EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104844/2020 (A)

Held via telephone conference call on 11 January 2021

Employment Judge A Kemp

Mr Christopher Vlassis	**Claimant**
Smart Metering Systems Plc	**Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claimant's claim of unfair dismissal is not within the jurisdiction of the Employment Tribunal and is dismissed.

2. The claimant's claim of disability discrimination is not within the jurisdiction of the Employment Tribunal and is dismissed.

REASONS

Introduction

1. This Preliminary Hearing was arranged to address issues of jurisdiction and whether to substitute another respondent for that given in the Claim Form. The Claim is one for constructive unfair dismissal and for disability discrimination. The Claim has admittedly been presented out of time.

2. There has been one earlier Preliminary Hearing. At that it was accepted by the claimant that the respondent was not the correct employer. I understand that he was shown at that hearing a contract of employment and payslips. That led to the issue of whether or not it was appropriate to substitute the correct employer for the respondent, which the respondent's solicitor has opposed. Following that hearing the claimant provided three emails and answered points that had been directed to him and the respondent provided a skeleton argument providing advance notice of the

arguments it was to make, also as directed in the Orders following that Preliminary Hearing.

Evidence

3. The claimant was the only person to give evidence. No Bundle of Documents had been prepared by the parties. That was unfortunate, as there were various documents including emails and two grievances which were referred to but had not been provided to the Tribunal.

4. The hearing took place by telephone in accordance with the Note from the last Preliminary Hearing on 12 November 2020. Neither party had sought to depart from that arrangement, although it was unusual for a hearing into issues such as those at present not to be in person or remotely by Cloud Video Platform. In light of the effect of the Covid-19 pandemic, and restrictions to control it, I considered that it remained in accordance with the overriding objective to proceed with the hearing as it had been fixed. It was conducted adequately and I was satisfied that a decision could be made on the basis of the evidence heard.

Issues

5. The hearing considered the following issues:

   (i) whether or not it was reasonably practicable to have presented the Claim within the primary time limit in section 111 of the Employment Rights Act 1996, having regard to the provisions on early conciliation, and if so separately whether the claim was presented within a reasonable period of time, also under that section.

   (ii) Whether it was just and equitable to allow the Claim for discrimination to proceed in light of section 123 of the Equality Act 2010.

   (iii) Whether or not it was appropriate, and in accordance with the overriding objective, to substitute CH4 Gas Utility and Maintenance Services Limited as the respondent, that party being the claimant's employer as he had accepted at the earlier Preliminary Hearing.

The facts

6. The claimant is Mr Christopher Vlassis.

7. The respondent is Smart Metering Systems plc. It is the parent company of CH4 Gas Utility and Maintenance Services Limited ("CH4").

8. The claimant was employed from 16 March 2016. It was his first full-time job.

9. The claimant has suffered from anxiety and depression. He is not in receipt of medication from his GP, and was not at all material times, including in January 2020 and onwards.

10. In January and early February 2020 the claimant was in communication with managers at CH4 about a matter at work that led to his suspension. The managers indicated that he may be dismissed for gross misconduct and one option for him was to resign.

11. The claimant had made managers aware of the anxiety and depression he suffered from, and had been given a form about seeking assistance.

12. At about early February 2020 the claimant intimated a grievance to CH4 as his employers (which was not before the Tribunal) in relation to the issues at paragraph 10.

13. In about early February 2020 the claimant's girlfriend suffered a miscarriage.

14. The claimant secured an offer of new employment from another company in about mid-February 2020. The job was due to commence on 5 April 2020.

15. At approximately that time he was taken ill with chest pains, and admitted to hospital for nine hours.

16. He intimated the resignation of his employment with CH4 by email and giving on one month's notice on or around 24 February 2020.

17. CH4 replied to him by email asking him if he wished time to reconsider, or words to that effect, but stated that if he did resign he would be paid in lieu of notice. The claimant replied asking if he would be paid until the end of his notice period of a month. CH4 responded to confirm that he would be.

The claimant then confirmed his resignation by email thereafter. (None of these emails was before the Tribunal).

18. The claimant's employment with CH4 terminated on 4 March 2020. He received a P45 confirming that termination date. He was paid in lieu for the balance of his notice period to 25 March 2020.

19. In March 2020 the claimant's grandmother was admitted to a care home, on a date not given in evidence. She had been suffering from dementia.

20. On or around 28 March 2020 the claimant was informed that the start of his new role was postponed because of the Covid-19 pandemic.

21. The restrictions imposed because of the pandemic meant that many solicitors offices were closed. The claimant was not able to access legal advice at that time.

22. The claimant's uncle died in May 2020. He was 42 years of age, and left a child aged 3 who the claimant helped to care for with his sister.

23. The claimant had internet access available to him throughout the period from at least January 2020 onwards. He conducted internet research about his employment position from time to time.

24. His understanding at around the time of his resignation was that the Employment Tribunal was for addressing disputes at work, not those following termination of employment. He also believed that he could not make any claim having himself resigned from his employment.

25. In May and June 2020 the claimant spoke to friends who told him about the possibility of making a claim to ACAS and the Employment Tribunal in relation to his employment with CH4.

26. At that stage, and thereafter, the claimant was fit for work.

27. On or around 1 June 2020 the claimant intimated a grievance to CH4 about the circumstances around his resignation (the terms of which were not before the Tribunal).

28. On 7 July 2020 the claimant commenced his new employment.

29. The claimant commenced Early Conciliation on 23 July 2020.

30. An Early Conciliation Certificate was issued by ACAS on 12 August 2020.

31. The Claim Form prepared by the claimant was presented to the Tribunal on 11 September 2020

The claimant's submission

32. The following is a brief summary of the short submission made, which was based on two emails sent to the Tribunal on 2 December 2020 and one on 3 December 2020. The claim should be accepted out of time. The effects of the pandemic meant that advice could not be taken, the combination of the claimant's mental health issues and events that took place, including the death of his uncle in May 2020, meant that it was appropriate to allow the claims to be received. At that time the claimant gave priority to family matters.

The respondent's submission

33. The following is a brief summary of the submission Mr Entwistle made in a skeleton argument he provided in advance of the hearing as directed by the Orders following the earlier Preliminary Hearing. He had set that out more fully than otherwise would have been the case as the claimant was a litigant in person. Having heard the evidence, he suggested that it was not clear why the claimant could not have started Early Conciliation in May or early June 2020. At that time he was preparing a grievance. He was fit to work. No medical evidence had been presented. His view that Tribunals were only for those in employment was unreasonable in 2020. The explanation was not credible. The extent of the discrimination claim was not clear. There was no basis to allow the just and equitable extension. His skeleton submission referred to case law, most of which is addressed below.

The law

(i) Time-bar

(a) Unfair dismissal

34. Section 111 of the 1996 Act provides as follows, so far as relevant to this Claim:

"**111 Complaints to employment tribunal**

(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(2A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a)."

35. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). This process is known as 'early conciliation' (EC), with the detail being provided by regulations made under that section, namely, the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 SI 2014/254. They provide in effect that within the period of three months from the effective date of termination of employment EC must start, doing so then extends the period of time bar during EC itself, and is then extended by a further month for the presentation of the Claim Form to the Tribunal. If not, then a Tribunal cannot consider a claim unless it was not reasonably practicable to have done so in time, and then if EC starts, and a Certificate issued, the Claim is presented within a reasonable period of time.

36. The question of what is reasonably practicable is explained in a number of authorities, particularly ***Palmer and Saunders v Southend on Sea Borough Council [1984] IRLR 119,*** a decision of the Court of Appeal in England. The following guidance is given:

> "34. In the end, most of the decided cases have been decisions on their own particular facts and must be regarded as such. However, we think that one can say that to construe the words 'reasonably practicable' as the equivalent of 'reasonable' is to take a view too favourable to the employee. On the other hand, 'reasonably practicable' means more than merely what is reasonably capable physically of being done. … Perhaps to read the word 'practicable' as the equivalent of 'feasible', as Sir John Brightman did in Singh's case and to ask colloquially and untrammelled by too much legal logic, 'Was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?' is the best approach to the correct application of the relevant subsection.
>
> 35. What however is abundantly clear on all the authorities is that the answer to the relevant question is pre-eminently an issue of fact for the Industrial Tribunal and that it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, an Industrial Tribunal may wish to consider the manner in which and reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery has been used. It would no doubt investigate what was 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. […] Any list of possible relevant considerations, however, cannot be exhaustive, and, as we have stressed, at the end of the day the matter is one of fact for the Industrial

> Tribunal, taking all the circumstances of the given case into account."

37. In ***Asda Stores Ltd v Kauser UKEAT/0165/07***, a decision of the Employment Appeal Tribunal, Lady Smith at paragraph 17 commented that it was perhaps difficult to discern how:

> "'reasonably feasible' adds anything to 'reasonably practicable', since the word 'practicable' means possible and possible is a synonym for feasible. The short point seems to be 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."

38. In ***Marks and Spencer plc v Williams-Ryan [2005] IRLR*** 562 the Court of Appeal set out the issues to consider when deciding the test of reasonable practicability, which included (i) what the claimant knew with regard to the time-limit, (ii) what knowledge the claimant should reasonably have had, and (iii) whether he was legally represented.

39. In ***Lowri Beck Services Ltd v Brophy [2019] EWCA Civ 2490***, the Court of Appeal stated that the test of reasonable practicability should be given a liberal interpretation in favour of the employee, citing ***Williams-Ryan***. In ***Brophy*** the claimant did not have professional advice, which was held to be a factor in his favour.

40. Ignorance of a time limit has been an issue addressed in a number of cases. In ***Wall's Meat Co Ltd v Khan [1979] ICR 52*****,** the test which Lord Denning had earlier put forward in another case was re-iterated as -

> "It is simply to ask this question: Had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights—or ignorance of the time limit—is not just cause or excuse unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences."

41. The editors of Harvey on ***Industrial Relations and Employment Law*** make the following comments at paragraph P1.207(2):

> "As the courts have pointed out, with the widespread public knowledge of unfair dismissal rights, it is all the time becoming more difficult for an employee to successfully plead ignorance: see, for example, ***Riley v Tesco Stores Ltd [1980] ICR 323*** at 328, 329, 335, ***Wall's Meat Co Ltd v Khan***, above. If this was the case in the 1980s, it applies with significantly more force now: with increasing discussion, advertisement and coverage of employment rights and litigation in the media, coupled with the ease of searching for information online, the cases of justifiable ignorance will be fewer and fewer."

42. The burden of proof is on the claimant to prove that it was not reasonably practicable to present the complaint in time: ***Porter v Bandridge Ltd [1978] IRLR 271.***

(b) Discrimination

43. Section 123 of the 2010 Act provides as follows

> **"123 Time limits**
>
> (1) [Subject to [sections 140A and [section] 140B],] proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
>
> (a) the period of 6 months starting with the date of the act to which the proceedings relate, or

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

(3) For the purposes of this section—

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

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

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

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

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

44. This therefore provides that the Tribunal has jurisdiction under the 2010 Act if a claim is commenced within three months of the act complained of, but there are two qualifications to that, firstly where there are acts extending over a period when the time-limit is calculated from the end of that period, and secondly where it is just and equitable to allow the claim to proceed.

45. An act will be regarded as extending over a period, and so treated as done at the end of that period, if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant (***Barclays Bank plc v Kapur [1989] IRLR 387***). It was also held in that case that it is only the continuance of the discriminatory act or acts, not the continuance of the consequences of a discriminatory act, that will be treated as extending over a period.

46. The Court of Appeal in ***Hendricks v Metropolitan Police Commissioner [2003] IRLR 96*** stated that terms mentioned in the above and other authorities are examples of when an act extends over a period, and

"should not be treated as a complete and constricting statement of the 'indicia' of such an act. In cases involving numerous allegations

> of discriminatory acts or omissions, it is not necessary for an applicant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken'. Rather, what he has to prove, in order to establish a continuing act, is that (a) the incidents are linked to each other, and (b) that they are evidence of a 'continuing discriminatory state of affairs'. This will constitute 'an act extending over a period'."

47. The assessment of what is just and equitable, if that stage is reached, involves a broad enquiry with particular emphasis on the relative hardships that would be suffered by the parties according to whether the amendment is allowed or refused.

48. Where a claim is submitted out of time, the burden of proof in showing that it is just and equitable to allow it to be received is on the claimant (***Robertson v Bexley Community Centre [2003] IRLR 434***). Even if the tribunal disbelieves the reason put forward by the claimant it should still go on to consider any other potentially relevant factors such as the balance of convenience and the chance of success: ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278***, ***Pathan v South London Islamic Centre UKEAT/0312/13*** and ***Szmidt v AC Produce Imports Ltd UKEAT/0291/14.*** Although the EAT decided that issue differently in ***Habinteg Housing Association Ltd v Holleran UKEAT/0274/14*** that is contrary to the line of authority culminating in ***Rathakrishnan***.

49. In the ***Rathakrishnan*** case there was a review of authority on the issue of the just and equitable extension, as it is often called, including the Court of Appeal case of ***London Borough of Southwark v Afolabi [2003] IRLR 220***, in which it was held that a tribunal is not required to go through the matters listed in s.33(3) of the Limitation Act, which is in any event an English statute in the context of a personal injury claim, provided that no significant factor is omitted. There was also reference to ***Dale v British Coal Corporation [1992] 1 WLR 964***, a personal injury claim, where it was held to be relevant to consider the plaintiff's (claimant's) prospect of

success in the action and evidence necessary to establish or defend the claim in considering the balance of hardship. The EAT concluded

> "What has emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see ***Hutchison v Westward Television Ltd [1977] IRLR 69)*** involves a multi-factoral approach. No single factor is determinative."

50. The factors that might be relevant include the extent of the delay, the reasons for that, the balance of hardship including any prejudice to the respondent caused by the delay, and the prospects of success of the claim, although all the facts are considered. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13*** the EAT said that a litigant can hardly hope to satisfy that burden unless he provides an answer to two questions:

> "The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was."

51. In ***Averns v Stagecoach in Warwickshire UKEAT/0065/08*** the issue of the lack of knowledge of the ability to claim is addressed, and it was held that the assertion must be genuine and the ignorance – whether of the right to make a claim at all, or the procedure for making it, or the time within which it must be made – must be reasonable.

52. In ***Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327***, the Court of Appeal stated the following

> "There is no principle of law which dictates how generously or sparingly the 'power to enlarge time is to be exercised' (para 31). Whether a claimant succeeds in persuading a tribunal to grant an extension in any particular case 'is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it'."

53. Th effect of early conciliation on assessing when a claim was commenced is again to be considered. The statutory provisions regarding early conciliation itself are referred to above. These collectively provide, in effect, that within the period of three months from the act complained of, or the end of the period referred to in section 123 above if relevant, EC must start, doing so then extends the period of time bar during EC itself, and time is then extended by a further month from the date of the certificate issued at the conclusion of conciliation within which the presentation of the Claim Form to the Tribunal must take place.

(c) Substitution of respondent

54. Rule 34 of the Rules of Procedure in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) 2013 provides:

> "The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings, and may remove any party apparently wrongly included."

55. That Rule falls to be considered in light of the overriding objective set out in Rule 2 which provides as follows:

> **"2 Overriding objective**
>
> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

Discussion

56. I considered that the claimant was seeking to give honest evidence, but I was concerned at his evidence firstly that he thought that Employment Tribunals were for claims during employment, and secondly that his internet searches had not revealed anything about the process to claim, time-limits, or claims for unfair dismissal or disability discrimination. He accepted both that he was making internet searches and able to do so from the point of his resignation onwards, that he had made two grievances one before his resignation and one on 1 June 2020, and yet did not give clear evidence on what he had searched and what those searches revealed. I did not consider the evidence that he had undertaken searches in relation to his employment position with CH4 but that that had not led to information about what to claim and how, essentially, to do so, including when that must be done, was reliable. I considered it very likely that any search of that kind would have led to such information very quickly indeed.

57. Not all of the documents that might have been before the Tribunal were produced, such as two grievances that the claimant accepted he had made. On a number of occasions, the precise date on which an event had occurred was not given in evidence.

58. The claimant has always accepted that the Claim was submitted out of time. The effective date of termination of employment was 4 March 2020. That followed an exchange of emails about his resignation in which he was given time to reconsider and clarification was given about pay in lieu

of notice. It was however clear that 4 March 2020 was the effective date of termination. Even if however, it were to be assumed that it was the end of the notice that the claimant gave the respondent, his Claim would still be materially out of time.

59. A number of matters that were material to the claim were in dispute, firstly whether or not the claimant was a disabled person under section 6 of the Equality Act 2010 and secondly whether or not there was a dismissal under section 39 of that Act and section 95 of the Employment Rights Act 1996.

60. The statutory provisions for jurisdiction are different for each Act and require to be considered separately.

(i) Jurisdiction

61. The first issue I shall address is in relation to jurisdiction for the unfair dismissal claim. The effective date of termination was, as stated, 4 March 2020. Early conciliation ought to have been commenced by 3 June 2020. It was not commenced until 27 July 2020, over seven weeks late. The question is whether the claimant has established that it was not reasonably practicable for him to have commenced that Claim timeously.

62. There are arguments both ways for the issue of reasonable practicability. It is a matter of fact and degree in each case.

(i) The respondent argued that the claimant ought reasonably to have known of the time bar provisions, and that had he reasonably searched the ACAS website or other websites on the issue he would have been aware of that very quickly. He was fit to work in May 2020 on his own admission, and preparing a grievance against his employer. He had been fit to be able to start the work he had intended to commence on 5 April 2020. There was no evidence of any impediment to undertaking reasonable enquiries as to his rights. On the contrary, the evidence was that he was able to do so, and that had he made even a cursory reasonable internet search issues of timebar, and the early conciliation requirement, would have been found. His evidence that he thought that Tribunals were for disputes

during employment was not reliable. As the quotation above makes clear, it is difficult for someone now to suggest such a fundamentally wrong understanding of the law. Concepts of unfair dismissal and discrimination are, or ought to be, very well known. If someone does not know the law, they have the opportunity to find out about it by internet searches or otherwise. Many claimants do that, act for themselves, and present their Claims timeously. I consider that the claimant's stated ignorance of the law, and procedure for making a claim including timebar, was not reasonable. There was no practical reason not to commence Early Conciliation at that time which would have been within the jurisdiction provisions. The fact that at that point he was both fit for work, and able to prepare a grievance against CH4, supported that. His use of internet searches, as he accepted, also supported that.

(ii) Against that the claimant argued that it was not reasonably practicable to have made the claim at that point, and the factors that support him include that -

(a) The claimant was not represented by a solicitor or other professional person.

(b) He had not been dismissed, or made a claim, before. This was his first full-time job.

(c) He had suffered from depression and anxiety, been admitted earlier to hospital, and had a number of family issues which affected him substantially.

(d) The Covid-19 pandemic meant that he could not seek legal advice as offices were closed. It also meant that he had less contact with friends, albeit that contact by telephone or through social media could be undertaken.

63. Taking all the circumstances into account, I consider that the claimant has not proved that it was not reasonably practicable to have presented the claim timeously. The claimant was fit for work. He was expecting to start a new role on 5 April 2020, and accepted that in May 2020 and onwards

he was fit for work. He had access to the internet, and said that he made some searches of it. Even a cursory search in relation to unfair dismissal or making claims will bring up websites including that for ACAS setting out the process, and time-limits that apply. He was also preparing for making a grievance in May 2020, and sent that on 1 June 2020, although its terms were not before the Tribunal. Whilst I accept that family bereavements and consequences for that including helping to care for a young child, a miscarriage, and a family member being admitted to a care home, are sources of stress, and can have a material effect on a person, I do not consider that the claimant has established that they are such as to render the commencement of a Claim not reasonably practicable. That is so particularly when a grievance was submitted towards the end of the primary three month period. Whilst a miscarriage is obviously a very upsetting event the claimant nevertheless arranged new employment at around that same time, emailed CH4 on a number of occasions about a resignation, confirmed that when he was told about pay in lieu of notice and then intended to start a new role on 5 April 2020. The issues he seeks to rely on made the circumstances more difficult, but that is not the statutory test. The picture that was built up was not that it was not reasonably practicable, in the sense of reasonably feasible as explained in authority, to have commenced early conciliation within that primary period.

64. Similarly whilst the pandemic has made seeking advice from a solicitor certainly more difficult, and made meetings in person probably not likely to be possible for much of the material period, that does not stop someone from undertaking their own researches. A very large number of claims have been presented by claimants representing themselves during that same period. That there is greater difficulty in accessing advice is also not, of itself, sufficient. The test is a reasonably high one. It is also not a matter of morality, as was explained to him during the hearing, but application of the law.

65. I consider that in all the circumstances the claimant has not established that it was not reasonably practicable for him to have commenced Early

Conciliation timeously, and on that basis the Tribunal does not have jurisdiction on the first "limb" of the statutory test.

66. The next issue does not strictly arise, but if it had been relevant was whether the Claim Form was presented within a reasonable period of time after it did become reasonably practicable to have done so. In this case the Early Conciliation Certificate was issued on 12 August 2020. By that time, at the very latest, it ought to have been clear that the Claim was required, and that it was at that stage late, and therefore needed to be submitted quickly, essentially within a day, or at least a matter of days, unless there was good reason that that could not be done.

67. No reason was given for that period of almost one month before the Claim was submitted on 11 September 2020. It is relevant that at this point the claimant was at work, having returned to employment on 7 July 2020. That is not indicative of someone suffering from either material mental health issues (particularly when he was not taking medication) or having substantial effects from family matters that had occurred many weeks, or months, earlier. There was less in the way of restrictions because of the pandemic at that point. He had by then been informed by friends about taking a claim. I considered that the claimant had not demonstrated that the Claim Form was presented within a reasonable period of time.

68. I must therefore conclude that the unfair dismissal claim is not within the jurisdiction of the Tribunal. It must be dismissed as a result.

(ii) Discrimination

69. I turn secondly to the claim for disability discrimination. The effective date of termination was 4 March 2020 and if there were acts extending over a period they cannot have been beyond that date. There was no suggestion that there was, but rather the respondent argued for earlier dates. For the purposes of the assessment of jurisdiction the claimant shall be given the benefit of any doubt, and the assumption made that all matters on which he claims took place on the basis of acts extending over a period to 4 March 2020. The start of early conciliation was late by over seven weeks as set out above in relation to unfair dismissal, and there was a period of

a day short of a month between the issue of the Early Conciliation Certificate and the presentation of the Claim Form.

70. The test in relation to this aspect is different to that for unfair dismissal, in that it is whether it is just and equitable to allow the claim to proceed although late. This is a matter in which wider issues than those set out above for unfair dismissal may be considered.

(i) Is the claimant likely to be a disabled person?

71. Only someone who meets the definition of disabled person in the 2010 Act, particularly section 6 and Schedule 1, is able to rely on its protections. I consider that the claimant has not provided evidence or argument to show that he has a reasonable argument that he is a disabled person. No medical evidence was produced. He has been working both for CH4 and latterly for a new employer. He has not been in receipt of medication at all material times at least. Whilst he was admitted to hospital on one occasion that was for a brief period of less than one day, and there is no suggestion of lengthy periods of absence from work or similar. It is not easy to assess matters at this stage, and there are some risks in doing so as the hearing was not specifically to address that issue, but the claimant did not provide written evidence or anything in the hearing before me to show that he was likely to be within the statutory definition. I conclude that whist he might be a disabled person, he has not shown that that is likely to be the case. That would be fatal to this aspect of his claim, and is a factor against holding that it is just and equitable to allow the claim to be made. The following proceeds, however, on the assumption that despite that the claimant may be a disabled person and can claim disability discrimination.

(ii) Why was the claim not presented in time?

72. I require to consider the period up to three months from termination on 4 March 2020, ie midnight on 3 June 2020, to commencing EC on 27 July 2020. In this connection the question is not of reasonable practicability but whether the claimant has a reasonable excuse for not presenting the claim form in time. It is undoubtedly true that the pandemic made seeking legal advice more difficult. Many offices for law firms were closed, or were operating on a limited capability. Arranging a face to face meeting was not

generally possible. Meeting friends who may have given informal advice was less easy, although contact by telephone or otherwise remained possible. It is also understandable that events such as the death of the claimant's uncle, the earlier miscarriage, his grandmother going into care, and the claimant helping to care for his uncle's young child also made seeking advice, or addressing internet or other research, more difficult as time and focus may have been on those issues and less on his employment than otherwise they would have been. The claimant further had a background of mental health issues, albeit not sufficiently serious at that point to require medication. These are all factors that favour his arguments.

73. On the other hand there are factors that do not favour his arguments. In April and May 2020 the claimant was fit for work, as he accepted. There is no suggestion indeed that he was not fit for work at all material times. He was also preparing a grievance against CH4 during the last week or more of May 2020, which he submitted on 1 June 2020. He had been working in February 2020, and intended to start a new job which he had arranged on 5 April 2020. He had access to the internet, as set out above. His ignorance of the law and process I do not consider reasonable or excusable given the circumstances. Any reasonable search of the internet would have revealed both time-limits for claims of discrimination, and how to commence them. The claimed understanding of Tribunal Claims being those in work is not reasonable. There was nothing presented to show that the events on which the claimant founds were such that starting early conciliation was not, by the time he made his grievance on 1 June 2020 when he was complaining at what had happened around the time of his resignation, something he could reasonably have done.

(iii) Why was the claim not presented sooner than it was?

74. I consider that the period of time between midnight on 3 June 2020, the commencement of early conciliation on 27 July 2020 and presenting the Claim Form on 12 August 2020 were reasonably lengthy periods where

the claimant has not proved that it was not reasonable for him, having received the Certificate on 12 August 2020, to have presented his Claim Form within a day, or at least a few days, of that date. That it took until 11 September 2020 to make the application was, I consider, an unduly long period of time from the issue of the Certificate almost a month earlier. It has simply not been adequately explained, and is unreasonably long. His delays were, I consider, unreasonable. These factors, including that at (ii) above, are against allowing the Claim to be received, but are not determinative of themselves.

(iv) Other factors

75. The Claim Form does not explain what claim for disability discrimination is made. When asked about that, the claimant said that he had undertaken internet research, but was not able to set out clearly what claims were made, and why. From his description he appeared to accept that the resignation was not affected by the disability he claims to have suffered from, but latterly he said that had he not been disabled he would have been treated differently, and that others who were not disabled were not treated the same way as he was. It appears to me unlikely that his resignation was in law (under section 39 of the 2010 Act in this instance) a dismissal. For there to be a dismissal requires, amongst other factors, repudiatory conduct by the employer which the employee accepts, such that that conduct is the reason for the resignation. Here it seems most likely that the dispute over what led to suspension, and issues of pressure put on the claimant, he says, to resign, were background, and that he resigned when he had a new job to go to, as he then thought.

76. In so far as there may be issues of discrimination by detriment prior to that, or any issue connected to any potential dismissal which are discriminatory, it seems most likely that the claims are for direct discrimination and discrimination arising out of disability, but the basis for them is simply not clear from the claimant's description of events. The claimant resigned when he had, at that time, a new position to go to. He was given the chance to reconsider, and then confirmed that he would resign when the notice pay position was confirmed. He was asked to explain what his

disability discrimination claims were, but did not do so to any extent clearly.

77. I consider from all that was said that even if the claimant is a disabled person, his claim or claims have very little prospects of success. There has been nothing said that links the treatment he received with his disability in any understandable way. The argument appears to be that as he is disabled, and there was treatment he complains of, therefore there was disability discrimination. That is not sufficient in law. If the claim is more than that it was not articulated either in the Claim Form, or in his emails to the Tribunal as referred to, or during the hearing before me.

78. There is a strong public interest in having discrimination claims heard when within the jurisdiction of the Tribunal, as set out in authority, and it requires a very clear case for a strike out of such a claim on the basis of no reasonable prospects of success, but doing so is permissible and there are examples of that being done. I am not engaged in that exercise, but I consider that it is a matter that may be taken into account when assessing the question of what is just and equitable.

79. The prospects of success are one of the factors that may be considered, and in this case I consider that they are at best very low, and as matters stand if the claim is permitted to proceed, the respondent may well succeed in a claim for strike out on the basis of no reasonable prospects of success even if the claimant is accepted to be a disabled person.

80. When considering the balance of hardship therefore, to dismiss the claim for want of jurisdiction appears to me to cause little hardship to the claimant, as his claim has such limited, if any, prospects of success, whereas the hardship to the respondent (or CH4 if substitution is permitted) of allowing it proceed would be material, given the time and cost of defending such a claim.

(v) Assessment

81. Taking all the circumstances into account I do not consider it to be just and equitable to allow the claim to proceed late, and it is outwith the jurisdiction

of the Tribunal accordingly. The claimant is not, on the information he has given, likely to be a disabled person. He is not likely to have been dismissed. He is not likely to have a claim of disability discrimination in any sense. He did not act reasonably in relation to the pursuit of the Claim, and it is materially late without sufficiently good reason for that. The respondent would suffer hardship in having to spend time and money in responding to the Claim, and that hardship is greater than that suffered by the claimant in not being able to advance the Claim he has made for discrimination.

82. I must therefore dismiss that Claim as being outwith the jurisdiction of the Tribunal under section 123 of the Equality Act 2010.

(vi) Substitution

83. In light of the findings above I do not require to address the issue under Rule 34, but had I done so I would have held that it was in accordance with the terms of the Rules to have allowed that application. The respondent is the parent of CH4. CH4 is and was the correct respondent as being the claimant's employer.

Conclusion

84. The claimant's claims of unfair dismissal and disability discrimination are not within the jurisdiction of the Employment Tribunal and must therefore be dismissed.

Employment Judge A Kemp
Employment Judge

14 January 2021
Date of Judgment

Date sent to parties **27 January 2021**