EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107906/20 (V)

Held on 3 May 2021 by CVP

Employment Judge N M Hosie

Mr D Taggart	**Claimant** **In Person**
University of Edinburgh	**Respondent** **Represented by:** **Mr N Maclean - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

(1) the complaints of disability discrimination are time-barred and are dismissed for want of jurisdiction;

(2) the complaint of unpaid holiday pay is time-barred and is dismissed for want of jurisdiction;

(3) the complaint of breach of contract (unpaid notice) is time-barred and is dismissed for want of jurisdiction;

(4) the complaint of detrimental treatment in relation to protected disclosures (whistleblowing) is time-barred and is dismissed for want of jurisdiction, save insofar as the complaints relate to the events of 17 September 2020,18 September 2020 and 18 October 2020;

(5) the claimant is directed, within 14 days from the date this Judgment is sent to the parties, to send to the Tribunal, copied to the respondent's solicitor, Further and Better Particulars of the complaints relating to the events on 17 September 2020, 18 September 2020 and 18 October 2020; and

(6) if so advised, the respondent is directed to respond in writing to the Tribunal, copied to the claimant, within 14 days of receipt of the claimant's Further and Better Particulars.

REASONS

Introduction

1. The claimant was employed by the respondent as a Post-Doctoral Research Fellow between 1 November 2016 and 31 May 2020. He brings complaints of disability discrimination, "whistleblowing", and for notice pay and holiday pay. The claim is denied in its entirety by the respondent and the respondent's solicitor has taken a time bar point.

2. At a case management Preliminary Hearing on 17 February 2021, it was determined that a Preliminary Hearing should be fixed on the time bar issue. The Note which EJ Porter issued following that Hearing is referred to for its terms.

Preliminary Hearing

3. This case called before me, therefore, on 3 May 2021, by way of a Preliminary Hearing, to consider and determine the time bar point. The Hearing was conducted by video conference using the Cloud Video Platform ("CVP").

The Evidence

4. At the Hearing, I heard evidence from the claimant and on his behalf from Ms Marie Graf, a Trade Union "case worker", who was consulted by the claimant. A joint bundle of documentary productions was also lodged ("P").

The Facts

5. Having heard the evidence and considered the documentary productions, I was able to make the following findings in fact, relevant to the time bar issue with which I was concerned. The effective date of termination of the claimant's employment with the respondent was 31 May 2020. He commenced ACAS Early Conciliation on 5 October 2020 and received his Early Conciliation Certificate on 5 November 2020 (P15). The claim form was received by the Employment Tribunal on 16 December 2020.

Grievance

6. The claimant submitted a grievance on 18 February against Professor Stephen Anderton and Dr Alan Serrels. He had the benefit of advice at that time, and throughout the grievance process, from his Trade Union, The University and College Union ("UCU").

7. Following an investigation by the respondent, there was a grievance hearing on 23 July 2020. On 24 June, the claimant had sent a reminder to the respondent concerning the progress of his grievance (P167/168).

8. In the meantime, the claimant had been dismissed by the respondent on 31 May, allegedly on the ground of redundancy.

9. On 30 July 2020, the respondent wrote to the claimant to advise him that whilst his grievance had not been upheld in relation to any one individual, it had been *"partially upheld"*, in some respects, and a number of *"recommendations"* would be made (P265-268).

10. On 13 August 2020, the claimant intimated that he wished to appeal against the outcome of his grievance (P271-279).

11. On 22 August, the respondent issued a "Report on Investigation related to authorship of on paper arising from work in the Serrells Laboratory submitted to Cell Reports" (P269-270).

12. On 17 September 2020, there was an Appeal Hearing.

13. On 28 September 2020, the respondent wrote to the claimant to advise him that his Appeal had been unsuccessful (P280-283).

14. The claimant contacted ACAS a day or so after 28 September 2020 when he was advised that his grievance appeal had been unsuccessful. He said that he was advised by ACAS that the 3 month time limit for submitting an Employment Tribunal claim "ran from the last act of discrimination". He said he understood that the 3 month time limit started to run from 28 September 2020.

15. The claimant had the benefit of Trade Union advice throughout the grievance procedure, He said that he was *"worried about what would happen"* if he had raised an Employment Tribunal claim earlier. As I understand it, the claimant sought further advice from his Trade Union after he was advised that his grievance appeal had been unsuccessful, but he completed and submitted the claim form himself on 16 December 2020. In the claim form he intimated that he did not have a representative (P11).

16. I also heard evidence from the claimant's witness, Ms Graf, a "local branch Trade Union case worker", who the claimant first consulted in February 2020. She accompanied him at the investigation meeting and Grievance Hearing. She said that the claimant's Trade Union, UCU, *"will only provide support if the internal process has been completely exhausted".*

Respondent's Submissions

17. The respondent's solicitor made oral submissions at the Preliminary Hearing and submitted these in writing thereafter. His written submissions are referred to for their terms.

18. He submitted that all of the complaints brought by the claimant were out of time. Accordingly, the issue for me was whether I should exercise my discretion and allow the complaints to proceed: on the basis that it was "just and equitable" to do so in respect of the discrimination complaints and that it had not been "reasonably practicable" to present the remaining complaints of "whistleblowing", holiday pay and notice pay in time.

Discrimination Complaints

19. In support of his submissions in this regard the respondent's solicitor referred to the following cases:-

Bexley Community Centre v Robertson [2003] EWCA Civ 576
British Coal Corporation v Keeble [1997] IRLR 336
London Borough of Southwark v Afolabi [2003] EWCA Civ 15
Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686
Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13
Robinson v Post Office [2000] IRLR 804

20. He submitted that, *"the allegations of unlawful disability discrimination appear to refer principally, and potentially exclusively, to events that occurred during the claimant's employment".* He referred to the claimant's Further and Better

Particulars (P28-30) and identified a number of allegations of *"disability discrimination, bullying, harassment and victimisation"*, which took place in 2018, 2019 or early 2020. He submitted these were, *"all one off, isolated events, and so claims arising from them should have been presented within 3 months of the relevant act or omission (the relevant date)".*

21. From what the respondent's solicitor could ascertain from the claim form and the claimant's Further and Better Particulars, the most recent complaint of unlawful discrimination occurred in April 2020 "*(when interviews were held as part of the grievance process). The investigation Report was issued to the claimant on 14 May 2020 (P70) and included with the Report was a copy of the transcripts from these interviews. A claim in connection with any statements made during these interviews should have been presented by 13 August 2020 (i.e. 3 months after the claimant became aware of this). The claims were not raised until 16 December 2020, and so they are significantly out of time. The claimant was already significantly out of time when he contacted ACAS on 5 October 2020 so the extension of time provisions in s207B of the ERA 1996 do not save this allegation.*

If there is an allegation of unlawful discrimination on 23 July 2020, which is not accepted, then this claim would benefit from an extension of time through ACAS conciliation of one month from the issue of the ACAS Certificate on 5 November 2020 (P15). However, that only gives the claimant until 5 December 2020 and as the claim was not presented until 16 December, it is still late, and on its face, the ET has no jurisdiction to consider it".

"Was the claimant subject to 'conduct extending over a period'?"

22. The respondent's solicitor accepted, with reference to s.123(3)(a) of the 2010 Act, that conduct extending over a period is to be treated as done at the end of that period.
23. He submitted that the test for a *"continuing act"* is set out in ***Hendricks*** which involved harassment over a period of 11 years. At paragraph 52 the Court said, "*The question is whether that is an act extending over a period as*

distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed". He submitted that, "*In short, was the employer responsible for 'an ongoing situation and a continuing state of affairs (paragraph 52) in which the acts of discrimination occurred, as opposed to a series of unconnected or isolated incidents".*

24. In support of his submission that there was, *"a series of unconnected or isolated incidents"* in the present case, the respondent's solicitor said this:-

> *"The claimant's employment with the respondent ended on 31 May 2020. Taking this as the last date that the claimant may have been subject to an unlawful act of discrimination, even if there was a course of discriminatory conduct, the claim should have been presented no later than 30 August 2020. Section 207B of the ERA 1996 does not operate to extend the time limit, as the claimant was already out of time when he contacted ACAS. The claimant has not identified an unlawful act within 3 months of his contact with ACAS on 5 October 2020. The allegations he has identified are not clearly complaints of unlawful discrimination, and in any event are not linked with any previous incidents or alleged unlawful conduct. Accordingly, any argument about a continuing course of conduct is moot because it does not save the claimant's claims.*
>
> *The claimant states in his Further and Better Particulars that at his grievance hearing (held on 23 July 2020), 'substantial amounts and crucial pieces of evidence were disregarded'. The claimant has not particularised the claim he is making against the respondent in this regard. The respondent notes that the claimant complained generally about the fairness of the grievance procedure and its outcome, which was issued on 30 July 2020, but this of itself is not an allegation of unlawful discrimination. However, even if it was, a claim based on this would have had to have been presented by 5 December 2020 and was not presented until 16 December 2020.*
>
> *The respondent does not accept that any claim that its handling of the grievance was unlawful discrimination, far less it amounted to a continuing act of unlawful discrimination".*

"Would it be just and equitable to extend the time limit"

25. In support of his submissions in this regard, the respondent's solicitor referred to ***British Coal, Abertawe and Robinson***.

26. So far as the "factors" identified in ***British Coal*** were concerned, he made the following submissions:

"***The length of and reasons for the delay"***

27. *He submitted that the claim was "significantly out of time". The claim form was submitted on 16 December 2020 which was some 4.5 months after the expiry of the 3 month time limit with the last date of the claimant's employment taken as the "relevant date".* Further, the acts complained of in 2018, 2019 and early 2020 were presented even later.

28. The respondent's solicitor also submitted that the claimant had waited some 6 weeks following the expiry of the ACAS early conciliation to submit his claim form and he was not aware of any new information coming to light in that period. There did not appear to be any reason, therefore, why the claimant could not have submitted the claim in time.

29. He also reminded me that the claimant had the support of his Trade Union, the UCU, throughout the grievance procedure. *"The claimant's position is that the UCU policy is not to present Tribunal applications until an employer's internal procedure is complete. The claimant's Union representative was an experienced representative who was familiar with the time limits applicable to the claimant's case. She acknowledged the UCU policy caused difficulties for the claimant's case on time-bar but felt there was nothing she could do to go against UCU policy. Whether or not this is UCU policy, it is clear from the case law that waiting until an internal procedure is concluded is not a good reason for not presenting a legal complaint within the prescribed time-limit. The knowledge of the UCU representative about time limits is ascribed to the claimant. The UCU's failure is his failure".*

"The extent to which the cogency of the evidence is likely to be affected by the delay"

30. The respondent's solicitor submitted that, *"a number of the allegations took place during the claimant's employment in 2018, 2019 and early 2020"*. He submitted that if the case were to proceed to a Final Hearing the respondent would be required to call witnesses to give evidence about events, "*which took place a long time ago in respect of matters which they would have considered closed at the time or in any event following their involvement in the grievance process in April 2020"*. He submitted that this delay in time might well affect the cogency of the evidence.

"The extent to which the parties sued had cooperated with any requests for information"

31. The respondent's solicitor submitted that, "*no request for information was made as far as we are aware"*.

"The promptness with which the claimant acted once he knew of the possibility of taking action"

32. It was submitted that, "*The claimant did not act promptly even when he knew of the possibility of taking action … he was late to initiate conciliation and then delayed unreasonably in bringing proceedings even after conciliation concluded for no apparent reason. The claimant had access to support via his Trade Union representative throughout the grievance process, he was aware of the time limits or ought reasonably to have been, and he should have acted more promptly to protect his position"*.

"The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action"

33. The respondent's solicitor referred again to the fact that the claimant had the benefit of advice and support from his Trade Union throughout the grievance process. He was aware of the possibility of initiating Employment Tribunal proceedings and his Trade Union representative was aware of the applicable time limits. Further, and in any event, the respondent's solicitor submitted that, "*The claimant is an intelligent and capable individual, familiar with research and complex concepts. The clamant had access to the internet where there is a wealth of information regarding the applicable time limits connected with raising a claim. The claimant would have been perfectly capable of conducting research in order to determine the time limits. Finding out and acting on a time limit for litigation is very much within his competency but yet he did not do so".*

34. The respondent's solicitor then referred to the guidance in ***Abertawe*** that when seeking an extension of time two questions required to be asked: "*The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was"*.

35. The respondent's solicitor submitted that the only explanation provided by the claimant was that he was pursuing an internal grievance appeal. The respondent's solicitor submitted, with reference to ***Robinson***, "*that awaiting the outcome of an unexhausted internal procedure is not an acceptable reason for delaying the presentation of an ET3 …. the EAT in* ***Robinson*** *concluded that Parliament had, 'quite deliberately not provided invariably the running of time against an employer should be delayed until the end of the domestic processes".*

Conclusion

36. In conclusion, the respondent's solicitor said this:-

"*The delay in bringing the claim was not caused by any action or failure to act on the part of the respondent. The respondent will be prejudiced in that it will be put to significant cost and resource in continuing to defend the claims, which look weak in any event, even if they are not dismissed on the basis of time bar. The respondent submits that for all these reasons it would not be just and equitable to extend the time limit".*

Whistleblowing, Holiday Pay and Notice Pay

37. So far as the other complaints were concerned, the respondent's solicitor submitted all of these had been lodged out of time.

38. In support of his submissions in this regard he referred to the following cases:-

GMB v Hamm EAT 0246/00
Porter v Bandridge Ltd [1978] ICR 943
Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73
Arthur v London Eastern Railway Ltd [2006] EWCA Civ 1358
Palmer and anr v Southend-On-Sea Borough Council [1984] 1WLR1129
Bodha v Hampshire Area Health Authority [1982] ICR 200
Cullinane v Balfour Beatty Engineering Services Ltd 0537/10

39. He submitted that these complaints should have been presented within a 3 month period, "*unless the Tribunal is satisfied that (1) it was not reasonably practicable for them to be presented in time; and (2) that they were brought within a reasonable period thereafter*".

40. He submitted, with reference to ***Porter***, that the onus was on the claimant to satisfy the Tribunal that it had not been reasonably practicable to submit the claim in time.

41. He submitted that the claims for notice and holiday pay were clearly out of time as they should have been made on termination of employment. They should have been presented by 30 August 2020, "*unless an extended period*

had been secured through participation in ACAS EC". However, early conciliation was initiated out of time. These complaints were not presented until 16 December and are therefore "*significantly out of time*".

42. So far as the "whistleblowing detriment complaint" was concerned, he submitted that the respondent's position "is more nuanced". He said this in his submissions:-

> "*The claimant makes no mention of whistleblowing in his ET1 (P3-14). In his Further and Better Particulars (P28-33) he provides a number of paragraphs under the heading "Detrimental Treatment because of Whistleblowing" but these paragraphs itemise a number of situations in which it could be said the claimant made disclosures but they don't identify victimisation by the respondent in response to the disclosures. The best the claimant says is that not much was done by the respondent in response to his disclosures: matters he thought were serious, did not seem to be viewed by the respondent in the same way.*
>
> *The paragraph on the authorship issue dated 2 June suggests a complaint in relation to the publication of a scientific paper that day but this is misleading because this issue was already part of the claimant's grievance, which he initiated on 18 February 2020 – i.e. even on the claimant's case there is no suggestion authorship was downgraded because of the claimant's grievance. The grievance came after the claimant was aware the authorship level he was being assigned was less than he believed he deserved.*
>
> *The closest the claimant comes in making an allegation of unlawful victimisation is in relation to the handling of his grievance appeal on 17 September 2020, which he complains was not fair and impartial 'as a result of his whistleblowing' (see final paragraph on P31). He doesn't provide any details as to why he believes it was handled the way it was because of his whistleblowing. Instead he gives a contradictory explanation: he asserts (over the page at top of P32) it was the appeal hearer's intention to absolve Dr Serrels, and the University, of responsibility over what had occurred. Accordingly, even on the claimant's case the motivation of the alleged discriminator was not a discriminatory motive to subject the claimant to a detriment. The case of* ***Jesudason*** *is in point here. In that case the employer sent letters to rebut allegations made by a consultant paediatric surgeon. The Court of Appeal held that although those letters amounted to a detriment to the employee's reputation, the detriment was not done on the grounds of the protected disclosure. The employer had been motivated by an intention to minimise the harm from adverse, and in part misleading, information which the*

employee had chosen to put into the public domain. It was to protect its staff, reassure its patients, and quell the overwhelming media interest. The employer was entitled to respond, even to protected disclosures, in order to rebut allegations against them. If the rebuttal contained misleading statements which constituted a detriment to the worker, it did not follow that the reason for making those statements was the fact that the worker had made a protected disclosure.

If the Tribunal feels that for the purpose of time bar it has to accept that an allegation of whistleblowing detriment in relation to the events of 17 September 2020, then the respondent has to acknowledge that these allegations are in time. However, the respondent contends there is no course of discriminatory conduct connecting any previous allegations to these later allegations. Per the Court of Appeal case of ***Arthur****, for alleged acts of detriment to form part of a series of similar acts, there must be 'some relevant connection between the acts and the 3 month period and those outside it'.*

The claimant also includes in his Further and Better Particulars paragraphs relating to events on 18 September 2020 and 18 October 2020. The respondent's position is that neither paragraph discloses an allegation of unlawful whistleblowing detriment. However, if the Tribunal considers that they do for the purposes of this time bar hearing, then the respondent has to acknowledge that a claim in relation to these events is also in time".

"Would it have been reasonably practicable to present the claim in time"

43. The respondent's solicitor submitted, with reference to the test in ***Palmer***, it would have been reasonably practicable for the claimant to present these complaints in time. He submitted that it would have been, *"reasonably feasible".*

44. He also submitted, with reference to ***Porter*** that, "*the correct test is not whether the claimant knew of their rights, but whether they ought to have known*". He submitted that, *"The claimant was aware of the facts giving rise to the claims, and ought reasonably to have known that he had a right to bring a claim in the ET. The claimant was employed by the respondent as a Post-Doctoral Research Fellow, and is an intelligent individual. He had access to the internet where there is a wealth of information regarding the applicable time limits connected with raising a claim, and he had support from*

his Trade Union representative throughout the grievance process. He could easily have sought advice at an earlier stage, in order to submit his claim in time.

The fact that the claimant was pursuing an internal grievance process and a subsequent appeal does not mean that it was not reasonably practicable for him to submit a claim within the applicable time limit, even if this would have meant submitting the claim before the appeal had concluded". In this regard, the respondent's solicitor referred to ***Bodha*** and submitted that, "*There was no physical, or legal barrier preventing the claimant from lodging the claim form on time, in advance of the conclusion of the grievance process"*.

"If it was not reasonably practicable for the claim to have been presented in time, was it brought within a reasonable period of time thereafter?"

45. In this regard, the respondent's solicitor referred to the "relevant considerations, as set out by Mr Justice Underhill in ***Cullinane***. He submitted that:-

> "*The claimant's claims are significantly out of time despite him knowing the time limits. If the claimant was waiting on the conclusion of the respondent's internal process, then that occurred on 28 September 2020. The claimant initiated ACAS Early Conciliation but then waited 6 weeks following the expiry of EC to lodge the claim. The claimant may have been waiting on a response to his request for legal support from UCU, which came on 20 November. Even if that is the case, the claimant then waited a further 3 weeks before presentation of the claims on 16 December 2020. The time-limits had expired months before. The claim was not brought within a reasonable period thereafter".*

Conclusion

46. The respondent's solicitor said this in conclusion:-

> "*The respondent's position is that the claims with a legal basis have all been submitted out of time, and that it is not just and equitable to extend the time limit (in respect of the discrimination claims and that it would have been reasonably practicable for the claimant to present the other claims in time and that even were that not the case, he failed to present them within a reasonable time thereafter. All claims should therefore be dismissed on the basis that the Tribunal does not have jurisdiction"*.

Claimant's Submissions

47. The claimant made oral submissions at the Hearing. He submitted that, *"Dr Serrells was covering up discrimination"* and that there was, "*a connection between events".* He submitted that, *"a lot of this comes down to bad management"* and referred me to the *"Formal grievance investigation iro Dr Alan Serrels & Prof Steve Anderton"* (P260-264).

48. He submitted that the discrimination was *"continuous*" and asked, *"How is it fair that the respondent can do whatever it likes with its internal procedures and I'm not allowed extra time?"*

49. He submitted that issues had arisen after September 2020 and in particular the *"paper"* which Dr Serrells had submitted in which he stated that he had consented. He submitted that this was *"fraud".* His name does not appear anywhere in the paper, *"that was within the last month and that's detrimental".*

50. He submitted that an academic career which he had been working on since he was a teenager had been *"destroyed".*

Just and equitable extension

51. The claimant submitted that the whole grievance process was biased and unfair. Evidence surrounding the appointment of Dr Serrells' wife came from Dr Serrells himself and this was accepted. He then referred to a complaint which had been made about him in September 2019 (P71) and submitted that the allegations were *"complete lies".* He submitted that he could not understand why this did not amount to *"bullying".*

52. The claimant also referred in his submissions to Dr Serrells' statements which were recorded in the grievance investigation report (P179-190 at P187) and asked me to compare what was recorded at P183 with the respondent's Policy about conflict of interests. He submitted that the respondent could not justify Dr Serrells *"hiring his wife".*

53. He also submitted, once again, that he had not consented to the paper being published which identified Dr Serrells as the author. He submitted that there were *"detrimental effects"* after the grievance appeal due to the publication of this paper.

Discussion and Decision

54. I remained mindful, when considering the issues in this case, that the claimant was unrepresented at the Hearing. However, he did have the benefit of Trade Union advice throughout the grievance procedure and immediately prior to submitting his claim form; he is a well-educated articulate person, well able to source information about Employment Tribunal proceedings; and there was no apparent impediment to him doing so in time.

Discrimination Complaints

55. The general rule is that a claim concerning work-related discrimination under Part 5 of the Equality Act 2010 ("the 2010 Act"), must be presented to the Employment Tribunal within the period of 3 months beginning with the date of the act complained of. Ss.123(1) and (3) of the 2010 Act are in the following terms:-

"***123 Time limits***

(1) ….. Proceedings on a complaint within section 120 may not be brought after the end of -

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

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

(3) For the purposes of this section -

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

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

56. The first issue I had to consider, therefore, was whether the discrimination complaints were out of time. I am satisfied that they are. I am satisfied that the submissions by the respondent's solicitor in this regard are well-founded. He set out, in some detail, the chronology, with reference to the various allegations of discrimination, as averred by the claimant in his claim form and in his Further and Better Particulars.

57. I am not persuaded either that the allegations were part of, *"conduct extending over a period"*. In my view what is averred are a series of distinct acts, not part of one continuing act of discrimination. This means that the last discernible complaint relates to the Investigation Report which was issued on 14 May 2020 (P70). This complaint should have been presented by 13 August 2020. The claim form was not presented until 16 December 2020 and is, therefore, well out of time. The claimant was also out of time when he contacted ACAS on 13 October 2020 and the extension of time provisions in s.207B of the Employment Rights Act 1996 ("the 1996 Act") do not apply.

58. Also, even if I were to accept that there is an allegation of unlawful discrimination on 23 July 2020, which is not at all clear, such a complaint would also be out of time.

Just and equitable extension

59. However, the 3 month time limit for bringing a discrimination complaint is not absolute: Employment Tribunals have discretion to extend the time limit for presenting a complaint where they think it *"just and equitable to do so"* (s.123(1)(b) of the 2010 Act). Tribunals thus have a broader discretion under discrimination law than they do in unfair dismissal cases as the 1996 Act provides that the time limit for presenting an unfair dismissal complaint can only be extended if the claimant shows that it was "*not reasonably practicable*" to present the claim in time.

60. In determining whether I should exercise my discretion and allow the late submission of the discrimination complaints, I found the guidance in ***British Coal*** to be helpful. In that case, the EAT suggested that Employment Tribunals would be assisted by considering the factors listed in s.33 of the Limitation Act 1980. That section deals with the exercise of discretion in civil courts in personal injury cases and requires the Court to consider certain factors. However, in considering these factors I was also mindful of the guidance in the recent Court of Appeal case, ***Adedeji v University Hospitals Birmingham NHS Foundation Trust*** [2021] EWCA Civ 23 where the Court reviewed a number of recent cases involving the list of Limitation Act factors cited in ***British Coal***. In his Judgment, Lord Justice Underhill cautioned against a *"rigid adherence to a checklist*" which, "*can lead to a mechanistic approach to what is meant to be a very broad general discretion".* He also said this*: "The best approach for a Tribunal in considering the exercise of the discretion under s.123(1)(b) is to assess all the 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 the reasons for the delay'. If it checks those factors against the list in* ***Keeble****, well and good; but I would not recommend taking it as the framework for its thinking".*

61. The Employment Tribunal has a wide discretion under the 2010 Act to consider whether to allow in a claim out of time and the relevance of the factors in ***British Coal*** depends on the facts of the particular case. That said, I was satisfied that, by and large, the submissions which the respondent's

solicitor made in respect of each of the factors identified in ***British Coal*** were well founded.

62. One of the factors *"almost always relevant to consider when exercising any discretion whether to extend time*", as the Court of Appeal said in ***Abertawe***, is *"the length of, and reasons for, the delay".*

63. It was significant, in this regard, that the claimant had the benefit of advice from his Trade Union throughout the grievance process. While Ms Graf, the claimant's Trade Union representative, is familiar with the time limits, apparently the Union policy is not to present Tribunal claim forms until an employer's internal procedure is complete. I found that very surprising indeed as it's clear from case law and ***Robinson***, for example, that awaiting the completion of an internal procedure is not an acceptable reason for delaying the submission of a claim form. This is but one factor to be balanced with all the other relevant factors.

64. Another factor which I took into account was, *"the extent to which the cogency of the evidence is likely to be affected by the delay".*

65. In my view, there would be a risk that the cogency of the evidence would be affected as a number of the allegations took place during the claimant's employment in 2018, 2019 and early 2020. I am also satisfied that the claimant did not act promptly once he became aware of the possibility of taking action. As the respondent's solicitor submitted, "*He was late to initiate conciliation and then delayed unreasonably in bringing proceedings even after conciliation concluded for no apparent reason. The claimant had access to support via his Trade Union representative throughout the grievance process, he was aware of the time-limits or ought reasonably to have been and he should have acted more promptly to protect his position"*.

66. While I was mindful that I had a wide discretion to extend the time limit and that the just and equitable "escape clause" is much wider than that relating to unfair dismissal claims, I was also mindful of such cases as ***Robertson*** in

which the Court of Appeal stated that when Employment Tribunals consider exercising this discretion:

> *"There is no presumption that they should do so unless they can justify a failure to exercise a 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 the discretion* ***is the exception rather than the rule***" (my emphasis)

67. Considering all of the relevant factors, therefore, and the fact that the onus was on the claimant and there was no impediment to him submitting his discrimination complaints in time, I arrived at the view, in all the circumstances, weighing all the relevant factors in the balance, that it would not be just and equitable to exercise my discretion and extend the time limit in respect of the discrimination complaints. Accordingly, the discrimination complaints are time barred. The Tribunal does not have jurisdiction and they are dismissed.

Whistleblowing, Holiday Pay and Notice Pay

68. I was also satisfied that, by and large, the respondent's submissions in this regard were well founded.

69. So far as the complaint of detrimental treatment for making a protected disclosure was concerned, the claim form requires to be presented before the end of the period of 3 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.

70. So far as the claim for holiday pay is concerned the claim requires to be presented before the end of the period of 3 months beginning with the date on which it is alleged that the payment should have been made.

71. So far as the claim for notice pay is concerned that requires to be brought within 3 months of the effective date of termination.

72. Further, even if it was not reasonably practicable to bring these complaints in time, they still require to be brought within a reasonable period thereafter.

73. I was satisfied that the claims for holiday pay and notice pay are out of time. The effective date of termination of the claimant's employment was 31 May 2020. These complaints should have been presented by 30 August 2020, therefore, unless the period had been extended through participation in ACAS Early Conciliation. Early conciliation was initiated out of time. These complaints were not presented until 16 December 2020.

74. By and large, the relevant factors when considering whether it had been "reasonably practicable" to submit these claims in time are the same as those which were relevant to the discrimination complaints. As I recorded above, the test of "reasonable practicability" is a higher, more demanding, one than the "just and equitable test". Having found that it was not just and equitable to exercise my discretion in respect of the discrimination complaints, it follows that it was "reasonably practicable" to submit these claims in time.

75. The Tribunal does not have jurisdiction, therefore, to consider these claims and they are dismissed.

Whistleblowing complaint

76. This complaint was not quite as straightforward, as there appeared to be an allegation of detriment for making a protected disclosure in relation to the events on 18 and 19 September 2020 and 18 October 2020.

77. The complaints of detriment prior to these dates are out of time. For the reasons already given, it would have been "reasonably practicable", in my view, for the whistleblowing complaints prior to these dates to have been submitted in time. These are dismissed.

78. The legal and factual basis for the whistleblowing detriment complaint(s) on 18 and 19 September and 18 October 2020 are not at all clear. It was with considerable hesitation, therefore, but having regard to the fact that the claimant is unrepresented, the "overriding objective" in the Rules of Procedure and the "interests of justice, I decided that I was not in a position to dismiss the whistleblowing detriment claim in its entirety without further information.

79. It will be necessary for the claimant to provide Further and Better Particulars of the legal and factual bases for his complaints in relation to the allegations of detriment on 18 and 19 September 2020 and 18 October 2020. I direct him to do so, in writing to the Tribunal, within 14 days from the date this Judgment is sent to the parties and at the same time copy the respondent's solicitor for comment.

80. I further direct the respondent, if so advised, to respond in writing to the Tribunal, copied to the claimant, within 14 days of receipt of the claimant's Further and Better Particulars.

Further procedure

81. Once the claimant's Further and Better Particulars and the respondent's response are to hand, I shall consider further procedure. I shall revisit the time bar issue and also consider the "prospects" of the whistleblowing detriment complaints succeeding

82. In particular, I shall consider whether the complaints should be struck out as having *"no reasonable prospect of success*", in terms of Rule 37(1)(a) in Schedule 1 of the Tribunal Rules of Procedure; or whether the claimant

should be required to provide a deposit as a condition of proceeding with such a complaint, on the basis that it has *"little reasonable prospect of success"*, in terms of Rule 39.

Employment Judge: Nick Hosie
Date of Judgment: 28 June 2021
Entered in register: 29 June 2021
and copied to parties