EMPLOYMENT TRIBUNALS

Claimant: Mr S Otieno

Respondent: Voyage 1 Limited

Heard at: South East Tribunal via Cloud Video Platform

On: 24 August 2021

Before: Employment Judge Brewer

Representation

Claimant: In person
Respondent: Mr N Brockley, Counsel

JUDGMENT

The Tribunal's judgment is as follows:

1. The claimant's claim for unauthorised deductions from wages was presented out of time and the Tribunal does not have jurisdiction to hear it.
2. The claimant's claims for race discrimination were presented out of time and the Tribunal does not have jurisdiction to hear them.
3. All of the claimant's claims are dismissed.

REASONS

Introduction

1. In his claim form the claimant makes claims of unauthorized deductions from wages and direct race discrimination.

2. This open preliminary hearing was listed before me to consider jurisdictional issues. The claimant represented himself and the respondent was represented by Mr Brockley of Counsel. I was provided with an agreed bundle of documents. The claimant gave evidence on his own behalf. For the respondent I heard from Ms Alex Kerin, Service Manager, and Ms Helen McAndrew, Senior HR Advisor. All of the witnesses gave their evidence under oath, all had provided written witness statements, and in the case of the respondent's witnesses, supplementary statements. Mr Brockley provided written submissions which I have considered along with the oral submissions of both parties.

3. Before I heard evidence, a preliminary matter was raised. In the notice of hearing the matters set out for me to deal with were the question of time limits, whether any claim should be struck out as having no reasonable prospect of success or whether any claim should be the subject of a deposit order as having little reasonable prospect of success. However, the parties advised me that the Tribunal had written to them to on 6 August 2021 confirm that today's hearing was only to consider the question of time limits and the claimant confirmed that he had only prepared for that issue.

4. A further slight complication was that the letter of 6 August 2021 referred only to the discrimination claims as being the subject of today's hearing although there is clearly a time limit issue in respect of the claim for unauthorised deductions.

5. Having discussed the matter with the parties it was clear that both parties were prepared to deal with the time limit issue in respect of all the claims and it seems to have been an oversight that the letter of 6 August did not refer to all claims. I have therefore determined the time limit issue in respect of both the unauthorised deduction claim and the race discrimination claims.

6. The hearing took longer than expected and at the end of the hearing I reserved my decision which I set out below.

Issues

7. The issues are as follows.

Race discrimination

8. Given the date the claim form was presented and the dates of early conciliation, some or all of the race discrimination complaints may not have been brought in time.

    a. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

b. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

c. If not, was there conduct extending over a period?

d. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

e. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

   i. Why were the complaints not made to the Tribunal in time?

   ii. In any event, is it just and equitable in all the circumstances to extend time?

Unauthorised deductions

9. Was the unauthorised deductions claim made within the time limit in section 23 of the Employment Rights Act 1996? The Tribunal will decide: Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made?

   a. If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

   b. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

   c. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

Law

10. In relation to time limits in claims for race discrimination, the material parts of s.123 EqA is in the following terms:

> ***123 Time limits***
>
> *(1) Subject to section 140B* ***p****roceedings 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.*
>
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
>
> *(a) when P does an act inconsistent with doing it, or*
>
> *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

11. The three-month time limit for bringing a discrimination claim is therefore 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) Equality Act 2010 (EqA)).

12. In **Robertson v Bexley Community Centre t/a Leisure Link** 2003 IRLR 434, CA, the Court of Appeal stated that when employment tribunals consider exercising the discretion under what is now s.123(1)(b) EqA,

> *'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.'*

13. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require this but simply requires that an extension of time should be just and equitable (**Pathan v South London Islamic Centre** EAT 0312/13).

14. In exercising their discretion to allow out-of-time claims to proceed, tribunals may also have regard to the checklist contained in s.33 of the **Limitation Act 1980** (as modified by the EAT in **British Coal Corporation v Keeble and ors** 1997 IRLR 336, EAT). S.33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case — in particular,

    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 has cooperated with any requests for information;

d. the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

15. In **Department of Constitutional Affairs v Jones** 2008 IRLR 128, CA, the Court of Appeal emphasised that these factors are a 'valuable reminder' of what may be taken into account, but their relevance depends on the facts of the individual cases, and tribunals do not need to consider all the factors in each and every case. However, while a tribunal is not required to go through every factor in the list referred to in Keeble, a tribunal will err if a significant factor is left out of account (**London Borough of Southwark v Afolabi** 2003 ICR 800, CA).

16. A tribunal considering whether it is just and equitable to extend time is liable to err if it focuses solely on whether the claimant ought to have submitted his or her claim in time. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other.

17. The fact that a claimant has awaited the outcome of his or her employer's internal grievance procedures before making a claim is just one matter to be taken into account by an employment tribunal in considering whether to extend the time limit for making a claim (**Apelogun-Gabriels v London Borough of Lambeth and anor** 2002 ICR 713, CA).

18. In relation to the **unauthorised deductions** claim, the relevant parts of s.23 Employment Rights Act 1996 (ERA) are as follows

> ***23 Complaints to employment tribunals***
>
> *(1) A worker may present a complaint to an employment tribunal*
>
> *(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),*
>
> *(2) Subject to subsection (4), an employment tribunal**]** shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—*
>
> *(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made…*
>
> *(3) Where a complaint is brought under this section in respect of—*
>
> *(a) a series of deductions or payments…*
>
> *the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.*

> *(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable…*

19. When a claimant tries to excuse late presentation of his ET1 claim form on the ground that it was not reasonably practicable to present the claim within the time limit, three general rules apply:

    a. s.23(2)(a) ERA should be given a 'liberal construction in favour of the employee' (**Dedman v British Building and Engineering Appliances Ltd** 1974 ICR 53, CA);

    b. what is reasonably practicable is a question of fact and thus a matter for the tribunal to decide. An appeal will not be successful unless the tribunal has misdirected itself in law or has reached a conclusion that no reasonable tribunal could have reached. As Lord Justice Shaw put it in **Wall's Meat Co Ltd v Khan** 1979 ICR 52, CA:

> *"The test is empirical and involves no legal concept. Practical common sense is the keynote and legalistic footnotes may have no better result than to introduce a lawyer's complications into what should be a layman's pristine province. These considerations prompt me to express the emphatic view that the proper forum to decide such questions is the [employment] tribunal, and that their decision should prevail unless it is plainly perverse or oppressive"*

    c. the onus of proving that presentation in time was not reasonably practicable rests on the claimant. *'That imposes a duty upon him to show precisely why it was that he did not present his complaint'* (**Porter v Bandridge Ltd** 1978 ICR 943, CA). Accordingly, if the claimant fails to argue that it was not reasonably practicable to present the claim in time, the tribunal will find that it was reasonably practicable (**Sterling v United Learning Trust** EAT 0439/14).

20. As to the meaning of "reasonably practicable" in **Palmer and anor v Southend-on-Sea Borough Council** 1984 ICR 372, CA, the Court of Appeal conducted a general review of the authorities and concluded that '*reasonably practicable'* does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means something like '*reasonably feasible'*. Lady Smith in **Asda Stores Ltd v Kauser** EAT 0165/07 explained it in the following words:

> *"the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it*

was reasonable to expect that which was possible to have been done"

21. A claimant's complete ignorance of his right to claim may make it not reasonably practicable to present a claim in time, but the claimant's ignorance must itself be reasonable. In **Porter v Bandridge Ltd** 1978 ICR 943, CA, the majority of the Court of Appeal, having referred to Lord Scarman's comments in Dedman, ruled that the correct test is not whether the claimant knew of his or her rights but whether he or she *ought to have known of them*.

22. A debilitating illness may prevent a claimant from submitting a claim in time. However, this will usually only constitute a valid reason for extending the time limit if it is supported by medical evidence.

23. An ongoing internal process is unlikely, in and of itself to be sufficient to extend time. For example, in an unfair dismissal claim the existence of a contractual appeal procedure does not alter the Effective Date of Termination. If, for example, an employee is summarily dismissed and his or her domestic appeal succeeds, he or she will be reinstated with retrospective effect. If, however, the appeal fails the dismissal takes effect from the original date of dismissal **J Sainsbury Ltd v Savage** 1981 ICR 1, CA, expressly approved by the House of Lords in **West Midlands Co-operative Society Ltd v Tipton** 1986 ICR 192, HL. The only exception to this will be where there is an express or implied contractual provision to the contrary. By parity of reasoning the same applies to a claim for unauthorized deductions. The date of the deduction, and thus the date from which time runs for our purposes, is not altered by an internal grievance.

Findings of fact

24. I make the following findings of fact.

25. The respondent provides specialist support for service users with learning difficulties and complex needs.

26. The claimant was employed by the respondent as a Support Worker (SW) with effect from 18 March 2019. The claimant worked at Waterbeach, a residential care home in Cambridgeshire for vulnerable adults.

27. In December 2019 the claimant began working as a Senior Support Worker (SSW). As an SW the claimant earned £8.63 per hour (£9.04 with effect from 1 April 2020). The hourly rate he was paid while working as an SSW was £12.03.

28. On 10 March 2020 the claimant's pay was reduced to £9.18 per hour.

29. The respondent says that the rate of £12.03 was paid in error and the correct hourly rate of pay for an SSW was £9.18. Thus the 'reduction' from £12.03 to £9.18 per hour applied to the claimant's pay in his pay

from March 2020 was the correction of an error. The claimant does not agree.

30. On 12 March 2020, the respondent told the claimant that he had been overpaid in January and February 2020 in the sum of £1,361.96 (477.88 hours at an excess rate of £2.85 per hour).

31. In an attempt to recover the overpayment, the respondent deducted the sum of £340.49 from the claimant's wages paid on 10 March 2020. Their intention was to repeat the deductions until the entire payment had been recovered.

32. However, following internal discussions it was decided to waive the balance of the purported overpayment. However, as set out above, from 10 March 2020 the claimant was paid the rate of £9.18 per hour while continuing to work as an SSW.

33. On 2 June 2020, the claimant was told that he would move from working as an SSW back to working as an SW with effect from 8 June 2020. His pay was therefore reverting to the SW rate which was then £9.04 per hour. This change duly took effect.

34. On 16 June 2020 the respondent identified that it had a vacancy for a Deputy Manager at Waterbeach. A note of that vacancy was put into the respondent's Communications Book. The job had been advertised in the respondent's internal job bulletin from 11 June 2020 with a closing date of 18 June 2020. The internal job bulletin is accessed through the respondent's intranet. There was only one candidate for the role, BW. She was appointed on 21 July 2020.

35. The claimant enquired about applying for the Deputy Manager role on 23 June 2020. He was told by Ms Kerin that details were on the intranet but in fact by then the application process had closed and this was incorrect.

36. The claimant emailed the respondent's HR team on 26 June 2020 to complain about the recruitment process for the Deputy Manager role. That complaint was never resolved.

37. The claimant resigned from the respondent by email of 20 October 2020. His employment terminated on 1 November 2020.

38. The claimant began early conciliation on 24 October 2020. He received his early conciliation certificate on 3 December 2020, and he presented his claim to the Tribunal on 10 December 2020.

39. The claimant claims:

    a. Unauthorized deductions from wages on 10 March 2020 and continuing until 10 August 2020;

    b. That his 'demotion' from SSW to SW on 2 June 2020 was direct race discrimination;

c. That he was directly discriminated against because of race by being denied the opportunity to apply for the Deputy Manager role and

d. That he was directly discriminated against because of by the respondent failing to respond to his complaint about the Deputy Manager recruitment process.

Discussion and conclusion

40. It is convenient to deal with each of the complaints in turn. Before that, in relation to credibility, while I accept the proposition that credibility is generally not 'all or nothing', and part of a witness's evidence may be credible while other parts may not be, in this case I have determined that where there is a conflict of evidence I prefer the evidence of the respondent. My reason for this is that during cross-examination Mr Brockley put to the claimant a number of propositions based on either a straightforward reading of the documents, or what flows logically from those documents. The claimant simply disagreed with what was plain on the face of the documents with no or no reasonable explanation. I shall refer to a number of these below. Further, many of the claimant's responses were vague. He could recall details of some matters but when faced with something which did not accord with his version of events, he often simply said that he could not recall. I found this to be problematic and it adversely affected the claimant's credibility.

Unauthorised deductions

41. I turn first to the claim for unauthorised deductions (references are to pages in the bundle).

42. The claimant says that he was promoted from SW to SSW in December 2019. He says he was told that he was demoted to SW on 2 June 2020, and thus his pay reduced from then, but that this decision was not "fully implemented" (see paragraph 9 claimant's witness statement) until 10 August 2020. His basis for asserting this is that during June and July 2020 he did some shifts as an SSW. Hence the claimant says that his claim was presented in time.

43. If the "demotion", and thus the reduction in pay was on 2 June 2020 the normal time limit expired on 1 September 2020. If the "demotion", and thus the reduction in pay was on 10 August 2020 then the time limit expired 9 November but by virtue of the application of s.207B(4) ERA, time would have been extended until one month after Day B. Day B was 3 December 2020 and so the time limit would expire on 3 January 2021.

44. I find that the claimant was not promoted as he asserted. It is plain from the contemporaneous documentation, which the claimant saw, that he was temporarily placed into the SSW role [64]. The change of circumstances form says, in terms:

> *"Samuel has been promoted on a temporary secondment from support worker to senior support worker"*

45. This temporary change was made on 5 December 2019 and confirmed in a letter of 22 January 2020 to the claimant [65] in which it says:

> *"This letter confirms that with effect from 05 December 2019 the following change(s) will be temporarily made to your terms and conditions"*

46. There is a second change of circumstances form at [104]. This deals with the end of the temporary secondment. It states:

> *"Samuel's time as Acting SSW has ended today. He is now returning to the SW role"*

47. The change was effective from 8 June 2020. Despite these clear words, under cross-examination the claimant refused to accept the temporary nature of the change. I prefer the respondent's evidence about this.

48. Having said that, the complaint at this stage is about pay. When the claimant was moved to the SSW role in December 2019, he was paid at the rate of £12.03 per hour.

49. On 3 March 2020 the Operations Manager, Alison Dolby emailed amongst others the respondent's Finance Business Partner, Chris Spencer. She was concerned that the pay for the SSW at Waterbeach (the claimant at this point) was £12.03 per hour and asked that this be checked [82].

50. In turn Mr Spencer asked Emma Parry (Senior Payroll Administrator) to check the rate [81]. She replied that the claimant was being paid £12.03 per hour but she questioned whether it was correct as it "*seemed a little high*". She did confirm that the claimant was being paid the rate shown on the respondent's payroll system.

51. The claimant's position was when Ms Parry said that the £12.03 was "correct" that meant that he was being paid correctly. In my judgment, reading her email in the round, she was querying whether the £12.03 rate was correct, but she ended by confirming that the rate being paid to the claimant was that shown on the system, and in that sense only was it correct.

52. Mr Spencer then emailed Ms Parry to confirm that the SSW rate, and thus the rate the claimant should have been receiving was in fact £9.18 per hour [79]. He confirmed that the rate of £12.03 per hour was in fact the Team Leader rate. The claimant was not a team leader.

53. It was agreed between the various participants in these email exchanges, all of which took place on 3 March 2020, to place the

claimant on the correct rate of pay and to recoup the overpayment which amounted to £1,361.96 [77].

54. The claimant was made aware of these circumstances between 3 March 2020 and 11 March 2020. This is evident from the email at [76] from Alison Dolby to various recipients. Amongst other things she confirmed that the claimant wanted to know how he came to be overpaid, he wanted an apology, he complained about the first deduction made to recover the overpayment, refused to agree any repayment scheme, and threatened to take the respondent to a Tribunal. In any event the claimant was written to in order to confirm the position on 12 March 2020 [83]

55. The claimant's pay slip dated 10 April 2020 shows that from 10 March 2020 to 10 April 2020 the claimant was paid only at the rate of £9.18, the SW rate [126]. The pay slips for May, June, July, and August show that the claimant was paid a mixture of SW and SSW rates. I note that the pay slip for February 2020 shows pay only at the SSW rate.

56. The claimant asserts that the fact that he did some limited work at the SSW rate up to 10 August 2020 means that his 'demotion' was concluded at that point. I do not agree. The claimant has in my view conflated working some shifts at the SSW rate with being temporarily seconded into the SSW role. The fact is that it is plain on the face of the documents that the claimant was seconded from one role, SW to another, SSW, for the period 5 December 2019 to 8 June 2020. Thereafter he was back in his role as an SW. The pay issue therefore crystalised when the last relevant payment was made to the claimant as in effect, an acting SSW, on 10 March 2020. That is the last payment in relation to the temporary secondment.

57. It is accepted that the claimant's pay during the secondment was reduced from £12.03 to £9.18. That happened with effect from 10 March 2020 and time began to run for a claim for unauthorised deductions from that point as thereafter the claimant was correctly paid as an SW or as occasionally working some hours as an SSW (and I note in passing that the claimant raised no claim that these subsequent payments at the SSW rate of £9.18 were incorrect).

58. Thus, the normal time limit for this claim expired on 9 June 2020.

59. The claimant gave no evidence that it was not reasonably practicable for him to bring his claim within the normal time limit.

60. At one point the claimant asserted that he was not aware of the time limit but even if that was true, I find that his ignorance was not reasonable. The claimant is an intelligent and articulate man. He researched sections of the Equality Act, he understands about acts extending over a period, he cited parts of the statute. Moreover, it is plain that in March 2020 he threatened the respondent with a tribunal claim over the deduction from his pay and/or the reduction in his hourly rate. In my

judgment he was or ought reasonably to have been aware of the limitation period for presenting this claim.

61. The claimant said in submissions that if I determined that his claim was out of time, he left it to my discretion as to whether to extend time. While of course it is a matter of discretion, the exercise of that discretion must have some evidential basis. In the absence of any evidence of any impediment to the claim being presented in time I decline to extend time to submit the claim. Thus, the claim for unlawful deductions was presented out of time and the Tribunal has no jurisdiction to hear it.

Race discrimination

62. I turn next to the claims for race discrimination.

63. It is convenient to deal first with the question of whether the claimant's claim that his "demotion" was direct race discrimination was presented in time.

64. I have dealt in some detail with the factual matrix above. I have found that the change, to use a neutral term, from being in the SSW role to not being in it took place on 8 June 2020. Thus, the time limit for presenting the race discrimination claim expired on 7 September 2020.

65. In cross-examination Mr Brockley asked the claimant a number of questions to endeavour to elicit from him reasons why he may not have brought his claims in time. In essence the claimant gave no reasons because he was certain that his claims were in fact in time.

66. I note that although I do not need to find that there were exceptional circumstances, nevertheless, there is no presumption that time should be extended and that I should not do so unless I can justify failure to exercise the discretion. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. I note that a key is the balance of prejudice.

67. As to the delay, this is extensive. The claim was submitted some 6 months out of time. No reason has been given for this. I do not consider that the evidence is affected by the delay. I am concerned however about the promptness with which the claimant acted once he knew of the facts giving rise to his complaint and what steps claimant took to obtain appropriate advice once he knew of the possibility of taking action.

68. According to the claimant, advice from a solicitor was too expensive and it appears he did not take advantage of any of the free advice services which abound. He relied on the internet. In my view the claimant took a conscious decision that he would rely on his own research, and he was of the view that his claim was not time barred.

69. The balance of prejudice seems to me to be this – that on the one hand the claimant would not be able to pursue his claim - but that is of course

true in every jurisdictional argument if it goes against the claimant. It cannot be sufficient in itself otherwise the balance would invariably fall in favour of the claimant. On the other hand, for the respondent, they will incur further not inconsiderable costs both legal and otherwise, they will have a number of individuals out of the business for a potentially protracted period to deal with the preparation and the hearing and they may suffer adverse publicity, which given the nature of their business may be considerably detrimental. I also note that in effect the claimant refused to address why he says it would be just and equitable to extend time, although that failure is not conclusive. The claimant does not plead ignorance of EqA time limits.

70. I find that the balance of prejudice falls in favour of the respondent and I decline to extend time. I find that it is not just and equitable to extend time and the Tribunal has no jurisdiction to hear this claim.

71. The second and third claims for race discrimination are that the claimant was discriminated against because of race by being denied the opportunity to apply for the Deputy Manager role and the respondent failing to respond to his complaint about that. Given that these are intertwined it makes sense to deal with them together.

72. First, the question arises when did the time limit in relation to the claim of race discrimination in relation to the recruitment to the Deputy Manager job start to run?

73. The job applications closed on 18 June 2020. A note was put in the communications book about the post, which staff are to look at each time they are on shift, on 16 June 2020 [105]. The claimant was working on 16, 17 and 18 June 2020. He was or ought reasonable to have been aware of the role. Furthermore, the role was advertised. There is no evidence that the respondent had any obligation to the claimant to bring the role to his specific attention. If the claimant thought that he was discriminated against by not being afforded an opportunity to apply for the role, in my judgment that opportunity ended on 18 June 2020 when applications closed, and time ran from that date. The claimant presented his claim just short of six months out of time.

74. I repeat the matters referred to above in relation to the balancing exercise under the just and equitable jurisdiction and for the same reasons I decline to extend time.

75. Having said that there is a secondary argument to explore which is connected to the final claim. This is the claim that the respondent failed to deal with the claimant's complaint about the Deputy Manager recruitment exercise.

76. The claimant made his complaint on 26 June 2020 [106/107]. It was never concluded.

77. The claimant's case is that as his complaint was not dealt with by the time he resigned and left the respondent, the situation was ongoing, thus

the discrimination – not dealing with the complaint – was ongoing and this brings not only this complaint but also the second discrimination complaint within the normal time limit because there was an ongoing sate of affairs.

78. In her witness statement Ms McAndrew stated that had the respondent acted on the claimant's complaint as it should have, the complaint would have been resolved at the latest by 10 July 2020. She asserts this in paragraph 10 of her witness statement based on her HR experience and the fact that the issue was not complex, it simply required some information from the respondent's recruitment team. I accept her evidence and significantly the claimant did not cross-examine Ms McAndrew on this although he did cross-examine her on other parts of this paragraph in her witness statement. I note s.123(4)(b) EqA that where the discrimination is the failure to do something and one cannot find an act inconsistent with that thing (which would be the trigger for time starting to run), time shall run "*on the expiry of the period in which P might reasonably have been expected to do it".*

79. In this case I find that 'P', the respondent of course, might reasonably have been expected to conclude the complaint in the timescale asserted by Ms McAndrew and therefore time began to run for the final race discrimination complaint on 10 July 2020. Three months from then takes us to 9 October 2020 and thus the claim was presented some two months out of time.

80. I repeat the matters referred to above in relation to the balancing exercise under the just and equitable jurisdiction and for the same reasons I decline to extend time.

81. For all of the above reasons all of the claimant's claims are out of time and the Tribunal does not have jurisdiction to hear the claim which are therefore dismissed.

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Employment Judge Brewer

Date: 24 August 2021

JUDGMENT SENT TO THE PARTIES ON

15 September 2021

S. Bhudia

FOR THE TRIBUNAL OFFICE

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