EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs M Mpotalingah	**AND**	**Wiltshire County Council**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol (by CVP) ON 11 May 2021

EMPLOYMENT JUDGE: J Bax

Representation

For the Claimant: **Mr N Brockley, counsel**
For the Respondent: **Mr M Edgar, solicitor**

RESERVED JUDGMENT

The judgment of the tribunal is that:

1. The claims of unfair dismissal and breach of contract were presented out of time and it was not reasonably practicable for them to have been presented in time. They were not presented within a reasonable period thereafter. The Tribunal did not have jurisdiction to hear the claims and they were struck out.

2. The claim of detriment for making a protected disclosure was presented out of time and it was reasonably practicable for it to have been presented in time. The Tribunal did not have jurisdiction to hear the claim and it was struck out.

3. The claims of discrimination on the grounds of race were presented out of time and it was just and equitable to extend time in relation to the last allegation, namely the dismissal of the Claimant's appeal. The issues of conduct extending over a period and whether time should be extended for the earlier allegations shall be determined at a final hearing.

REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not the claimant's claims of unfair dismissal, automatically unfair dismissal, breach of contract in respect of notice and detriment for making protected disclosures and discrimination on the grounds of race were presented in time.

Background

2. The Claimant started her employment with the Respondent on 4 February 2019 and it ended on either 11 or 13 March 2020. On 19 June 2020 the Claimant notified ACAS of the dispute and the certificate was issued on 22 June 2020. The Claimant presented her claim on 30 August 2020.

3. The claim form set out that the Claimant identified as black. The allegation for which the Claimant dismissed involved her and one of her children.

4. The claim form detailed that the Claimant relied upon protected disclosures made in her rebuttal document to the Respondent's allegations and in the grievance which she had raised.

5. The Claimant did not have two years' service and therefore her unfair dismissal was one of automatically unfair dismissal under s.103A of the Employment Rights Act. She also confirmed that she was bringing claims of detriment for having made a protected disclosure.

6. It was clarified that the Claimant was bringing claims of direct discrimination harassment and victimisation on the grounds of race and religion or belief.

7. From the claim form the full nature of the discrimination or detriment claims was not apparent and therefore the allegations required clarification before the question of time could be considered. Further it was not clear what the timeline of events was. The solicitor for the Respondent had difficulty identifying what was being alleged and the dates of the incidents. Counsel for the Claimant confirmed that the last allegation of discrimination and/or detriment was the rejection of the Claimant's appeal on 15 May 2020. The parties agreed that full evidence would need to be heard in order to determine whether there was conduct extending over a period and whether it would be just and equitable to extend time and there had been no provision for the Respondent to provide witness evidence at the preliminary hearing. The parties agreed that the lack of clarity in the claim form and clarification at the hearing was a material change of circumstances. It was therefore agreed to determine whether the last alleged acts of detriment and/or discrimination were presented in time and that if they were the

Respondent could argue that there was not conduct extending over a period and/or time should be extended for the other allegations after hearing all the evidence at a final hearing.

8. The Claimant and her husband gave evidence. The Claimant had not provided any medical evidence in support of her application to extend time. The order listing the hearing only permitted the Claimant to rely on documentation in her possession. The parties agreed that given the nature of the Claimant's case and the difficulty that she had in identifying dates that she should obtain her medical records and provide the relevant parts to the Respondent and Tribunal. It was agreed with the parties that after receipt of the medical records the parties would make written submissions and a decision would be provided in writing.

The evidence

9. I heard from the Claimant, and from Mr Mpotalingah on her behalf. The Respondent did not adduce any evidence. I was provided with a bundle containing the pleadings and a witness statement by the Claimant. I was also subsequently provided with extracts from the Claimant's medical records and written submissions from both parties.

The facts

10. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

11. Mr and Mrs Mpotalingah are both immigrants, with permanent leave to remain in the United Kingdom.

12. On 20 September 2019, Claimant was signed off from work with a mixed anxiety and depressive disorder. Her medical notes recorded that she was struggling to sleep, had low mood, but that there were not any suicidal thoughts. She was signed off work and prescribed mirtazapine. She was reviewed by her GP on 1 October 2019 and was considered unfit to return to work and continued taking mirtazapine. On 15 October 2019, the Claimant reported to her GP that she thought the mirtazapine was helping, but they did not want to increase the dose.

13. On 17 October 2019, the Claimant attended an interview with the Respondent to discuss the allegations made against her.

14. On 21 October 2019, the Claimant attended a further interview following which she was suspended. The Claimant's evidence was that after the

meeting she suffered a mental breakdown and cried inconsolably for days. She attended her GP on 1 November 2019, and it was recorded that the Claimant's husband was very supportive, and she saw her sister and friends if she was feeling very down. By this stage she was eating well and sleeping well since starting mirtazapine. It was considered that there was no risk of self harm. The Claimant was advised that if she started feeling very low, depressed or had thoughts of self harm she should urgently see her GP. At this time the Claimant was engaging with IAPT for stress and mood management. The Claimant's evidence that she had a mental breakdown at this stage was inconsistent with the description she gave to her GP. It was likely that she was suffering from a low mood, but that her recollection of when her mental breakdown occurred was mistaken.

15. On 27 November 2019, the Claimant had an appointment with her GP, and it was recorded that, 'sleep was not so good', but her mood was 'not so bad'. She remained unfit to work due to stress.

16. On 31 December 2019, the Claimant had an appointment with her GP and said that she planned to return to work in the new year. She still felt low but did not want to increase her medication. The Claimant had started counselling. She remained unfit to return to work.

17. On 6 March 2020, the Claimant attended a disciplinary hearing.

18. On 11 March 2020, the Claimant was sent a letter informing her that she was being summarily dismissed. The Claimant could not recall when the letter was received but said it was probably on 13 March 2020. No finding of fact is made in this respect, but for the purpose of the preliminary hearing it is assumed that it was received on 13 March 2020.

19. The Claimant's evidence was that by the time she attended the disciplinary hearing and was informed that she was dismissed she was unable to function properly, her confidence was shattered and she was having suicidal thoughts. She was not eating, would sleep all day and did not want to get out of bed. She became unable to take care of her own personal care needs or those of her children. The Claimant spoke to her GP on the telephone on 26 March 2020. The notes recorded that she had submitted an appeal. She had not been sleeping for 3 days. That her husband was supportive, but that she did not tell him much. She had been eating a lot. She was worried about finance. She had thoughts that she did not want to go on, but also said that was not the right answer and had no plans or intent or thought as to what she would do. There had not been previous self-harm. The Mirtazapine was increased to 30mg. The GP record was consistent with the Claimant having suicidal thoughts and I accepted that she was having such thoughts after her dismissal. I did not accept that the Claimant was not eating at this stage. I accepted that the Claimant had disturbed

sleep and she was very upset by the nature of the allegations which involved her child. The Claimant felt helpless and was unable to do anything independently and came to rely on her husband for to look after her and their children. After about two months the Claimant was able to take her children to school, cook and shower herself. The Claimant's unchallenged evidence, which I accepted was that she had some knowledge of unfair dismissal but was uncertain about time limits or the need to enter into early conciliation. She also thought that she had to wait for her appeal to be heard before she could bring a claim.

20. When the country went into the first national lockdown due to the covid 19 pandemic, the effect on the Claimant was that she became more withdrawn. Whenever she started to think about a claim against the Respondent she struggled.

21. On 23 April 2020, the Claimant requested an increase of amitriptyline from her doctor, but the dosage was kept the same.

22. The Claimant's husband lodged an appeal against dismissal on her behalf and provided a rebuttal document to the allegations. The Claimant was not able to do this due to her mental state. Those documents were created by Mr Mpotalingah and a friend of his and the Claimant had very little involvement in the process.

23. On 13 May 2020, the Claimant attended her appeal against dismissal hearing, by remote means. She was sent the outcome on 15 May 2020 and the original decision was upheld. After the appeal the Claimant was unable to properly function and was not able to engage in daily life activities at home and was unable to help her children with their schoolwork. The Claimant started sleeping most of the time. At this stage Mr Mpotalingah took time off work to look after the Claimant and the family. I accepted Mr Mpotalingah's evidence that the Claimant would have mood swings and was unpredictable and that therefore he took time off work because he was not sure what would happen.

24. Mr and Mrs Mpotalingah were also worried about the prospect of being left without a home and the effects of the first national lockdown meant that there were additional concerns and pressures regarding the schooling of their children, and this caused the Clamiant to become more withdrawn. The Claimant was also facing a hearing before her professional body, Social Work England, which added further to her distress and mood.

25. At the end May 2020, Mr Mpotalingah spoke to relatives about the Claimant's welfare, due to his level of concern for her. As a result, he started, with the Claimant's consent, to look into how to bring a claim on behalf of his wife. I accepted that the Claimant was unable to properly

understand the significance of the discussions at the time. As a result, Mr Mpotalingah started to look for a ‘no win no fee’ employment lawyer to assist his wife. He spoke to a solicitor at about this time, but was not advised about any time limits. During his searches online he became aware of ACAS.

26. On 19 June 2020, Mr Mpotalingah notified ACAS of the dispute on her behalf and at that stage he was unaware of the time limit. On speaking to ACAS, he found out that there were time limit and that they ran from the date of the dismissal and he then knew that the claim was late.

27. After speaking to ACAS Mr Mpotalingah panicked and tried to find someone who could help. He was unable to undertake much research in relation to what to do, due to his concerns with what was happening to his family and the need to look after them. A barrister, not Mr Brockley, was instructed to provide advice, although details of that advice were not provided to the Tribunal. Mr Mpotalingah’s evidence was that as a result of the conversation with ACAS he thought that the time limits had stopped, because he had entered into early conciliation. This was not challenged by the Respondent, however it was unlikely given that he was panicking to find someone who could help, and it was inconsistent with his understanding that the claim was late, and I did not accept that evidence.

28. The Claimant’s evidence was that at this stage she had started sleeping most of the time and she had become paranoid and very suicidal. She would lock herself in the bedroom and wanted to stay in the dark. At this time the Claimant was unable to write a letter or make any decisions for herself. She was unaware when her husband had contacted ACAS and could not remember when she decided to bring a claim. I did not accept that the Claimant was suicidal at this time, her assertion is inconsistent with the medical record dated 26 August 2020. However, I accepted that she was scared and was often tearful and sad and that she had a tendency to lock herself in her bedroom. I accepted that she was not able to properly make decisions for herself and was unable to write documents at this stage.

29. In early July 2020, the Claimant and her husband decided that a claim should be made, however the Claimant felt unable to complete the claim form herself due to her mental state. Mr Mpotalingah believed that he needed legal advice to bring the claim. Mr Brockley was subsequently instructed, and he drafted the claim form, which was presented on 30 August 2020.

30. When giving evidence the Claimant suggested that at the time of presenting the claim she was still suicidal and that she she started to receive counselling after it had been presented. She said it was not until counselling started that the suicidal thoughts or the need to sleep and stay in a dark room started to improve. I did not accept that evidence. The medical record

for 26 August 2020 recorded side effects from the Mirtazapine, but no diagnosis of major mood disorder. In terms of mood, by that time she had some good days and some bad days. Sleep was good, she was often tearful and feeling sad and sometimes scared. There had only been one episode of thoughts of self-harm some time ago. It was planned to reduce the dose of mirtazapine by half for a week and then stop using it and replace it with sertraline. On 27 August 2020 the Claimant was assessed and scored as having medium anxiety and depression. In the letter dated 23 October 2020 it was recorded that she still was suffering from low mood and anxiety, she was using techniques learnt in cognitive behavioural therapy at the end of 2019 and was motivated to restart work. It was recorded that there was a large improvement over the previous 2 months.

31. The Claimant's account is contradicted by the medical records. On the balance of probabilities, the Claimant's mental state, by the beginning of July 2020, had improved and she was able to agree that a claim should be brought. She was suffering from a moderate level of depression and anxiety at the time the claim was presented. She was having good days and bad days during August 2020 and at the time of presenting the claim the claimant was still tearful on occasions. She was not suicidal at these times. The Claimant was mistaken in her recollection about when counselling started. I accepted that the Claimant was still impaired by anxiety and depression during August 2020, however her decision making ability had improved, as demonstrated by agreeing that a claim should have been brought. I did not accept that she was still having to stay in a darkened room, because something so significant would have been recorded. I was not satisfied that the Claimant's inability to make decisions or write letters extended beyond the end of July 2020.

32. The Respondent did not adduce any evidence of prejudice or hardship if time was extended and did not make any submissions in relation to the same.

The Law

33. s. 48(3) ERA provides: An employment tribunal shall not consider a complaint under this section unless it is presented—
(*a*) before the end of the period of three months beginning with the date of 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 that period of three months.
(4) …

34. Section 111(2) of the ERA provides that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

35. Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides: [Subject to [[article 8B]], an employment tribunal] shall not entertain a complaint in respect of an employee's contract claim unless it is presented—
(*a*) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or
(*b*) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or
[(*ba*) …
(*c*) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.

36. Section 120 of the Equality Act 2010 ("EQA") confers jurisdiction on claims to Employment Tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

37. With effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings. The claims brought by the Claimant were relevant proceedings within the meaning of s. 18 of the Employment Tribunals Act 1996.

38. Section 207B of the Employment Rights Act 1996 (there are a similar provision in the EQA and Extension of Jurisdiction Order) provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B

is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

39. Where the EC process applies, the limitation date should always be extended first by S.207B(3) or its equivalent, and then extended further under S.207B(4) or its equivalent, where the date as extended by S.207B(3) or its equivalent is within one month of the date when the claimant receives (or is deemed to receive) the EC certificate to present the claim (Luton Borough Council v Haque [2018] ICR 1388, EAT). In other words, it is necessary to first work out the primary limitation period and then add the EC period. Then ask, whether that date is before or after 1 month after day B (issue of certificate)? If it is before the limitation date is one month after day B, if it is afterwards it is that date.

Unfair dismissal, detriment and breach of contract

40. The question of whether or not it was reasonably practicable for the claimant to have presented his claim in time is to be considered having regard to the following authorities. In Wall's Meat Co v Khan [1978] IRLR 499, Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances [1974] 1 All ER 520) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the claimant, see Porter v Bandridge Ltd [1978] IRLR 271 CA. In addition, the Tribunal must have regard to the entire period of the time limit (Wolverhampton University v Elbeltagi [2007] All E R (D) 303 EAT).

41. In Palmer and Saunders v Southend-on-Sea BC [1984] IRLR 119 the headnote suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the Industrial Tribunal taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, in determining whether or not it was reasonably practicable to present the complaint in time, an Industrial Tribunal may wish to consider the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike,

or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases, the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit. The Industrial Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used. Contrary to the argument advanced on behalf of the appellants in the present case and the obiter dictum of Kilner Brown J in Crown Agents for Overseas Governments and Administrations v Lawal [1978] IRLR542, however, the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time. The views expressed by the EAT in Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204on this point were preferred to those expressed in Lawal:-

42. To this end the Tribunal should consider: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of her rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.

43. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) concluded that "reasonably practicable" does not mean reasonable (which would be too favourable to employees), and does not mean physically possible (which would be too favourable to employers) but means something like "reasonably feasible".

44. Subsequently in London Underground Ltd v Noel [1999] IRLR 621, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing

so. As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of practicability … the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204).

45. A debilitating illness may prevent a Claimant from presenting a claim in time, however usually it will only constitute a valid reason if supported by medical evidence and support that it prevented the Claimant from presenting the claim in time. The EAT in Midland Bank plc v Samuels EAT/672/92 held, that if a person asserts that they were unwell it is up to them to produce medical evidence of the extent and effect of the illness. However, as observed in Norbert Dentressangle Logistics Limited v Hutton EATS/0011/13, medical evidence is not an essential factor, but it is a desirable one. In Hutton the EAT held that it was difficult to see what help the medical evidence would be in the circumstances of that case. In Schultz v Esso Petroleum Co Ltd [1999] ICR 1202, in which the Claimant had a disabling illness at the end of the limitation period, the Court of Appeal held that although it was necessary to consider what could have been done, during the whole of the limitation period, attention should be focused on the closing stages rather than the earlier ones.

46. In Schultz it was found that the Claiamnt was sufficiently well to instruct solicitors in the first seven weeks of the limitation period, but that his health deteriorated by reason of depression and was too ill to give instructions to his solicitors. The court of appeal held at p1209G to 1210D

“I consider the approach of the industrial tribunal was flawed for two reasons. First, I consider that, as I have stated, it runs counter to the observations of May L.J. quoted above. Second, in accepting that the absence of disabling illness after 11 September 1996 was ipso facto decisive of the overall question, the industrial tribunal failed to have regard to the fact that, whenever a question arises as to whether a particular step or action was reasonably practicable or feasible, the injection of the qualification of reasonableness requires the answer to be given against the background of the surrounding circumstances and the aim to be achieved. In a case of this kind the surrounding circumstances will always include whether or not, as here, the claimant was hoping to avoid litigation by pursuing alternative remedies. In that context the end to be achieved is not so much the immediate issue of proceedings as issue of proceedings with some time to spare before the end of the limitation period. That being so, in assessing whether or not something could or should have been done within the limitation period, while looking at the period as a whole, attention will in the ordinary way focus upon the closing rather than the early stages. This seems to me to be so whether the test to be applied is that of simple reasonableness or, as here, reasonable practicability.

Thus, while I accept Mr. Wynter's general proposition that, in all cases where illness is relied on, the tribunal must bear in mind and assess its effects in relation to the overall limitation period of three months, I do not accept the thrust of his third submission, that a period of disabling illness should be given similar weight in whatever part of the period of limitation it falls. Plainly the approach should vary according to whether it falls in the earlier weeks or the far more critical later weeks leading up to the expiry of the period of limitation. Put in terms of the test to be applied, it may make all the difference between practicability and reasonable *practicability in relation to the period as a whole. In my view that was the position in this unusual case. The way in which the industrial tribunal expressed its decision indicates to me that it had its focus wrong and, in the light of the primary findings of fact which it made, misdirected itself, in its approach to the question of reasonable practicability."*

47. A Claimant's complete ignorance of his or her right to claim may make it not reasonably practicable to present a claim in time, but the Claimant's ignorance must itself be reasonable. As Lord Scarman commented in Dedman v British Building and Engineering Appliances Ltd [1974] 1 All ER 520*, CA*:

"*…does total ignorance of his rights inevitably mean that it is impracticable for him to present his complaint in time? In my opinion, no. It would be necessary to pay regard to his circumstances and the course of events. What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would not be appropriate to disregard it, relying on the maxim "ignorance of the law is no excuse." The word "practicable" is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance. But what, if, as here, a complainant knows he has rights, but does not know that there is a time limit? Ordinarily, I would not expect him to be able to rely on such ignorance as making it impracticable to present his complaint in time. Unless he can show a specific and acceptable explanation for not acting within four weeks, he will be out of court.*"

48. Where ignorance of the time limits is claimed, the question is whether that ignorance was reasonable. In John Lewis Partnership v Charman UKEAT/0079/11, it was accepted that it would not be reasonable if the Claimant ought reasonably to have made inquiries about how to bring an Employment Tribunal claim, which would have inevitably put them on notice of time limits. The question comes down to whether the Claimant should have made such inquiries immediately following his dismissal.

49. It was held in Trevelyans (Birmingham) Ltd v Norton [1991] ICR 488, that "…*where an applicant has knowledge of his rights to claim unfair dismissal before an industrial tribunal, then there is an obligation upon him to seek information or advice about the enforcement of those rights*…. *Third, that if his advisers give him unsound advice or fail to give him proper advice, or fail to give him advice on a relevant issue, then the failure of those advisers is the failure of the applicant and does not provide a good excuse for the escape clause*."

50. Counsel for the Claimant referred me to Lowri Beck Services Ltd v Brophy UKEAT/0277/18/LA, which was upheld on appeal. The Claimant in that case was severely dyslexic and relied heavily upon his brother for matters of an official nature. On 29 June 2017, the Claimant was informed by telephone that he was being dismissed with immediate effect and did not tell his brother about the dismissal until he received the letter confirming the same on 6 July 2017. ACAS were contacted on 29 September 2017, the certificate issued on 13 November 2017 and the claim was presented on 5 December 2017. It was concluded that the Claimant's brother had misunderstood when the effective date of termination was, and that the Claimant had been reliant on him. It was concluded that it was reasonable for the Claimant to hand over matters to his brother and it was not reasonably practicable to have presented the claim in time. This was not interfered with on appeal.

51. Underhill P, as he then was, considered the period after the expiry of the primary time limit in Cullinane v Balfour Beattie Engineering Services Ltd UKEAT/0537/10 at paragraph 16: "The question at "stage 2" is what period - that is, between the expiry of the primary time limit and the eventual presentation of the claim - is reasonable. That is not the same as asking whether the claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted - having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months."

Discrimination

52. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service IRLR 434 CA that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can

justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of discretion is the exception rather than the rule". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require exceptional circumstances: it requires that an extension of time should be just and equitable - *Pathan v South London Islamic Centre EAT 0312/13*.

53. Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13 before the Employment Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was.

54. However, As Sedley LJ stated in Chief Constable of Lincolnshire Police v Caston at paragraphs 31 and 32: “In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it.”

55. In exercising its discretion, tribunals may have regard to the checklist contained in S.33 of the Limitation Act 1980 (as modified by the EAT in *British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT*). S.33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case and in particular ,
    a. the length of and the reasons for the delay.
    b. the extent to which the cogency of the evidence is likely to be affected by the delay.
    c. the extent to which the party sued has cooperated with any requests for information
    d. the promptness with which the claimant acted once he knew the facts giving rise to the cause of action.

e. the steps taken by the claimant to obtain appropriate professional advice.

56. In *Department of Constitutional Affairs v Jones 2008 IRLR 128, CA*, the Court of Appeal emphasised that these factors are a 'valuable reminder' of what may be taken into account, but their relevance depends on the facts of the individual cases, and tribunals do not need to consider all the factors in each and every case. In Adedeji v University Hospitals Birmigham NHS Foundation Trust [2021] EWCA Civ 23, the Court of Appeal did not regard it as healthy to use the checklist as a starting point and that rigid adherence to a checklist can lead to a mechanistic approach to what is meant to a very broad general discretion. The best approach is to assess all factors in the particular case which it considers relevant to whether it is just and equitable to extend time including in particular the length of and reasons for the delay. If the Tribunal checks those factors against the list in Keeble, it is well and good, but it was not recommended as taking it as the framework for its thinking.

57. A Tribunal considering whether it is just and equitable to extend time is liable to err if it focuses solely on whether the claimant ought to have submitted his or her claim in time. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other: *Pathan v South London Islamic Centre EAT 0312/13* and also *Szmidt v AC Produce Imports Ltd* UKEAT 0291/14.

58. No one factor is determinative of the question as to how the Tribunal ought to exercise its wide discretion in deciding whether or not to extend time. However, a claimant's failure to put forward any explanation for delay does not obviate the need to go on to consider the balance of prejudice.

Conclusions

Unfair dismissal, detriment and breach of contract claims

When should the claims of unfair dismissal and breach of contract have been presented?

59. For the purpose of this hearing, it was assumed that the Claimant was dismissed on 13 March 2020 and therefore the claim should have been presented by 12 June 2020, subject to pausing by reason of early conciliation via ACAS. The Claimant notified ACAS on 19 June 2020, which post-dated the primary limitation date and therefore she did not get the benefit of any extension of time for the early conciliation period. The claim form was presented on 30 August 2020 and was therefore presented 11 weeks 2 days out of time.

When should the detriment claim have been presented?

60. The appeal was rejected on 15 May 2020 and therefore the claim should have been presented by 14 August 2020, subject to pausing by reason of early conciliation via ACAS. The Claimant notified ACAS of the dispute on 19 June 2020 and certificate was issued on 22 June 2020, which would have had the effect of pausing time for 3 days and providing a new limitation date of 17 August 2020. The claim was presented on 30 August 2020 and was therefore presented 13 days out of time.

Was it reasonably practicable for the Claimant to have presented her claim in time?

61. The Claimant's case was that she was medically unfit to present the claim in time and that her husband had mistakenly believed that after contacting ACAS time had stopped. Counsel for the Claimant identified, very fairly, in his written submissions that it would be an easier task if the Tribunal could conclude that the Claimant's impairment persisted up to 30 August 2020, but that it was not easily reconciled with the medical evidence. Further that the level of delegation to Mr Mpotalingah was not straightforward given the Claimant's agreement to bring a claim in July 2020.

62. The Claimant was always aware of the ability to claim unfair dismissal. However, after she was dismissed her mental health significantly declined and she became reliant on her husband to look after her and her children. The Claimant's husband lodged the appeal against dismissal on her behalf and I accepted that the Claimant was unable to prepare those documents at the time. Mr Mpotalingah had taken over responsibility for the Claimant's arrangements for the internal process. The Claimant was fit enough to attend the appeal hearing, however the outcome caused a relapse in her mental health, which was sufficient for Mr Mpotalingah to take time off work to look after his family. The Claimant's mental health, as of the end of May 2020, was such that she was not functioning properly, and she was unable to properly make decisions or write documents. At the end of May 2020, Mr Mpotalingah, with his wife's consent, started making enquiries on her behalf about bringing a claim and I accepted that the Claimant was unable to properly understand the significance of the discussions at the time. At the time Mr Mpotalingah contacted ACAS on 19 June 2020, the Claimant had delegated to her husband the responsibility of investigating how she could claim. Up to this point the Claimant was mentally prevented from complying with the time limit and Mr Mpotalingah was unaware of it. The Claimant and her husband were in a difficult situation and Mr Mpotalingah was trying to look after his family and research into the Claimant's claim at the same time. Although the Claimant had been aware of the concept of unfair dismissal, she was not aware of the time limits and as of the 19 June 2020 it was not reasonably practicable for her to have presented her claim.

63. The Claimant's belief that she needed to internally appeal before bringing a claim was relevant to a limited extent, in that the appeal outcome was given within the time limit and by 19 June 2020 and her husband was informed by ACAS that the time limit had expired.

64. After speaking to ACAS, the situation changed. Mr Mpotalingah was aware that the time limit had expired. He panicked and sought advice and received some from a barrister, however no evidence as to the nature of that advice was given. I rejected that he had thought that the time limit had stopped, because he was already aware that the claim had not been presented in time. Mr Mpotalingah was able to look for people to advise him and therefore it was reasonably feasible for him to search online as to how to make the claim. The Claimant was still not able to make decisions for herself as of 19 June 2020, but things had changed by early July 2020 when she was able to decide with her husband that she wanted to bring the claim. The Claimant's agreement to bring a claim was significant. From this time the Claimant's descriptions of the effects of depression were contradicted by her medical records and the Claimant inability to make decisions or write letters did not extend beyond the end of July 2020.

65. The Claimant had delegated responsibility to her husband whilst she was suffering with the worst effects of her depression and anxiety, however from the beginning of July 2020 she started assuming responsibility again. Until the Claimant was able to make an informed decision about bringing a claim, Mr Mpotalingah was aware of the time limits, but had not agreed with her that the claim should be presented. Until the beginning of July 2020, it was not reasonably practicable for the Claimant to have presented the claim. She was prevented from doing so by reason of her mental health, she had not agreed to bring the claim and Mr Mpotalingah, although aware that the time limit for unfair dismissal had expired was also very concerned about the Claimant's and his family's wellbeing.

66. From July 2020 the Claimant's mental health continued to improve. I was not satisfied that the Claimant's inability to make decisions or write documents extended beyond the end of July. The Claimant and her husband were aware that the time limits had expired. I accepted that the Claimant and her husband are immigrants, but rejected that it was reasonable to believe that further legal advice was required before bringing the claim. Mr Mpotalingah had undertaken research before online and discovered ACAS and it would have been reasonably feasible for them to make enquiries online as to how to present the claim.

67. If the Claimant had made such enquiries a reasonable time by which she should have presented her claim was by 8 August 2020.

68. Accordingly, although it was not reasonably practicable for the Claimant to have presented her claims of unfair dismissal and breach of contract within the time limit, she failed to present her claim within a reasonable period thereafter.

69. The claim of detriment should have been presented by 17 August 2020. It was reasonably feasible for the Claimant and her husband to have made he same enquiries as to presenting her claim of unfair dismissal and breach of contract. Accordingly, it was reasonably practicable for her to have presented this claim in time.

70. Accordingly, the Tribunal does not have jurisdiction to hear the claims because they were presented outside of the time limits. In relation to the detriment claim it was reasonably practicable to have presented the claim in time and in relation to the unfair dismissal and breach of contract claims it was not reasonably practicable to have presented them in time, but they were not presented within a reasonable period thereafter. The claims were therefore struck out.

<u>Race Discrimination claims</u>

When should the claims have been presented?

71. The last alleged act of discrimination was the rejection of the Claimant's appeal on 15 May 2020 and therefore the claim should have been presented by 14 August 2020, subject to pausing by reason of early conciliation via ACAS. The Claimant notified ACAS of the dispute on 19 June 2020 and certificate was issued on 22 June 2020, which would have had the effect of pausing time for 3 days and providing a new presentation date of 17 August 2020. The claim was presented on 30 August 2020 and was therefore presented 13 days out of time.

Was it just and equitable to extend time?

72. The claims were presented 13 days out of time. If time was not extended the Claimant would be prevented from bringing her claim. The Respondent did not adduce any evidence, or make any submissions, in relation to hardship it would suffer if time was extended. Given the short delay, and in the absence of any evidence, it was highly unlikely that the Respondent would be put to any forensic prejudice in terms of loss of witnesses or evidence. The refusal to extend time would therefore put the Claimant to more hardship that the Respondent.

73. Further the Claimant's mental health prevented her from presenting her claim until she had recovered sufficiently by the end of July 2020. It was further understandable that Mr Mpotalingah was mainly concerned with the

wellbeing of his family until July 2020, at which point the Claimant's health started to improve. Mr Mpotalingah thought they needed legal advice to present the claim, that advice was eventually provided by Mr Brockley at the end of August and the claim was presented. Although it was reasonably feasible for the Claimant and her husband to have undertaken their own research it is relevant that they were otherwise litigants in person and the substantive advice was only received shortly before the claim was presented.

74. In the circumstances, taking into account the short delay in presenting the claim, the lack of prejudice/hardship experienced by the Respondent, the nature and extent of the Claimant's mental health difficulties and the need to deal with cases justly and fairly, the balance falls in favour of the Claimant. It was therefore just and equitable to extend time for the presentation of the discrimination claim in relation to the allegations of discrimination arising from the appeal. The Tribunal, at the final hearing will need to consider whether the earlier allegations of discrimination formed conduct extending over a period culminating in the appeal decision and if not whether it was just and equitable to extend time in relation to those matters.

Employment Judge J Bax
Date: 22 June 2021

Judgment & Reasons sent to the Parties: 25 June 2021

FOR THE TRIBUNAL OFFICE