# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
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| Ms I Cetin | v | 1. A Limited<br>2. Mr B.C. |

# OPEN PRELIMINARY HEARING

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| **Heard at:** | Watford Employment Tribunal by CVP | **On:** | 27 November 2020 (judge in chambers) and 2 June 2020 (fully remotely) |

**Before:** Employment Judge George (sitting alone)

**Appearances:**

**For the Claimant:** In person
**For the Respondents:** Mr D.E. - Director of the First Respondent and husband of the Second Respondent

# JUDGMENT

1. It was reasonably practicable for the claims of unlawful detriment on grounds of protected disclosure contrary to s.47B of the Employment Rights Act 1996 (hereafter referred to as the ERA) to be presented within the time limit specified under s.48(3) of the ERA and/or they were not presented within a reasonable time thereafter.

2. The claim as presently worded does not include a complaint of unlawful detriment on the ground that action was taken or was proposed to be taken by or on behalf of the claimant with a view to enforcing the right to be paid the national minimum wage of contrary to s.23 of the National Minimum Wage Act 1998.

3. It was not reasonably practicable for the claim of automatic unfair dismissal under under s.103(A) of the Employment Rights Act of an automatic unfair dismissal to be made within the time limit specified under s.111 of the ERA but it was not presented within a reasonable time thereafter.

4. It was reasonably practicable for an unauthorized deduction from wages claim in relation to underpayment of national minimum wage to be presented within three months of the payment from which the alleged deduction was made as

prescribed by s.23 of the ERA. Alternatively, it was not presented within a reasonable time thereafter.

5. The above claims under the ERA were not brought within the applicable time limits and therefore, the employment tribunal does not have jurisdiction to hear them. There are no reasonable prospect of the claims succeeding and the claims against both respondents under the ERA 1996 and NMW Act 1998 are struck out under rule 37 of the Employment Tribunal Rules of Procedure 2013.

6. The claim of harassment and discrimination claim on grounds of sex and race were not brought within three months of the act complained of and it is not just and equitable to extend time under s.123(1)(b) EQA.

7. The claim of victimization was not brought within three months of the act complained of and it is not just and equitable to extend time under s.123(1)(b) EQA.

8. The above claims under the EQA were not brought within the applicable time limits and therefore, the employment tribunal does not have jurisdiction to hear them. There are no reasonable prospect of the claims succeeding and the claims against both respondents under the EQA are struck out under rule 37 of the Employment Tribunal Rules of Procedure 2013.

9. The Employment Tribunal does not have jurisdiction to hear complaints under the Data Protection Act 2018 or the Human Rights Act 1998.

# REASONS

## Background

1. The claimant started work on 14 November 2016 as a live in Nanny caring for the children of the second respondent and Mr D.E.. She was employed through a company run by Mr D.E.. After being given one months' notice, her employment ended on 23 June 2017. She therefore did not have enough qualifying service to be entitled to the right not to be unfairly dismissal under s.94 of the Employment Rights Act 1996 (hereafter the ERA).

2. She brought an employment tribunal claim in London Central Employment Tribunal against a subsequent employer, Melanie Marenge-Lejeune, in May of 2018 and a letter was disclosed to her within the disclosure of documents in those proceedings. She says she received it in October 2018. This caused her to discover, as she has explained to the tribunal, that actions had been taken against her by the respondents to this claim, her previous employer and the second respondent, whom she claims acted on behalf of her previous employer, that she considered needed action on her part.

3. She made a data subject access request at the end of October 2018. She subsequently complained to the Information Commissioners Office, either that that month or the following month, about alleged disclosure of information to her subsequent employer (see para.9 of the particulars of claim). She also says that she discovered through her investigations concerning her claim against Mrs

Griffiths because her employer, Mrs Marenge-Lejeune, is also known by her married name, Mrs Griffiths.

4. She discovered during the course of preparing for those proceedings that she regarded herself as not having been paid national minimum wage as a Nanny employed by the current respondents. The claimant argues that she was contracted to be paid to take a lunch break and not be paid for her lunch break but, in reality, she was unable to take it. This is the matter that was the subject of an HMRC investigation in December 2018. This ultimately led to an award being made in her favour on 30 April 2019 of £52.72 that they have satisfied, although it is fair to say that the claimant disputes that that is the correct amount. She alleges that untruths were told by the current respondents as part of the investigation and that in fact she should have been awarded more money.

5. Early conciliation in the present proceedings took place between 11 and 12 November 2019 and the claim was accepted by the Tribunal on 12 November.

6. The respondents defended and their ET3 was accepted on 11 December 2019.

7. A notice of open preliminary hearing was sent out on 8 February, this is because the respondent had in their ET3 argued that the claim was out of time and for all claims to be struck out. They also queried whether it was right that the claim should be brought against Mr B.C. because they said that the employer had been A. Limited and Mr B.C. was not the claimant's employer. They pointed out that the claimant had not appealed against the ruling of the HMRC in relation to her National Minimum Wage claim, arguing that action could not be taken both in the Tribunal and through HMRC, nor had the ICO thought it necessary to take action against them.

8. The claimant applied to strike out the ET3 on 17 February on the basis that she said it did not respond in full to her allegations and the employment tribunal decided that it was not proportionate to do so and rejected that application on 10 April.

9. Case management orders were made by Employment Judge Heal, sent to the parties on 19 April 2020, directing that in relation to each of the claimant's post-employment discrimination and whistleblowing claims she must send the employment tribunal and respondents a list setting out in numbered paragraphs what was the act of discrimination or whistleblowing detriment, when did it happen and how and when did she find out about it.

10. The claimant responded to that request for further and better particulars on 11 May 2020 and she applied by letter dated 18 June 2020 for further information from the respondent. She said in paragraph 3 of that letter that she had recently been contacted by the police and had been told by them that the respondent had filed a complaint of harassment against her for communicating with them because of this claim through the tribunal and also because of an application and witness statement that she had sent to them after being directed to do so by the Family Division of the High Court.

11. It appears that the claimant's intervention into the family proceedings was a voluntarily one made in family proceedings by which the respondents applied for parental orders in relation to their children. To the extent that the claimant complains about actions taken by the respondents in family proceedings, it seems to me that, subject to my decision on whether the claims are out of time, the principal of judicial immunity from suit may be relevant.

12. The claimant did not in so many words apply to amend her claim but a generous reading of the email of 16 June 2020 to the employment tribunal would be that she wished to include this complaint about the respondents having gone to the police as an allegation. She says:

> "Complaining to the police about me for trying to deal with the respondent's conduct since last year is unreasonable and worrying. This is a post-employment continued act to harm me. They also want to harm my reputation and affect my DBS"

13. She confirmed that during the course of the preliminary hearing on 27 November 2020 hearing that she had found out that the complaint had been filed with the police on 15 April 2020. The claimant expressly applied to amend her claim on 13 November 2020 by an email in which she said that, so far as the contents of her further and better particulars were not in the ET1, she wished to apply to add them by amendment. To be clear, the claimant is complaining about what she alleges to be an additional visit to the police by Mr D.E. and the second respondent to that which she infers happened prior to issue of proceedings which is referred to in paragraph 14 of the particulars of claim.

14. I had indicated that I would decide the issues that had been listed for hearing by the notice of 8 February, namely whether to consider the strike out on the grounds that the claim is out of time and has no reasonable prospects of success before, if necessary, going on to hear consider the amendment application. As it turned out, I heard submissions from both parties in the alternative so that when I was reserved the decision I was able to consider all of the matters. If I were to decide that the claims should be struck out, then the application to amend would fall away.

15. I did remind the parties and in particular the respondent of their duties under Rule 92 to copy each other into any correspondence. The claimant has been vexed by not having received two letters dated 3 and 13 February 2020 that was sent by the respondent to the employment tribunal which I read out to her. When she heard the contents, she agreed that she was not at any disadvantage proceeding with today's hearing despite not having received those letters.

16. She also stated during argument that perhaps Mr D.E. should be a respondent because she seemed to assert, or certainly did not agree, that in reality she was employed by A Ltd but was employed as a Nanny with the formalities of her employment being arranged through A Ltd. She apparently received a contract of employment indicating that she was in administration or Administrative Assistant which she denied. No application had been made to add or substitute Mr D.E.as a party.

17. When considering my decision in this case, I realised that I had omitted to see whether the parties were aware of the Tribunal's powers under rule 50 of the

Employment Tribunals Rules of Procedure 2013 to make an order to prevent or restrict the public disclosure of any aspect of the proceedings in so far as it is necessary to do so in the interests of justice. The claimant claims that she was dismissed and suffered post-employment detriments because she was a whistleblower. The disclosure of information on which she relies involves an allegation of one or more serious sexual offences against one or more children. I understand from what both parties said that the police dismissed the allegations. The second respondent is the father of the children. He and his husband, who represented both respondents at the hearing, were the alleged perpetrators. It seemed to me that it would not be possible for me to explain my decision without reference to the nature of the alleged disclosures and therefore that the parties ought to have the opportunity to consider whether or not to make applications under rule 50. I caused the Tribunal to write to them and both parties made competing applications. I therefore caused the claim to be listed for a further preliminary hearing at which I heard and determined those applications and made anonymity and restricted reporting orders for reasons which are provided separately. Unfortunately, that has led to a delay in the judgment in the preliminary issues. I delivered that judgment with reasons orally on 2 June 2021 and the claimant requested written reasons at the hearing.

**The Issues in the claim**

18. The claim form, in Box 8, sets out that the claimant is bringing the following different kinds of complaint.

    a. Unfair dismissal,

    b. Discrimination on grounds of race and sex

    c. Post-employment discrimination, victimisation and harassment under the Equality Act,

    d. obtaining using and sharing personal data in an unauthorised way under GDPR and DPA 2018,

    e. breach of rights under The Human Rights Act,

    f. breach of contract for failing to pay National Minimum Living Wage and

    g. whistleblowing under Public Interest Disclosure Act 1998.

19. The particulars of claim were provided in a separate document that ran to 18 paragraphs and formed the basis of the discussion at the public preliminary hearing on 27 November 2020. The format of that public preliminary hearing was that it was necessary for me to take evidence from the claimant about the reason for the delay in bringing claims, because no evidence about that had been presented in advance, but it was also necessary for me to clarify with her exactly which were the specific acts that she alleged against each of the respondents and how she alleged them to be unlawful; what kind of legal claim which the Tribunal has jurisdiction to hear did she intend to bring by the narrative set out in her particulars of claim and further particulars provided on 11 May 2020. I

therefore proceeded by asking the claimant to be affirmed so that anything that was said by way of explanation could be said on oath and incorporated her evidence and discussion by way of me asking questions and the claimant answering which led to the preparation of a list of factual allegations.

20. Her narrative intertwines with complaints against her subsequent employer, Mrs Griffiths, who is the respondent in another claim as I have already said. At times, it is difficult to separate out the allegations that she makes against Mrs Griffiths and those that she makes against these respondents. Much of what the claimant alleges is based upon her inference from what she has found out in the course of the proceedings against Mrs Griffiths. She complains that the respondents have not cooperated with her enquiries. Nevertheless, it was possible to draw up the following list of specific actions which do include at least one that is not yet in the claim form and which is the subject of the amendment application. These were read out to the claimant and she accepted that they represented the gist of her present complaints.

    a. First, the claimant alleges that she was dismissed because of a protected disclosure with effect from 23 June 2017.

    b. Next, she alleges that there was a detriment on grounds of protected disclosure by the respondents writing a letter to Mrs Griffiths in about September 2018 that she found out about in October or November 2018.

    c. Next, she alleges that at some point prior to 1 November 2019, the second respondent and Mr D.E. subjected her to a detriment when they volunteered information about her to Mrs Griffiths and alleged to the latter, the subsequent employer, that the claimant's employment had been terminated on the advice of the police because of the claimant's reports to them of child abuse. She alleges in paragraph 11 of her narrative particulars of claim that she found out this information because it was contained in Mrs Griffiths' application for reconsideration of a costs order awarded in the claimant's favour in the Tribunal proceedings between them. The way that the claimant explained this allegation in her evidence is that the respondents told Mrs Griffiths that they volunteered to give her information about the claimant because it was a public duty and shared file number for the Parental Order Application (see also paragraph 1 of the claimant's further particulars dated 11 May 2020). The claimant had made allegations of child abuse which resulted in police, medical, and social services investigations. All allegations were dismissed. According to the respondents, the police advised them to terminate the claimant's employment immediately. The claimant does not know when that action is said to have taken place by the respondent. The respondent says that, in reality, all that information available to claimant from the letter of October 2018 (from which I quote in paragraph 42 below).

    d. The next specific allegation is that of subjecting the claimant to a detriment by supporting her subsequent employer (Mrs Griffiths) against the claimant in her own employment tribunal claim. In reality the facts

relied upon are the same as those set out in paragraph 20.b. and c. I deal with the alleged date of knowledge below.

*e.* Next it is alleged that the respondents (or, the second respondent and Mr D.E.), provided untrue information about the claimant in support of their own application for a parental order at the Family Court. In the present application, I am concerned primarily with whether the complaint was presented in time, however reliance upon acts done within the Family Court proceedings seem to me to be potentially affected by the principal of judicial immunity from suit.

f. Next, it is alleged in paragraph 14 of the narrative claim form, that the respondent went to the police and she accuses the respondents of supporting Mrs Griffiths against her. She says, and this is in paragraph 14:

> "Some of their communications suggest Mr [D.E.] and Mr [B.C.], highly likely complained to the police about me post-employment just like Ms Mareuge-Lejeune did. I get a disclosure and barring check from my employments and they seem to have wanted to create suspicion about me after I left the job. They used the notion of parenting and vulnerability of children to attack my personality, prospects and livelihood."

g. She then complains that the respondent shared sensitive information about her without checking the identity of the person to whom they were sending it. She refers in relation to this to the forwarding a payslip to Mrs Griffiths and alleging that they had given her disciplinary warnings when she says that that was untrue. In reality, it is difficult to see that this is different to information she may have discovered when finding out about the letter of October 2018 because the letter refers to those details.

h. And in paragraph 18 of the particulars of claim there is an allegation that reads as follows:

> "Mr [B.C.] made degrading comments about women during my employment. He was trying to teach the children supremacy over females even at their young age. He likened himself to a chicken husband in relation to the nurses in the hospital he part-manages nurses. He laughed about "terrorizing chickens" he ridiculed women such as the other nannies they employed, Mr [D.E.'s] female friends, the surrogate mother who carried the twins. His attitude towards me was derogatory, rude and verbally aggressive. Mr [B.C.] looked down upon Turkish and Kurdish people where this ethnic group formed the biggest sub-group in the community where they lived. He had a hierarchical view of races which he used as a basis for relating to people."

21. There is then the application to amend the claim to allege that the detriment by the respondent filing a complaint of harassment with the police against her on 15 April 2020. It may be that that is the date on which the claimant alleges she found out from the police about the actions of which she complains.

22. The racial group that the claimant relies on is that she is Kurdish.

<u>The victimisation claim</u>

23. The alleged protected act is not particularized in the claim form. As explained to me the claimant relies upon her claim against Mrs Griffiths in the London Central Employment Tribunal. She told me, although I have not seen any paperwork connected with this claim, that it was originally included allegations of discrimination (and referred to a race discrimination claim) but by September 2018 she put it, "It had been decided" that it would be a claim of failure to pay national minimum wage. I asked her whether she was going to to be able to prove that the respondents knew that it had been an Equality Act 2010 claim at some point and the claimant replied; "not unless they cooperate and tell me".

24. She sought to argue that she had been subjected to a detriment on the grounds that she had brought a National Minimum Wage Act 1998 claim against Mrs Griffiths (hereafter referred to as the NMW Act 1998). This is not how the claims are articulated in the present claim form. She would need to bring a claim alleging a breach of s.23 of the NMW Act 1998. The claim would be brought under ss.24(1) and (2) of the NMW Act 1998. By reason of s.24(2) of the NMW Act 1998, the provisions of s.48 of the ERA apply. Therefore, any such claim should have been presented within the time limit specified under s.48(3) of the ERA. In other words the Tribunal may not consider a claim of breach of s.23 of the NMW Act 1998 brought more than 3 months of the act complained of unless it was not reasonably practicable to do so and the claim was presented within a reasonable further period. I am not aware of any authority that deals with the question whether such a claim can be brought in relations to post-employment detriments but that is not something which needs to be considered at this stage.

25. On a fair reading of the claim form as a whole, in particular paragraph 17 which refers to the actions being "post employment victimisation, harassment and discrimination […] covered by Equality Act 2010 and EHCR (sic)" my view is that there is presently no claim of unlawful detriment on the ground that action was taken or was proposed to be taken by or on behalf of the claimant with a view to enforcing the right to be paid the national minimum wage of contrary to s.23 of the National Minimum Wage Act 1998. The reference is to a victimization claim under the EQA 2010 and not to a detriment claim under the NMW Act 1998.

26. The claimant is presumed to have intended that any acts that she complains about, which post-date the bringing of the claim against Mrs Griffiths, were acts of victimization contrary to s.27 of the EQA. Those are the same allegations relied upon as post-employment acts of detriment on grounds of protected disclosure.

<u>The sex discrimination, race discrimination and harassment claims</u>

27. The claimant confirmed during the course of the hearing that this related to paragraph 18 of the particulars of claim alone which I have already quoted. She alleges that those were breaches of s.13 and 26 of the EQA 2010. They are therefore subject to the time limit set out in s.123 of the same Act.

<u>Whistleblowing</u>

28. The claimant alleges that she was subjected to dismissal and detriment because of a disclosure of information that she had made in March and then again in May 2017. She alleges that she called the NSPCC telephone line and made serious allegations. The detail of what she said to the NSPCC in those calls has not been gone in to today. If there is a full merits hearing in this matter the employment tribunal would have to consider whether or not she made a disclosure of information which, in the reasonable belief of the claimant, was in the public interest and tended to show that a crime had been committed, or was being committed, or, alternatively, that the health and safety of another had been, or was being, endangered.

29. I have not explored with the claimant in detail which particular sub-section of section 43(B) she was relying on, but the way that the communication to the NSPCC was described by both parties has the potential to amount to a disclosure of information that falls within 43(B)(1)(a) – that a criminal offence is being committed. As I say, I do not need to decide that today as it is not relevant to either issue that I have to decide. Therefore, it seems that the claimant will be relying upon having made a qualifying disclosure to a prescribed person in accordance with s.43(F) of the ERA. She had made no previous communications to the first respondent of substantially the same matters and, indeed, said to me that she had been told not to do so.

30. Since she is relying upon s.43F ERA, the claimant needs, in addition to the usual elements, to show that she reasonably believed that the information disclosed and any allegations contained in it are substantially true. If she were unable to do that, she would not succeed in her argument that the communication of information was a protected disclosure. The NSPCC are prescribed in the schedule to the relevant statutory instrument (SI 2014/2418) for matters that are set out in the schedule and the claimant will need to show that she reasonably believed that it fell within their remit. Again, that is not a matter which I need to determine today but, based upon the description of what was communicated, it seems potentially to fall within the remit of the NSPCC.

**Applicable Time Limits**

31. Having explored the nature of the claims brought by the claimant, it therefore seems to me that the following protected disclosure claims are subject to the time limit test of reasonable practicability:

    a. Post-employment whistleblowing detriment claims brought under s.48 of the ERA 1996. The specific acts relied on would appear to be the following:

        i. The September 2018 letter that was disclosed to the claimant in October 2018.

        ii. Potentially, actions separate to and postdating that letter prior to 1 November 2019. The claimant's description of what these acts might be was vague and overlapped with the detail in the 2018 letter. The principal additional information – as pleaded – is that the respondents informed Mrs Griffiths that the police had told them to dismiss her.

iii. Supporting her next employer, Mrs Griffiths, in the employment tribunal claim between the claimant and Mrs Griffiths.

iv. Providing information in support of their own application for a Parental Order to the Family Division about the claimant that was untrue.

v. Sharing sensitive information about the claimant to Mrs Griffiths without checking that Mrs Griffiths was a former employer.

vi. Reporting the claimant to the police and using information from another employer that was false (referred to in paragraph 14 of the narrative particulars). If the amendment is permitted, then that would be another instance of the same type of behaviour.

*b.* A claim under s.103(A) of the ERA 1996 of an automatic unfair dismissal.

32. Furthermore, the claimant complains of underpayment of national minimum wage. The claimant argues that she was contracted to take an unpaid lunch break but, in reality, she was unable to take it and was, therefore, paid less than national minimum wage. This is the matter that was the subject of an HMRC investigation that made an award against the respondent that they have satisfied. According to the respondent in the ET3, the claim was raised in December 2018, investigated and the claimant was awarded £52.72 on 30 April 2019. They argue that the claimant should not be permitted additionally to complain about the same alleged breach of s.1 of the NMW Act 1998 to the Employment Tribunal.

33. The complaint could either be brought as an unauthorized deduction from wages claim or as a breach of contract claim under art.3 of the Employment Tribunals (Extension of Jurisdiction) Order 1994. As an unauthorized deduction from wages claim it is brought under s.23 ERA 1996. In the case of the latter, the complaint has to be brought within three months of the date of the last deduction – in the present case that would be within three months of the last payment of salary/wages. The ET has no jurisdiction to hear a complaint brought more than three months unless it was not reasonably practicable to bring it within time and it was brought within a reasonable further period. In the case of a complaint under art.3 of the Extension of Jurisdiction Order 1994, the complaint must be brought within three months of the end of the employment, unless it was not reasonably practicable to do so. Therefore exactly the same questions arise.

34. I set out the statutory provisions relating to time limits from the EQA 2010 below. They are very different to those found in the ERA 1996 or the Extension of Jurisdiction Order 1994. Claims to which that, more flexible, time limit applies include complaints of direct race and sex discrimination (under s.13 of the EQA) and sex and race related harassment (contrary to s.26 of the EQA) as set out in para.18 of the particulars of claim (see paragraph 20.h. above). The victimisation claims (contrary to s.27 of the EQA) should also have been brought within the time limit set out in s.123 of the EQA.

**Law Relevant to the Open Preliminary Hearing**

35. The power to strike out a claim on the ground that it has no reasonable prospect of success comes from rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013. It is a power to be exercised sparingly, particularly where there are allegations of discrimination. In the case of Anyanwu v South Bank University [2001] IRLR 305 HL, the House of Lords emphasised that in discrimination claims the power should only be used in the plainest and most obvious of cases. It is generally not appropriate to strike out a claim where the central facts are in dispute because discrimination cases are so fact sensitive.

36. That said, where it is plain that a discrimination claim has no reasonable prospects of success (interpreting that high hurdle in a way that is generous to the claimant), then the tribunal does have and, in a plain and obvious case, may use the power to strike out the claim so that the respondent and the tribunal system are not required to spend any more resources on a claim which is bound to fail.

37. Such as case might be one which the Tribunal has no jurisdiction to hear because it was not presented within the time specified. For discrimination, harassment and victimisation claims that means the time limit provided in s.123 of the EQA. For present purposes, that section provides that, subject to the effect on time limits of early conciliation, proceedings on a complaint within Part 5 of the EQA (which relates to employment) 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."

38. The discretion in s.123(2) to extend time is a broad one but it should be remembered that time limits are strict and are meant to be adhered to. The burden is on the claimant to persuade the Tribunal that the discretion should be extended in her favour: Robertson v Bexley Community Services: [2003] I.R.L.R. 434 CA. There is no restriction on the matters which may be taken into account by the tribunal in the exercise of that discretion and relevant considerations can include the reason why proceedings may not have been brought in time and whether a fair trial is still possible. The tribunal should also consider the balance of hardship, in other words, what prejudice would be suffered by the parties respectively should the extension be granted or refused?

39. In British Coal Corporation v Keeble [1997] IRLR 336 the EAT advised that tribunals should consider, in particular, the following factors:

    (a) the length of and 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 had cooperated with any requests for information;

    (d) the promptness with which the claimant had acted once he or she had known of the facts giving rise to the cause of action; and

(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she had known of the possibility of taking action.

29. This was reiterated by the Court of Appeal in Southwark London Borough Council v Afolabi [2003] I.R.L.R. 220 CA and, more recently, in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23. However, the factors to be taken into account depend upon the facts of a particular case. It is not necessary that the Tribunal should be satisfied that there is a good reason for the delay before finding that it is just and equitable to extend time although the explanation will always be relevant: Abertawe Bro Morgannwg University v Morgan [2018] I.C.R. 1194 CA. Furthermore, one of the most significant factors to be taken into account when deciding whether to set aside the time limit is whether a fair trial of the issue is still possible (Director of Public Prosecutions v Marshall [1998] ICR 518). In Baynton v South West Trains Ltd [2005] ICR 1730 EAT, it was observed that a tribunal will err if, when refusing to exercise its discretion to extend time, it fails to recognise the absence of any real prejudice to an employer. This is part of considering the balance of prejudice and in doing so, the Tribunal may have regard to the potential merits of the claim: Rathakrishman v Pizza Express (Restaurants) Ltd [2016] I.R.L.R. 278. There is prejudice to a respondent having to respond to an apparently unmeritorious claim which is out of time. Conversely, there is prejudice to a claimant in being deprived of the opportunity to litigate an apparently meritorious one.

40. Claims of unauthorised deduction from wages under s.23 of the ERA, detriment under s.44 and automatically unfair dismissal brought under s.103A are all subject to the same time limits. To avoid repetition, I refer to that applicable to s.103A - s.111 of the ERA. Again, by reason of s.111 (2 A), subject to the effect of early conciliation,

> "the 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 complaints to be presented before the end of that period of three months."

41. When the Tribunal is considering whether it has jurisdiction to consider a complaint which was not presented within the applicable three months' time limit (as extended, if applicable, by reason of early conciliation), it must first consider whether it was reasonably practicable for the claim to be presented within three months of the act complained of and, if not, consider whether it was presented within a reasonable period thereafter. The burden of proof in relation to both stages is on the claimant. 'Reasonably practicable means more than merely what is reasonably capable physically of being done but less than simply reasonable. When considering the claimant's explanation for the delay, the employment tribunal needs to investigate what was the substantial cause of the claimant's failure. Examples of situations where it might not be reasonable practicable to present the claim in time were given by Brandon L.J. (as he then was) in Walls Meat Co Ltd v Khan [1979] I.C.R. 52 CA at paragraph 44,

> ''The performance of an act. . .is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such

performance. The impediment may be physical, for instance the illness of the complainant or a postal strike: or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such enquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him."

**Date of knowledge and reasons for the claimant's delay**

42. The claimant says that she received a letter that the respondents had sent to her, subsequent employer, Mrs Griffiths, when she received disclosure of documents within that litigation in about October 2018. It was also in the final hearing bundle in November 2018. So far as material it reads as follows:

> "In response for your request for clarification regarding a PAYE tax of £280.40 regarding the employment of Mrs Ilkay Cetin please find her latest payslip in attachment where you can see evidence of that payment.
>
> I wish to take the opportunity to draw your attention to the circumstances around her employment and why her contract was terminated.
>
> During the interview she gave us a good impression and she showed us some reference letters but she was unable to provide us with any contact numbers of her ex employer. The reason she gave is that her last employer was "divorced mum who was abusive towards her son and therefore she thought it would not be appropriate if we contacted her for a job reference".
>
> We decided to give her the job but we started to have concerns about her performance and we raised them with her.
>
> Shortly after we discussed those concerns with her the police visited our house. The reason was that she had reported us to Social Services alleging child abuse. The police said that there were many inconsistencies and fabrications in her report but still, the children had to be examined in the hospital. The charges were dismissed but at the time we went through the Parental Order process in order to have the parental rights of our twins who were born through surrogacy. Ms Cetin's allegations risk to compromise the Parental Order and caused us profound distress and humiliation.
>
> In the following months we have received a couple of emails from Ms Cetin expressing unhappiness about her dismissal and how this would have a bad impact on our children. Soon after receiving these emails we have decided to move to another borough as we were concerned she had our address and she knew our children's habits. On 25 May 2018 we have received a third email, but this time asking for £1,815.56 due to "owed lunch breaks" during her employment with us the previous year. She also stated in this email that "this calculation doesn't include the help I offered on weekends and holidays. I did extra on those days so the children couldn't suffer negligence as I consider it my gift to them".
>
> Please do not hesitate to contact me in order to get further clarification about this matter."

43. The claimant accepts that she knew in general terms that there is a three-month time limit for presenting employment tribunal claims at least by May 2018 which was when she presented the claim against Mrs Griffiths.

44. It was clear from her oral evidence that the claimant had known about the allegations that she raises in paragraph 18 of her claim form, at the time she left employment because she says that they happened during the course of employment. I asked the claimant to explain why she had not presented her claim about those matters sooner. Her explanation was that this:

> "…is difficult to prove, there are a lot more important matters, these things happened, I can say I didn't bring them before because of the nature of what I'm saying here they are part of what happened and they are important in that sense."

45. It therefore seems to me that the claimant knew everything that she needed to know in order to bring a complaint based on the matters that occurred during the currency of her employment, both in terms of the acts alleged and the ability to complain about them, at the time that she left and certainly no later than May 2018 when she decided to bring the complaint at the employment tribunal against a subsequent employer.

46. At the time of her dismissal she knew that the police had visited the home because of her report to the NSPCC. She was present. She says that she was given alternative reasons for her dismissal, namely that she had not accompanied the family on holiday to Spain and that she was not getting on in her job. She had not told the respondents about her report to the NSPCC and the gist of what she said was that at that point she therefore believed they were unaware of it and did not have the information from which to suspect that they had dismissed her because of it.

47. The respondents allege that the police told them at the time that they came and investigated but the claimant has denied this. She denies that she knew enough by the time of the October 2018 letter to challenge the reason she was given for her dismissal. She expanded on that in her letter to the tribunal, 18 June 2020. She says in that (see her paragraph 2) that she is asking for information against the respondents:

    a. At para.2.a. she stated that the former employers claim that the respondents volunteered a vast amount of information because they think it's a public service to warn them against her and she would like the respondents to confirm or deny it and give details.

    b. At para.2.b. she says, "My other former employer say that the respondents claim they were told by the police to sack me immediately". She claims that the police divulged who had reported the respondents for child abuse - "I would like them to confirm or deny and explain the circumstances around these conversations".

    c. At para.2.c. "My other former employer claims that the respondents have been unable to obtain a Parental Order until she talked to their social workers and, in essence, smeared my name to help them. I would like

the respondents to confirm, deny and explain the circumstances around these events".

d. Para.2.d. "The respondents were contacted for the first time by my other former employer when I brought a claim against them nearly two years ago. The respondent shared my confidential information and documents with these people. They gave a defamatory letter that made allegations against me. It is undated. I would like them to explain the circumstances surrounding the events."

48. This is not information which the claimant is lacking in order to make her allegation against the respondents. She complains that the respondents have not put in a full defence stating which of her allegations they admit and which they deny. She seeks to find out their case but already has the information available which forms the basis of her allegations. It is hearsay information which she has gleaned from the other Tribunal proceedings against Mrs Griffiths and which has led her to make a claim against these respondents.

49. However, in her further and better particulars, the claimant does argue that she found out more information about the alleged activities of these respondents on 1 November 2019 in a letter Mrs Griffiths sent asking for reconsideration of a costs order. She refers (paragraphs 1 and 2) to allegations behind her back to the authorities ie.e the police; misleading the Family Division. Furthermore, she complains that the respondents refused a request that they confirm that they were the authors of the letter which I have quoted from above and complied only in part with a DSAR. The respondents say the DSAR was on 30 October 2018 and that the ICO took no action against them. The claimant alleges in FBPs para.4 that additional information was provided after her complaint to the ICO and dates these matters to spring and early summer of 2019.

50. In oral evidence, the claimant gave further information about legal advice that she had received and said that she had been unaware until November 2019 that it was possible to complain about post-employment detriment on grounds of protected disclosure and that she had found out by reading a LAG book in October 2019. She had been to a number of different advisers. She mentioned having obtained advise through the Free Representation Unit as it was then called and also, she paid a solicitor on exchange of documents in October 2018 when she received the letter that I have quoted from. The claimant's evidence was that she only understood that there was a right to complain about a data protection breach and did not understand it was possible to complain about post-employment detriment on grounds of protected disclosure.

51. It is argued by the respondent that in reality the claimant knew everything by way of the October 2018 letter that they had communicated to Mrs Griffiths and that there was nothing of substance further that she found out through the reconsideration application.

52. I explained to the claimant and she accepted that the Employment Tribunal does not have jurisdiction specifically under the Data Protection Acts 1998 or 2018 or under the Human Rights Act 1998 if allegations of contraventions of those Acts do not additionally amount to breaches of Acts under which the Employment Tribunal does have jurisdiction.

**Conclusions**

53. I accept the respondents argument that the letter which she received through disclosure in her Employment Tribunal litigation against Mrs Griffiths contained enough information to enable her to know the following information which forms the essential basis of her present complaints. By reason of that, and her knowledge of events at the time, the claimant was aware no later than October 2018

    a. That the police had visited their house because the claimant had reported the respondents for child abuse. These allegations risked compromising the parental order application.

    b. Mr D.E. had apparently authored a letter to Mrs Griffiths outlining this information because he wanted to "draw your attention to the circumstances around her employment and why her contract was terminated." This leads to a potential inference that the reason for the dismissal was the matters set out in the letter (including knowledge that the claimant had made an allegation of child abuse against the second respondent) and not the reasons which the claimant had been originally given.

    c. By this letter, Mr D.E. was providing information to Mrs Griffiths.

54. It seems to me that the real reason why the claimant did not bring the central claims of automatically unfair dismissal and detriment arising out of any correspondence from the respondents to Mrs Griffiths as soon as she was aware of the correspondence was that she may not have known that it was possible to complain of post-employment detriment on grounds of whistleblowing. However, she had a number of opportunities and, indeed, did take legal advice. She knew through the receipt of the October 2018 letter all of the information essentially about which she now complains and certainly, she knew enough information to be able to raise the allegation that the dismissal was because of her report to the NSPCC. Any reasonable ignorance was removed at that point. Even in relation to the alleged detriment by making a complaint to the police she says in her claim form "some of their communications suggest Mr [D.E.] and Mr [B.C.] highly likely complained to the police about me post employment" which suggests that it was the correspondence within the litigation which lead to this inference. Therefore, it was incumbent upon her to bring proceedings within a reasonable period after that point because, at that point, her ignorance of what she needed to know in order to bring a claim was lifted.

55. It therefore seems to me that she was aware of all of the matters giving rise to the post-employment detriment claim at the time she found out about the actions complained of. Although it may not have been reasonably practicable for her to complain of automatically unfair dismissal on grounds of protected disclosure within three months of the dismissal, I do not think that she has brought a claim within a reasonable period of October 2018, when she had a basis for thinking that the dismissal was because of her complaint to the NSPCC. This is particularly so, given what she knew about the timetables for bringing unfair dismissal claims because she would certainly have known that she had the right to bring an unfair dismissal claim against the respondents.

56. I conclude that it was reasonably practicable for the complaints of unlawful detriment on grounds of protected disclosure and automatically unfair dismissal to have been presented within three months of October 2018 when the claimant received the letter from Mr D.E. to Mrs Griffiths which removed any reasonable ignorance about the matters which underpin her right to claim. The claimant infact contacted ACAS on 11 November 2019, nearly 12 months later.

57. It was reasonably practicable for the complaints of unauthorized deduction from wages to be brought within three months of the last payment of her wages approximately the termination of employment in 2017. Even taking into account ignorance of the legal right to complain about the alleged failure to allow her to take unpaid lunch breaks and the impact of that upon her rate of pay, there is no satisfactory explanation of her failure to present a claim within three months of her actual knowledge of the potential infringement, which was in about May 2018. She chose to complain to HMRC but could additionally have brought ET proceedings at that time.

58. The complaints of sex and race discrimination and harassment relate to allegations that date from within the employment itself. They must, therefore have predated 23 May 2017 (the claimant dates them from shortly after the return from Spain) but the claimant contacted ACAS on 11 November 2019 more than two years later. The is no coherent explanation as to why the claimant did not complain at the time or within three months of her dismissal. These factual allegations do not form any part of the request for information of the respondent and therefore the claimant's allegation that they have not cooperated with her request for information does not apply. It seems to me that there is likely to be prejudice to the respondents in having to respond to allegations made for the first time so long after the event. It is not that I make a presumption that the cogency will be affected without evidence to support that, it is that, the particular circumstances of the combination of the delay before making the allegation and lack of previous complaint which would have alerted the respondent to the need to make investigations mean that the reliability of the evidence is likely to have been adversely affected. It seems to me that the balance of prejudice is against exercising my discretion in the claimant's favour.

59. The claimant also complains about post employment victimization on the ground of the alleged protected act of her litigation against Mrs Griffiths which is said, initially at least, to have included a discrimination element. At this preliminary hearing I am concerned with whether those claims have been presented within time. I am not primarily concerned with the prospects that the claimant would be able to show evidence from which it might be inferred that the reason why, for example, Mr D.E. and the second respondent wrote to Mrs Grifitths was on the ground that the claimant had brought a complaint under the Equality Act 2010 against Mrs Griffiths rather than, for example, that she had made allegations of child abuse against them in the past. The claimant frankly said that she would be relying upon the respondents' cooperation to admit that they knew that the claim against Mrs Griffiths was a protected act under the EQA. However, it is a relevant consideration that the merits of that argument appear weak. That is because, when balancing the relative prejudice between the claimant and respondent, there is prejudice to a respondent in having to respond to an apparently weak claim. That should be set against the public interest in discrimination and victimization claims being fairly and openly adjudicated upon

and the clear prejudice to the claimant if she is unable to pursue her claims. This prejudice is tempered by the apparent improbability of the respondents having acted on grounds of the nature of the litigation against Mrs Griffiths when such personal and disruptive allegations had been made by the claimant about them.

60. As I found above in relation to the protected disclosure claims, I find that the claimant knew all of the facts which she needed to know in order to bring a victimisation claim at least by the October 2018 receipt of the letter from the respondents through disclosure in the other proceedings. Taking all of the above matters into account, my conclusion is that it would not be just and equitable to extend time in relation to the victimization claims.

61. Since I have concluded that the claim is out of time and should be struck out because the ET has no jurisdiction, I do not need to go on to consider the application to amend.

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**Employment Judge George**

21 June 2021

Sent to the parties on:

…….

For the Tribunal:

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