



**IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH**

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**Judgment of the Employment Tribunal in Case No: 4114942/2019 (A) Issued  
Following Open Preliminary Hearing Held at Edinburgh via the Cloud Based  
Video Platform on 13<sup>th</sup> October 2020 at 10 am**

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**Employment Judge J G d’Inverno**

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**Mr S Beech**

**Claimant  
In Person**

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**Lothian Buses Limited**

**Respondent  
Represented by  
Mr W Rollinson -  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is:

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**(First)** That the Tribunal lacks Jurisdiction, in terms of section 111 of the  
Employment Rights Act 1996, to consider the claimant’s complaint of  
breach of contract and that claim is dismissed, for want of Jurisdiction.

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**(Second)** That the Tribunal lacks Jurisdiction to Consider the claimant’s  
complaints of Discrimination and of Victimisation and those claims are  
dismissed for want of Jurisdiction.

## REASONS

### Introduction

- 5 1. This case called for Open Preliminary Hearing on the Cloud Based Video Platform at Edinburgh on the 13<sup>th</sup> of October 2020 at 10 am. The claimant, Mr Beech appeared in person. The Respondent Company was represented by Mr Rollinson, Solicitor.
- 10 2. The Open Preliminary Hearing had been fixed, in terms of Order **(Fifth)** of the Tribunal's Orders of 12<sup>th</sup> May 2020 to determine two Preliminary Issues viz:-
- 15 (a) Whether, at the material time for the purposes of his complaints of discrimination, the claimant was a person possessing the protected characteristic of disability in terms of section 6 of the Equality Act 2010, by reason of his asserted relied upon medical condition (mental impairment) of Post Traumatic Stress Disorder ("PTSD"); and,
- 20 (b) Whether the claimant had Title to Present and the Tribunal Jurisdiction to Consider his complaints of:- breach of contract, disability discrimination and or of victimisation, insofar as the same were founded upon any alleged act or omission of the respondent or of their employees for whose actings they are
- 25 vicariously liable and said to have occurred prior to the 9<sup>th</sup> of September 2019.
- 30 3. In the event, and in advance of the Open Preliminary Hearing the claimant had confirmed that he no longer sought to rely upon his alleged condition of Post Traumatic Stress Disorder as giving rise to his protected characteristic of disability. It already being a matter of concession by the respondent that the claimant was so disabled by reason of his separate condition of diagnosed depression, the issue of disability status fell away leaving for determination at Open Preliminary Hearing, only the Preliminary Issue of the

challenge to the Tribunal's Jurisdiction, by reason of asserted time bar, in relation to all three of the complaints identified. Were the Tribunal to hold that it did not have Jurisdiction to Consider those complaints the effect would be that the remaining complaint of Unfair Dismissal only, would proceed to a Final Hearing.

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4. The claimant gave evidence on his own behalf, answered questions in cross examination put by Mr Rollinson and questions from the Tribunal. Each party thereafter made submissions, the claimant in the first instance followed by the respondent's representative, with the claimant, in conclusion, exercising a brief right of reply.

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5. Parties lodged a Joint Bundle of Documents to some of which reference was made in the course of evidence and submission.

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6. Prior to the Open Preliminary Hearing the respondent's representative had adjusted with the claimant and had lodged with the Tribunal, in compliance with paragraph **(Seventh)** of the Tribunal's Orders of 12<sup>th</sup> May 20, a list of those material facts such as parties were able to agree and which were relevant to the determination of the Preliminary Issues at the OPH.

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### List of Agreed Facts

7. The following agreed facts were placed before the Tribunal at the outset of the Hearing:-

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**7.1 The claimant was employed from 15<sup>th</sup> September 2008 until 27<sup>th</sup> September 2019.**

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**7.2 The claimant was dismissed by reason of his conduct.**

**7.3 The claimant suffers from depression and the respondent concedes that this is a disability for the purposes of section 6 of the Equality Act 2020 (sic 2010)..**

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- 7.4 The claimant previously alleged that he suffered from Post Traumatic Stress Disorder (PTSD). The claimant no longer wishes to rely on PTSD as constituting a disability.**
- 7.5 The claimant alleges he suffered a breach of contract in August 2019 when his shift pattern was changed.**
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- 7.6 The claimant alleges he was discriminated against in August 2019 when his shift pattern was changed.**
- 7.7 The claimant alleges that he was victimised by a particular member of staff (Anji Carter) between December 2018 and May 2019.**
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- 7.8 The claimant contacted ACAS on the 29<sup>th</sup> October 2019.**
- 7.9 The claimant was issued with an Early Conciliation Certificate on the 28<sup>th</sup> of November 2019.**
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- 7.10 The claimant lodged his claim with the Employment Tribunal with an incorrect ACAS Early Conciliation Certificate Number.**
- 7.11 On 6<sup>th</sup> January, the claimant appealed against the decision by**
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- the Tribunal not to accept his Claim Form.**
- 7.12 This was received by the Tribunal on 8<sup>th</sup> January 2020.**
- 7.13 The Tribunal wrote to the respondent on 8<sup>th</sup> January 2020 to**
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- advise that it had accepted a claim which appeared to be out of time and that the Tribunal would decide, as a preliminary issue, whether the claim should be allowed to proceed.”**

Parties agreed in submission that to the extent that the claimant's oral evidence was inconsistent with an "Agreed Fact" he should be regarded as having departed from agreement in respect of that fact.

5 **Findings in Fact**

8. On the oral and documentary evidence presented, the Tribunal made the following additional Findings in Fact, restricted to those relevant and necessary to the determination of the Preliminary Issue before it.
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9. The breach of contract upon which the claimant founds was the asserted unilateral change of his shift patterns from flexible various shifts to set shifts and is said by the claimant to have occurred in the last week of July/first week of August 2019. It was a single act decision which thereafter was not revisited by the respondents.
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10. The act founded upon by the claimant, as constituting a breach of contract, was a single act with continuing consequences in that, the respondents did not revisit the decision and the claimant continued to work set shifts until the date of his suspension in the last fortnight of September 2019, the same despite a statement allegedly made to him by Mr Ferguson on or about the 15<sup>th</sup> of August 2019 that his shifts would revert to a flexible pattern after the 30<sup>th</sup> of August; and, despite the claimant raising the matter again with the respondents on a number of occasions, the last being with Mr Ferguson on the 12<sup>th</sup> of September 2019.
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11. The relevant time limit for the presentation of a complaint to the Employment Tribunal in respect of that alleged breach of contract falls to be calculated from the time of that single act, that is from the last week of July/the first week of August 2020.
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12. The last act of victimisation of which the claimant seeks to give notice of founding upon occurred in the first week of July 2019, the first act having occurred in or about December 2018. The statutory period within which the

claimant would have right to present a complaint of victimisation falls to be measured, at the latest, from the first week of July 2019.

- 5 13. The act of discrimination of which the claimant complains is that of the respondent's unilateral change in his shift patterns which occurred in the last week of July/the first week of August 2019. That act was a single act with continuing consequences which was not revisited by the respondent and was not an instance in a continuing act of discrimination.
- 10 14. The statutory time period during which the claimant had right to present a complaint of discrimination falls to be measured from the time of that single act namely from the last week in July/the first week in August 2019.
- 15 15. Allowing for extension of the same by operation of the Early Conciliation Regulations, the primary statutory time periods for presentation of the following complaints expired on or about the following dates respectively:-
- 20 (a) In respect of the breach of contract claim, on or about the last week in November/the first week in December 2019 which failing on or about the 29<sup>th</sup> of December 2019
- (b) In respect of the discrimination claim on or about the last week in November/the first week in December 2019
- 25 (c) In respect of the complaint of victimisation on or about the first week in November 2019.
- 30 16. The claimant first attempted to present his initiating Application ET1 to the Employment Tribunal (Scotland) on the 23<sup>rd</sup> of December 2019.
17. The claimant successfully presented his Form ET1 (though late) to the Employment Tribunal (Scotland) on the 8<sup>th</sup> of January.

18. The date of effective first presentation of the Claim Form by the claimant namely 8<sup>th</sup> January was a date which, in relation to the complaints of: breach of contract, discrimination and, victimisation which occurred respectively, some 31 days, which failing 9 days late, and 32 days late.
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19. As at the date of effective first presentation, 8<sup>th</sup> January 2020, the claimant lacked Title to Present and the Tribunal lacks Jurisdiction to Consider the claimant's complaints of: breach of contract, discrimination and victimisation in terms respectively of section 111(2)(a) of the Employment Rights Act 1996 and section 123(1)(a) of the Equality Act 2010.
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20. The claimant was aware of his rights of action in respect of the three complaints and of his entitlement to raise proceedings before the Employment Tribunal, by the end of October 2020 at the latest. By that time he had in fact already drafted his Claim Form ET1 and had submitted it to his Trade Union representative with a request that his Trade Union provide him with legal representation. The Union declined to do so and the claimant having appealed against that decision received a reiteration of it from the higher level Trade Union Officer on or about 10<sup>th</sup> November 2019.
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21. In the meantime, the claimant had also submitted his draft ET1 and taken advice from the Citizens Advice Bureau and separately from an acquaintance who was a lawyer in Edinburgh, including taking advice particularly on the next steps of submitting his claim to the Employment Tribunal.
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22. The claimant was advised by the Citizens Advice Bureau to proceed to lodge his Claim Form on his own behalf.
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23. The claimant was aware of his rights of action and the right to present his complaints to the Employment Tribunal and had already drafted his Claim Form ET1 well before the expiry of the relative primary statutory periods.
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24. There was no single compelling reason why the claimant did not submit his Claim Form earlier.

25. There was no impediment which prevented the claimant from submitting his Claim Form within the relative statutory periods.
- 5 26. At or about that time, the claimant was also devoting time to a number of matters including; having started a new employment which involved him working longer hours, helping to look after his two year old child and visiting his family in Orkney in the days immediately preceding Christmas.
- 10 27. The claimant had also initiated the early conciliation process on the 29<sup>th</sup> of October 2019 and that process had concluded, unsuccessfully, on the 28<sup>th</sup> of November 2019 when ACAS issued an Early Conciliation Certificate.
- 15 28. While the claimant had been hoping that his complaints might be addressed by the respondents without the need for him to raise proceedings, he was aware by the 28<sup>th</sup> of November at the latest, that a conciliated settlement had not been achieved. The claimant, thereafter, did not attempt to lodge his Claim Form until the expiry of a further three weeks that is, until the 23<sup>rd</sup> of December 2019.
- 20 29. In the event when first submitting his Form on 23<sup>rd</sup> December 2019 the claimant made an error in entering the Conciliation Number which resulted in his claim being rejected by the Employment Tribunal (Scotland) who wrote to him on 3<sup>rd</sup> January 2020 advising him of the same.
- 25 30. The claimant returned from Orkney to his Edinburgh address to which the Tribunal had written, that being the address provided by the claimant to the Tribunal, on either the 4<sup>th</sup> or the 5<sup>th</sup> of January 2020. On reading the letter he took steps to confirm the correct Certificate Number and resubmitted his Application. The resubmitted Application was formally accepted by the Tribunal as at the 8<sup>th</sup> of January 2020 that being the “Effective Date of First Presentation.”
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31. While the claimant was entitled to submit his Application at any time up to the last day of the relative respective statutory periods, he was under no obligation or compulsion to wait until on or close to the last day, before submitting his Form.
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32. The claimant had in his possession all the information and knowledge as to his rights and procedures, for several weeks prior to the expiry of the relative statutory periods, such as to enable him to submit the Application at an earlier point in time. Had he done so, but nevertheless made the same error, sufficient time could have existed for that error to be detected by the Tribunal for him to be advised of it and thereafter, on its correction, and for him to resubmit his Application, all within time.
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33. In the circumstances presented, the claimant has not established that it was not reasonably practicable for him to present his complaint of breach of contract within the relevant initial statutory period and the Tribunal does not have Jurisdiction, in terms of section 111(2)(b) of the Employment Rights Act 1996, to Consider the complaint of breach of contract.
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34. In respect of his complaints of discrimination and of victimisation, the claimant had access to relevant third party advice, variously from; his Trade Union representative, the Citizens Advice Bureau and a friend who was a lawyer. That advice included or ought reasonably to have included advice, as to the relative statutory time limits for submitting his complaints.
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35. The claimant knew, or ought reasonably in those circumstances to have known, when the statutory time limits would expire and of the potential consequences of his not submitting his claim prior to the expiry of the time limit.
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36. Separately, the claimant had engaged in the early conciliation process and, as at the 28<sup>th</sup> of November 2019, ACAS had issued an Early Conciliation Certificate. By reason of the same, the claimant was separately aware of the
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date by which the relative and relevant statutory time limits for presentation of his claims would expire.

- 5 37. There was no impediment which prevented the claimant from submitting his claims within the statutory time limit.
38. The claimant had within his possession, from the end of October 2019 at the latest, all the information and knowledge which he required to enable him to present his complaints.
- 10 39. The claimant attempted, on 23<sup>rd</sup> December 2019, to present his complaints to the Employment Tribunal before the expiry of the relative time limits.
- 15 40. In the event, the initiating Application was rejected by the Tribunal because it was neither accompanied by a copy of the ACAS Conciliation Certificate, nor did it bear a correct ACAS Conciliation Certificate Number.
- 20 41. The Employment Tribunal wrote to the claimant on 3<sup>rd</sup> January 2020 advising him of the rejection and the reasons, and of his right to appeal against the decision to reject within a period of 14 days.
- 25 42. On the 23<sup>rd</sup> of December 2019, the claimant was in Orkney visiting his family. Having not submitted his Claim Form prior to travelling to Orkney, the claimant sought to submit it from Orkney on the 23<sup>rd</sup> of December 2020.
- 30 43. The claimant received the Tribunal's intimation of rejection upon his return from Orkney, on or about the 4<sup>th</sup> or 5<sup>th</sup> of January 2020. He immediately took steps to confirm the correct Conciliation Number and to resubmit the Claim Form while appealing against the decision to reject it. That Appeal was successful and the Tribunal accepted the resubmitted corrected Claim Form, advising the claimant of the effective date of first presentation of 8<sup>th</sup> of January 2020.

44. Had the claimant sought to present his Claim Form at an earlier stage there would have been sufficient time for the error, which it contained, to have been detected by the Tribunal, corrected by the claimant and the corrected Claim Form resubmitted, all within the statutory primary time periods.

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45. There was nothing which prevented the claimant from so presenting his claim at an earlier stage. He had in his possession all the information which he required in order to do so, he had drafted his Claim Form some seven or eight weeks earlier and he had received relative advice in relation to it from multiple sources.

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46. In the circumstances presented the claimant has failed to satisfy the Tribunal that it is just and equitable that his claims be considered notwithstanding their late presentation.

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47. The Tribunal lacks Jurisdiction, in terms of section 123(1)(b) of the Equality Act 2010, to Consider the claimant's complaints of discrimination and of victimisation.

## 20 **Submissions for the Claimant**

48. In submission, Mr Beech reiterated the position which had been outlined by him when giving evidence namely, that in relation to the breach of contract claim constituted by the unilateral changing of his shift pattern, there had been no consultation nor had there been any written confirmation of intention or indeed of change after the event, rather, "it had just happened".

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49. He stated that:-

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- (a) his Union were dealing with the matter when he was off sick and that when he got back to work the respondents played him along, feeding him lies about their intentions.

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- (b) When he met with Mr Ferguson in August of 2019 he had assured him that his shift pattern would be changed back to a flexible shift pattern but that that would happen at the end of August because of the Festival;
- (c) that he, the claimant, had agreed to wait until then but that when August came and went it hadn't changed back,
- 10 (d) that he had thereafter, in the course of September, referred back to Mr Henderson,
- (e) On the last such occasion being on the 12<sup>th</sup> of September 20, he had passed to Mr Henderson a sick line from his doctor asking that the shift pattern be changed back; but,
- 15 (f) that Mr Ferguson had told him on that occasion that he would require to speak to the Human Resources Department and revert to him.
- 20 (g) It was after that exchange that he decided to lodge his grievance.
- (h) He stated that the respondent's Mr Ferguson was aware of his depression and the effects that working on the changed shifts was having upon him.
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50. The claimant went on to explain that:-

- 30 (a) he had submitted his ET1 to his Trade Union representative on the 3<sup>rd</sup> of November but had heard from the rep on the 10<sup>th</sup> of November that it would not be forwarded to the Union lawyers.

- (b) He had challenged that decision to the representative's superior who had got back to him in late November telling him that the Trade Union would not provide legal representation.
- 5 (c) He had at that time also been taking advice from the Citizens Advice Bureau and had shown them the ET1.
- (d) He was hoping that the matter could be resolved without the need to take legal action.
- 10 (e) The attempt to resolve the matters through early conciliation were not successful and he was told to submit the ET1 Claim Form himself with the Conciliation Certificate being issued at the end of October.
- 15 (f) The above all took time and in addition, he was starting a new job which involved him working longer hours, was helping to look after his two year old and, before Christmas, had spent time with his family in Orkney.
- 20 (g) That it was when in Orkney that he got round to submitting the ET Form on the first occasion.
- (h) That but for his having made a mistake in entering the  
25 Conciliation Number on the Form the Claim Form would have been submitted in time.

### **Submissions for the Respondent**

- 30 51. Mr Rollinson commenced by noting that the claimant had appeared to accept, in the course of Case Management Discussion conducted at the outset of the Hearing, that what became the effective date of presentation of his Claim Form ET1 namely the 8<sup>th</sup> of January 2020, was a date which occurred after the expiry of the initial time period, as extended by the operation of the Early

Conciliation Regulations, and prescribed by Parliament as the period during which the claimant would, as of right, be entitled to present his respective claims of breach of contract, discrimination and victimisation. He submitted separately, and in any event, that that was the position was self evident from an examination of the claimant's pleaded case, According to the claimant the benefit of the doubt by allocating the last day in August, that is 31<sup>st</sup> August, to the events founded upon by the claimant where he asserts respectively that the respondents breached his Contract of Employment by changing his shift pattern in August 2019, it could be seen:-

(a) That the respondents, by the same act, were said discriminated against him and that the respondents' Manager Anji Carter victimised the claimant in the period December 2018 to May 2019 with the last alleged act of victimisation having occurred in the first week of July 2019, an assertion introduced by the claimant in the course of his oral evidence.

(b) That on an analysis of the above dates it could be seen, submitted Mr Rollinson, on any view that the claimant lacked Title to Present and the Tribunal Jurisdiction to Consider the claimant's complaints of breach of contract in terms of section 111(2)(a) of The Employment Rights Act 1996 and his complaints of discrimination and or victimisation, in terms of section 123(1)(a) of The Equality Act 2010.

52. In relation to the complaint of breach of contract, Mr Rollinson, while noting that the claimant had stated in his oral evidence that the breach of contract consisting of the unilateral changing of his shift patterns occurred in the last week of July/the first week of August 2020 resulted in a situation which had subsisted unrectified until the 23<sup>rd</sup> of September 2020 and that, to that extent, the claimant might be regarded as arguing that subsequent breaches of contract also occurred, the last being on the 23<sup>rd</sup> of September 2019.

53. Mr Rollinson submitted however that on both the claimant's own admission in cross examination and on his evidence objectively construed, the decision to change his shifts was one taken by the respondents on one occasion (now said by the claimant to be in the last week of July/first week of August 2019) and was a decision which was never revisited by the respondents. Thus, he submitted, it fell to be regarded as a single act with continuing consequences and not as a continuing or subsisting breach of contract, the last instance of which occurred on the 23<sup>rd</sup> of September 2019.

## 10 The Saving Provisions

54. In Mr Rollinson's submission, therefore, what the Tribunal required to determine was:-

15 (a) In relation to the complaint of breach of contract, whether the claimant could satisfy the test contained within section 111(2)(b) that is – "*within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months*"; and

20 (b) In respect of the complaints of discrimination and of victimisation whether the claimant met the test encapsulated in section 123(1)(b) namely "*such other period as the Employment Tribunal thinks just and equitable*".

25 55. In relation to both tests the respondent's representative reminded the Tribunal that the onus sat squarely with the claimant. He referred the Tribunal to the case of ***Robertson v Bexley County Council 2003 IRLR 434*** in which Auld LJ stated that the time limits exercised in the Employment Tribunal are exercised strictly and that there is no presumption that Tribunals should extend them, that indeed the contrary was the case such that the exercise of the discretion was the exception rather than the rule.

## The Complaints of Discrimination and of Victimisation

56. Under reference to the case of *British Coal Corporation v Keeble and others 1997 IRLR 336 (UKEAT496 96 2503)*, he identified factors to be considered in the application of the justice and equity test, these being:-

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- The length of the delay and the reasons for the delay
- The extent to which the cogency of any evidence is impacted by the delay
- The extent of the respondent's cooperation with requests for information
- The promptness with which the claimant had acted once he became aware of his right of action
- The steps taken by the claimant to obtain advice and the extent to which the advisor was appraised of the material facts by the claimant at the time of giving advice

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57. Of the above the respondent's representative submitted that the second and third factors were not applicable on the facts of the current case. In relation to the first factor, length and reasons for delay, he submitted that the claimant had delayed significantly before seeking to exercise his right of action; in the case of a complaint of victimisation from at the latest July 2019 and arguably from much earlier date of December 2018; and, in the case of discrimination from late July/early August 2019. In that regard the claimant had not spoken in evidence to any cogent reason for the delay but rather, only to his description of the other things which he was doing at the time, both in relation to his complaint and in his general life. Mr Rollinson submitted that the delay had been significant and that no proper reason for it had been provided by the claimant. On the same basis he submitted, in relation to the fourth factor that the claimant had not acted promptly following his becoming aware of his

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right of action. Mr Rollinson submitted that factors one and four did not weigh in favour of the exercise of discretion by the Tribunal.

58. In relation to factor five, the claimant had taken a significant number of steps in that he took advice from an early stage, variously from, his Trade Union Unite the Union, the Citizens Advice Bureau and “a lawyer” with whom he was acquainted. He had drafted his initiating Form ET1 as early as the end of October/beginning of November and he had submitted it to his Trade Union representative with a request that he be given legal assistance some seven or eight weeks before he submitted it. He had separately made contact with ACAS on the 29<sup>th</sup> of October 2019 and had received from ACAS their Early Conciliation Certificate on the 28<sup>th</sup> of November 2019. By that time he was aware that the attempts to resolve matters, through conciliation, without the need to resort to litigation had been unsuccessful. He had also received directly from the CAB advice that he should proceed to raise his claim on his own but nevertheless waited for a further three weeks or thereby until on or about the 23<sup>rd</sup> of December when, for the first time, he sought to present his Claim Form to the Employment Tribunal.

59. In the event, the claim was rejected because the claimant had neither attached the ACAS Conciliation Certificate nor had he set out accurately the Conciliation Number. The latter circumstance arose due to an error on the part of the claimant in submitting his Claim Form online. The Form was rejected by the Employment Tribunal who specified the reason and the claimant was afforded the opportunity to appeal against the rejection within a 14 day period. The Tribunal wrote that letter to the claimant on the 3<sup>rd</sup> of January. The claimant returned to his Edinburgh home on the 4<sup>th</sup> or the 5<sup>th</sup> of January. He subsequently corrected the error and resubmitted the Form with an Appeal, the same being granted and the Form being received with the effective date of 8<sup>th</sup> January 2020.

60. The claimant had cited various factors with which he had been being occupied at or about that time including starting a new job in which he worked

longer shifts, helping to care for his two year old child, the general busyness of Christmas and the anticipated normal delays in post.

5 61. In Mr Rollinson's submission, none of those matters were unforeseen. They were all factors which the claimant knew would be in play during the period within which he had the right to submit his Claim Form. He ought reasonably to have allowed for them and to have built in some leeway which would have allowed for the occurrence, emergence and correction of an error, such as the one which occurred, and the resubmission of the Claim Form, all within 10 the original time period. He had chosen not to do so leaving the matter, in Mr Rollinson's submission, to the "last minute" with the result that by the time the claimant's error had been detected, brought to his notice by the Tribunal and subsequently corrected by the claimant on Appeal, the relevant time periods had elapsed and the Claim Form, though accepted, was accepted 15 late.

20 62. Mr Rollinson invited the Tribunal to consider that those circumstances were on all fours with those in the case of ***Fishley v Working Men's College [2004] UKEAT045/04*** in which a last minute hitch, involving a computer, was not considered sufficient reason to exercise discretion in favour of extending the time limit, in circumstances where the Claim Form could have been submitted, and the hitch encountered and resolved, earlier. Mr Rollinson further referred the Tribunal to the case of ***Beasley v National Grid Electricity Transmissions UKEAT0626/06*** in which it was held that it does 25 not matter whether a claim is submitted one minute or one month late if it is a last minute glitch which results in the late submission.

### **The Breach of Contract Claim**

30 63. In relation to the breach of contract claim the respondent's representative referred the Tribunal to the case of ***Palmer and Saunders v Southend On Sea Borough Council [1984] IRLR 119, [1984] ICR 372*** where May LJ proposed the test of "reasonable possibility" or "reasonably feasible" in

approaching the statutory test of reasonable practicability, and identified a number of relevant factors to be considered, these being:-

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- (a) What was the substantial cause of the failure to submit the claim within time
  - (b) Was there some physical impediment which prevented the submission of the claim on time
  - 10 (c) Whether the claimant had been advised
  - (d) The extent of the advice given and finally;
  - (e) whether the claimant or their advisor had been at fault.

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64. In relation to the above, Mr Rollinson submitted:-

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- (a) that the claimant had identified no substantial reason for the failure, but had merely described in evidence other things that he was doing.
  - (b) That there was no physical impediment identified which had prevented the timeous lodging of the claim; and,
  - 25 (c) that the claimant had indeed been advised, firstly by his Trade Union representative, then by a lawyer who was an acquaintance and also by the Citizens Advice Bureau to all of whom he had fully explained the facts of his case and, in respect of the Citizens Advice Bureau and his Trade Union representative had physically given them a copy of his drafted ET1.
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65. The advice which the claimant appeared to have received was that he should proceed to lodge his Claim Form himself.

5 66. By his own admission the last minute hitch or error in the Conciliation Number included in the Form, was an error which arose at the hands of the claimant himself. He did not seek to blame anyone else.

10 67. The reality was that the claimant had had plenty of time to seek advice in relation to his claim, and indeed had done so and, had plenty of time within which to lodge it timeously, even after the issue of the ACAS Conciliation Certificate by which time he knew that attempts to resolve the matter without lodging his claim had not been successful.

15 68. In the respondent's representative's submission, the claimant had failed to show that it was not reasonably practicable for him to have lodged his breach of contract claim timeously and, in relation to the discrimination claim and the complaint of victimisation, that the claimant had failed to establish, on the balance of prejudice, that it would be just and equitable in the circumstances to exercise discretion extending the time limit.

20 69. Mr Rollinson concluded by;

(a) referring the Tribunal again to the case of **Robertson** and the statement that no presumption arose in favour of exercise of discretion to extend the time limit that being a matter for the claimant to satisfy the Court or Tribunal about, that the time limits were intended by Parliament to be observed and that the respondents were entitled to rely upon the strict time limits prescribed by Parliament.

30 70. He invited the Tribunal to hold that the complaints of breach of contract, of discrimination and of victimisation were claims in respect of which, as at the 8<sup>th</sup> of January 2020 the effective date of their presentation, were claims which the claimant lacked Title to Present and the Tribunal Jurisdiction to Consider.

He invited the Tribunal to dismiss those claims with the result that the complaint of Unfair Dismissal only would proceed to Final Hearing.

5 71. In a brief reply to Mr Rollinson's submissions once those had been made, Mr Beech stated that it wasn't a question of him having left it to the "last minute" but rather, there were other things which were taking up his time and he was also hoping that the matter could be resolved without the need to submit a Claim Form.

## 10 **Discussion and Disposal**

15 72. The onus of satisfying the Tribunal that it was not reasonably practicable for the claimant to have presented his complaint of breach of contract within the extended primary statutory period; and of satisfying the Tribunal that circumstances existed and it was just and equitable that the claimant's claims of discrimination and of victimisation be considered, though presented late, sat with the claimant.

20 73. The claimant gave his evidence in a forthright and entirely frank manner and is to be commended for doing so. I have no doubt whatsoever that the claimant was speaking truthfully in the course of his evidence and submissions and in answering questions put to him by the respondent's representative in cross examination and in answering questions put by the Tribunal. While that was to the claimant's credit, it put beyond doubt the fact  
25 that the late submission of his complaints occurred in circumstances where there was no impediment which prevented him from submitting the complaints at an earlier stage and, in particular, at a stage which would have allowed, let it be assumed it had been submitted with the same error as the Form ultimately contained; for the detection of that error by the Tribunal, the rejection of the Claim Form, the communication of that fact to the claimant,  
30 the correction of the error and the making, by the claimant, of an Appeal against the decision to reject, and the resubmission of the corrected Claim Form, well within the relative primary statutory periods.

74. The claimant's evidence also established:-

- 5 (a) that he had had in his possession for several weeks before the expiry of the relevant periods all the information which he needed to present his complaints,
- (b) that he had already drafted his Claim Form some six or seven weeks prior to the expiry of the relative time limits and further,
- 10 (c) that he had had access to and had taken advice variously from his Trade Union representative, the Citizens Advice Bureau and from a friend who was a lawyer and;
- (d) that he had engaged in the early conciliation process with an  
15 Early Conciliation Certificate being issued on the 28<sup>th</sup> of November 2019 and was separately aware, in those circumstances, of the expiry date of the relative statutory periods.

20 75. Notwithstanding the above, the claimant delayed attempting to submit his Application until the 23<sup>rd</sup> of December 19, a date close to the expiry of the statutory periods and he did so in circumstances where there was no single compelling reason which caused him to do so. While the claimant confirmed in evidence that his time was occupied also by other matters and while he  
25 identified the Christmas period and the potential for delay in postal delivery as potential factors, the matters spoken to by the claimant were all foreseeable and could have, and reasonably should have, been factored in by him such as to result in him not leaving until the 23<sup>rd</sup> of December the first attempt to submit his Claim Form.

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76. As was made clear in the case of **Roberts** the time limits prescribed by Parliament are expected to be adhered to by parties bringing complaints before the Tribunal and there is no presumption in cases such as this that the Tribunal's discretion will be exercised in favour of extending the time limit.

The respondents for their part are entitled to rely upon the time limits except in circumstances where the claimant can establish, in relation to the complaint of breach of contract, that it was not reasonably practicable for him to submit the claim within the relevant statutory time period and, in relation to the complaints of discrimination and victimisation, that circumstances exist in which it would be just and equitable for the claims to be considered although presented late.

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77. The onus of establishing that the above two tests are met, sits squarely with the claimant and, on his own evidence, which I again commend for its frankness and straightforwardness, he has failed to discharge that onus. In the circumstances, the Tribunal is not satisfied, that it was not reasonably practicable for the claimant to submit his breach of contract claim within the statutory period nor that circumstances exist in which it is just and equitable that the claims of discrimination and victimisation be considered though late.

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78. The Tribunal accordingly lacks Jurisdiction to Consider the claimant's claims respectively in terms of section 111 of the Employment Rights Act 1996 and section 123 of the Equality Act 2010, and those claims are dismissed.

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79. The effect is to leave outstanding for determination at Final Hearing the claimant's complaint of unfair dismissal and, the Tribunal directs that date listing stencils now be issued to the claimant and to the respondent's representative for the purposes of allocating dates to a Final Hearing on the complaint of unfair dismissal, to which the case is now appointed.

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Employment Judge: Joseph d'Inverno  
Date of Judgment: 27 October 2020  
Entered in register: 05 November 2020  
and copied to parties

**I confirm that this is my Order in the case of Beech v Lothian Buses Limited and that I have signed the Order by electronic signature.**