-management, it is not a micro-trial of all these matters because the Tribunal has not heard all the evidence and made findings of fact. Claims that are put forward by Claimant's claiming a protected disclosure or discrimination must be taken at their highest level and indeed there is a comment in the Respondents written submissions that a number of the matters factually are not necessarily in dispute, which means of course that what is in dispute is the reason why those things occurred. The Respondents say they occurred because they were following the ordinary disciplinary or the capability procedure and there is nothing in it. The Claimant has a different view. The Claimant's view is that because of her disability and/or because she made protected disclosures these actions were taken by the Respondents. The claim should not be struck out, only in the most exceptional circumstances or if there are clear time points because there is a crucial core of disputed facts. Often the Tribunal should take the Claimant's version at its highest and assume that that is right in approaching this matter.

57. In the case of ***Silape -v- Cambridge University Hospitals NHS Foundation Trust*** a decision of Ocober 2017 by the now President of the Employment Appeal Tribunal, Mr Justice Choudhury. Mr Justice Choudhury looked at the law in respect of striking out. At paragraph 23 Rule 37 of the Employment Tribunals Constitutional Rules and Procedure Regulations 2013 is quoted. I am not going to repeat it fully, what it does say is the power of the Tribunal to strike out if the claim is scandalous or vexatious or has no reasonable prospect of success, and that the proper approach is as set out in ***Mechkarov -v- Citibank NA***, the approach to striking out applications in discrimination cases is not, with one reservation, controversial. The starting point is the observation of Lord Stein in ***Anyanwu -v- South Bank Student Union*** in which he said "from my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact sensitive, their proper determination is always vital in our pluralistic society. In this field perhaps more than any other, the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest. In the case of ***Ezias -v- North Glamorgan NHS Trust*** **[2007]** Lord Justice Maurice Kay said, "it seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the Employment

Tribunal to decide otherwise. In essence, that is what Mr Justice Elias held. I do not consider that he put an unwarranted gloss on the words "no reasonable prospect of success" it would only be in an exceptional case that an application to an Employment Tribunal would be struck out as having no reasonable prospect of success when the central facts are in dispute and an example might be where the facts sought to be established by the Claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level."

And then in paragraph 13 reference was made to the case of ***Tayside Public Transport Company -v- Reilly***, "Counsel agreed that the power conferred by Rule 18(vii) as it then was, may be exercised only in rare circumstances, it has been described as draconian. In almost every case the decision in an unfair dismissal claim is fact sensitive. Therefore where the central facts of a dispute a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute of the crucial facts is not for the Tribunal to conduct an impromptu trial of the facts. There may be cases where it is instantly demonstrable the central facts in the case are untrue, for example where the alleged facts are conclusively disproved by the productions, but in the normal case where there is a crucial core of disputed facts it is an error of law for the Tribunal to pre-empt the determination of a full hearing by striking out."

Mr Justice Choudhury says this, in paragraph 14 "on the basis of those Authorities the approach that should be taken in a strike out application in a discrimination case is as follows, (1) only in the clearest case should a discrimination claim be struck out, (2) where there are core issues of fact that turn to any extent on oral evidence they should not be decided without hearing oral evidence, (3) the Claimant's case must already be taken at its highest, (4) if the Claimant's case is conclusively disproved by, or is totally, inexplicably consistent with undisputed contemporaneous documents it may be struck out, and (5) a Tribunal should not conduct an impromptu mini-trial of oral evidence to resolve core disputed facts."

58. Perhaps of some significance is on the facts of the ***Silape*** case in relation to the disability discrimination Mr Justice Choudhury said, "the Tribunal accepted the Respondents submission that the act complained of was clearly not because of the protected characteristic of disability. The less favourable treatment must be because of disability and the reason for the treatment was not because of the existence of the disability itself. However, the Tribunal has here accepted the Respondents submission as to the reason for the treatment. The Claimant however has a different contention which is that her treatment was by reason of her disability. She claims that the Respondent did not explore the possibility of alternative employment as recommended by the Occupational Health Doctor and

further asserts there are examples of other staff who were in long term illness who were given alternative employment. It seems to me that if the Tribunal had approached the matter correctly it would have taken those aspects of the Claimant's case at its highest and would have found the comparator or comparators had been identified and that the less favourable treatment being alleged was clear. It would also mean that at the very least there would be an important issue of fact to determine, namely the reason for the alleged treatment. That is not a question that can be determined in the circumstances of this case in the absence of hearing the evidence". In paragraph 41 Mr Justice Choudhury says "the same applies in respect of the Tribunals alternative decision to make Deposit Orders in respect of those claims". The appeal was allowed against the Employment Tribunals decision on the facts of that case.

59. These are the very clear principles which need to be applied in cases of discrimination and/or protected disclosures. In this case as far as the protected disclosures are concerned, and the alleged detriments, those are clear issues of fact that will have to be determined by the Tribunal.

60. Dealing with the disability discrimination claim and applying the same approach, in relation to some of the earlier matters which were considered and which the Tribunal has struck out, those are matters which the Claimant alleges took place again as far back as 2000, I am not going to repeat the precise nature of the allegations there. In relation to the matters which go up to the period which starts with the July 2014 matter, the position is this, that the Claimant has said, and it would appear to be supported by the Judgment of the Tribunal on disability, that in about the July period, possibly a bit later, that she had severe panic attacks and that led to the meeting in December 2014 and that the treatment that she had, such as the failure of the Respondents allegedly to redeploy her in accordance with medical reports, and all the other matters which are contained in the Schedules, are matters which will require the Tribunal to consider on the facts.

61. Why is it not just and equitable in relation to the 3 matters which have been struck out to allow the matter to proceed? It is not just and equitable because one has to look at not simply the extent of the delay and why in 2011, 2012, 2013, 2014 those matters were not litigated, but also the prejudice to the Respondents to deal with those matters, all the circumstances and apply what in ***The Department of Constitutional Affairs -v- Jones*** Lord Justice Pill set out the extent to which cogency of evidence is affected, the promptness the Claimant acted when she knew the facts, steps taken to obtain proper professional advice. At times in 2011 the Claimant had solicitors acting for her, albeit in a neighbour dispute, the advice she was receiving from her union UNISON who had in the past instructed solicitors on her behalf. The reasons for the delay have

not been accepted by me namely the lack of action without the support of any medical evidence, which is not essential but is a factor, that the Claimant was in a frame of mind where she could not bring such a claim. Therefore it is not just and equitable for time to be extended in relation to those three allegations. They are out of time and are struck out.

62. In relation to the other matters they will all proceed to be determined on the facts. As far as whether it is just and equitable to extend any time if necessary in relation to those, Employment Tribunals frequently do not deal with just and equitable points at an early stage because it does involve all the circumstances and to be looked at very carefully. As far as whether it is just and equitable to allow matters if they are found to be out of time, after a proper hearing of the case, with all the evidence and all the documents. I remind myself that in this case the Schedule refers to a number of emails, letters, correspondence, none of which have been put before me. That is not a criticism but is a fact and would explain why possibly Judge Beard did not consider that just and equitable should be dealt with generally because it is necessary to look at all the circumstances in relation to those matters. It would not be right at a Preliminary Hearing to strike out those matters from 2014 onwards on the basis of being out of time. That is not to say time points cannot be made at the Final Hearing and they may remain to be decided there, but it is not right applying the strike out principles as set out in the authorities, particularly Mr Justice Choudhury, for these claims to be struck out.

63. I have taken into account in arriving at this conclusion the very careful and very full submissions, which I have not repeated, of the Respondents and I have also taken into account the evidence I have heard from the Claimant and also the Claimant's submissions. What I propose to do now is to give further directions to allow this matter to proceed as promptly and as fairly as possible to a Final Hearing so that this matter may be determined for the benefit of the Claimant and the Respondents, bearing in mind that it is over 3 years since the Claimant's employment was terminated. This is a case that does need resolving as soon as reasonably and fairly possible.

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Employment Judge P Davies
Dated: 17th November 2020

JUDGMENT SENT TO THE PARTIES ON 20 November 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS