EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss Jade Gallacher	AND	Cosham Orthodontic Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY AT Plymouth **ON** 8 September 2021
By Cloud Video Platform

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person
For the Respondent: No Appearance Entered, Did Not Attend

JUDGMENT

The judgment of the tribunal is that (i) the claimant's claims for unfair dismissal and for accrued but unpaid holiday pay were presented as soon as reasonably practicable; and (ii) it is just and equitable to extend the time for presentation of the claimant's claim for discrimination; and accordingly these claims may proceed.

RESERVED REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not the claimant's claims were presented in time. The claimant has presented claims of automatically unfair dismissal; for discrimination on the grounds of pregnancy/maternity; and for accrued but unpaid holiday pay. The respondent has failed to enter a response.
2. I have heard from the claimant. The respondent did not enter a response, and no one from the respondent has attended today. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to any factual and legal submissions made by and on behalf of the respective parties.
3. The respondent is an orthodontic clinic and its proprietor is Mr Gunter Flatichler. The claimant Miss Jade Gallacher was employed by the respondent as a receptionist from 1

November 2016 until 28 March 2019. Her normal working week was for 17 hours for which she received £130.00 per week. This was the gross figure but also the net figure.

4. Following the pregnancy of her second child the claimant commenced a period of maternity leave in February 2019. At that time she was on certified sickness absence as a result of a pregnancy related sickness. She was paid statutory sick pay for February 2019, and maternity pay on 28 March 2019. She continued to receive maternity allowance from the DWP after that date. The reason was that her employment had ended at that stage, although no one had communicated the same to the claimant.
5. The claimant was concerned about her holiday entitlement and her right to working tax credits and towards the end of 2019 she raised a number of queries to both the respondent and the respondent's accountant. She did not receive a reply. In about December 2019 the respondent removed the claimant from its message group, but again failed to confirm the position with regard to the claimant's employment and/or her holiday entitlement.
6. The claimant then sought advice from Citizens Advice in February 2020, and they helped her to write a number of recorded delivery letters. The claimant was then informed by HMRC on 27 March 2020 that the respondent had terminated the claimant's employment the previous year on 29 March 2019. This came as a shock to the claimant because no other indication had been given to her.
7. The claimant was expecting to accrue holiday during her maternity leave but accepts that as at the date of the termination of her employment on 29 March 2019 she was not due any accrued holiday pay.
8. Citizens Advice also advised the claimant that she would need to obtain an early conciliation certificate from ACAS, and issue proceedings within three months. The claimant first made contact with ACAS under the Early Conciliation provisions on 1 April 2020 (Day A). ACAS issued the EC certificate on 24 April 2020 (Day B).
9. This coincided with the lockdown as a result of the Covid-19 pandemic, and the claimant had to look after her two children. She has also suffered from anxiety for many years and was ill with this condition at that time. She sought advice from her GP, who advised her to avoid confrontation. The claimant did not feel well enough to present these proceedings for a number of weeks, and subsequently presented these proceedings on 21 September 2020.
10. Having established the above facts, I now apply the law.
11. One of the relevant statutes is the Employment Rights Act 1996 ("the Act"). The claimant's unfair dismissal claim is one under section 99 of the Act and Regulation 20 of the Maternity and Parental Leave etc Regulations 1999 (and more particularly s. 99(1)(b) and (3)(a) of the Act, namely that her dismissal was for the prescribed reason of pregnancy, childbirth and maternity).
12. Section 111(2) of the Act provides that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
13. The claimant also claims in respect of holiday pay for accrued but untaken holiday under the Working Time Regulations 1998 ("the Regulations"), and there are similar time limit provisions in Regulation 30(2), although under Regulation 30(2)(a) time does not necessarily start to run from the termination of the relationship, and might otherwise run from the date the payment should have been made.
14. This is also a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination under section 18 of the EqA. She claims that her dismissal was unfavourable treatment because of her pregnancy (s18(2)(a)) and/or because she had exercised her right to ordinary maternity leave (s 18(4)).
15. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act

to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

16. With effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.
17. Section 207B of the Act provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.
18. I have considered the following cases, namely: Palmer and Saunders v Southend-on-Sea BC [1984] ICR 372; Porter v Bandridge Ltd [1978] IRLR 271 CA; Wall's Meat Co v Khan [1978] IRLR 499; London Underground Ltd v Noel [1999] IRLR 621; Dedman v British Building and Engineering Appliances [1974] 1 All ER 520; Cullinane v Balfour Beattie Engineering Services Ltd UKEAT/0537/10; Wolverhampton University v Elbeltagi [2007] All E R (D) 303 EAT; Riley v Tesco Stores [1980] ICR 323; Croydon HA v Jaufurally [1986] ICR 4 EAT; British Coal v Keeble [1997] IRLR 336 EAT; Robertson v Bexley Community Service [2003] IRLR 434 CA; Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640; Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT; Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA; London Borough of Southwark v Afolabi [2003] IRLR 220 CA; Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23;
19. In this case the claimant's effective date of termination of employment was 28 March 2019. The three months time limit therefore expired at midnight on 27 June 2019. The claimant first made contact with ACAS under the Early Conciliation provisions on 1 April 2020 (Day A). ACAS issued the EC certificate on 24 April 2020 (Day B). The claimant presented these proceedings on 21 September 2020. The proceedings were therefore presented more than a year out of time.
20. Unfair Dismissal and Accrued Holiday Pay
21. The grounds relied upon by the claimant for suggesting that it was not reasonably practicable to have issued proceedings within the relevant time limit are that (i) she simply did not know that she had been dismissed for at least a year after the effective date of termination of her employment; and (ii) having obtained the ACAS EC certificate she was then too unwell to present these proceedings for a short period thereafter.
22. The question of whether or not it was reasonably practicable for the claimant to have presented his claim in time is to be considered having regard to the following authorities. In Wall's Meat Co v Khan Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the claimant, see Porter v Bandridge Ltd. In addition, the Tribunal must have regard to the entire period of the time limit (Elbeltagi).
23. In Palmer and Saunders v Southend-on-Sea BC the headnote suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the

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

24. To this end the Tribunal should consider: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.
25. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) concluded that "reasonably practicable" does not mean reasonable (which would be too favourable to employees), and does not mean physically possible (which would be too favourable to employers) but means something like "reasonably feasible".
26. Subsequently in London Underground Ltd v Noel, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing so. As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of practicability … the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204).
27. Underhill P as he then was considered the period after the expiry of the primary time limit in Cullinane v Balfour Beattie Engineering Services Ltd (in the context of the time limit under section 139 of the Trade Union & Labour Relations (Consolidation) Act 1992, which is the same test as in section 111 of the Act) at paragraph 16: "The question at "stage 2" is what period - that is, between the expiry of the primary time limit and the eventual presentation of the claim - is reasonable. That is not the same as asking whether the claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted - having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months."

28. This is a very unusual case in that the claimant was wholly unaware of the termination of her employment for effectively one year. The claimant acted promptly and sensibly thereafter and obtained advice and an ACAS EC certificate. She was then unwell for a number of weeks and on the advice of her GP tried to avoid confrontation, and she perceived these proceedings to be confrontational.
29. In my judgment it was not reasonably practicable for the claimant to have presented these proceedings within three months of the effective date of termination of her employment, quite simply because she was unaware that her employment had ended. Given the claimant's illness, the advice from her GP, and the difficulties relating to the lockdown following the Covid-19 pandemic, I also find that the claimant presented these proceedings within such further period as can be considered reasonable. I therefore conclude that the claimant can proceed with her claim for unfair dismissal. Technically she can also proceed with a claim for her accrued but unpaid holiday pay, but as it happens none was due as at the date of the termination of her employment.
30. Discrimination Claim
31. The grounds relied upon by the claimant for suggesting that it would be just and equitable to extend the time limit are that: (i) she simply did not know that she had been dismissed for at least a year after the effective date of termination of her employment; and (ii) having obtained the ACAS EC certificate she was then too unwell to present these proceedings for a short period thereafter.
32. I have considered the factors in section 33 of the Limitation Act 1980 which is referred to in the Keeble decision. For the record, these are the length of and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the parties cooperated with any request for information; the promptness with which the claimant acted once the facts giving rise to the cause of action were known; and the steps taken by the claimant to obtain appropriate professional advice.
33. However, it is clear from the comments of Underhill LJ in Adedeji, that a rigid adherence to such a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion. He observed in paragraph 37: "The best approach for a tribunal in considering the exercise of the discretion under section 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."
34. This follows the dicta of Leggatt LJ in Abertawe Bro Morgannwg University Local Health Board v Morgan at paragraphs 18 and 19: "[18] … It is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the equality act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in the circumstances to put a gloss on the words of the provision or to interpret it as if it contained such a list … [19] that said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."
35. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.

36. Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan (at the EAT) before the Employment Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was.
37. However, As Sedley LJ stated in Chief Constable of Lincolnshire Police v Caston at paragraphs 31 and 32: "In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it."
38. For the reasons explained above, namely that the claimant was unaware that her employment had ended; she became ill with anxiety; she received advice from her GP not to do anything confrontational; and with the difficulties relating to the lockdown following the Covid-19 pandemic, I find that it is just and equitable to extend the time limit for presenting the claimant's discrimination claim, and accordingly this claim may also proceed.

Employment Judge N J Roper
Dated: 8 September 2021

Judgment sent to Parties: 11 October 2021

FOR THE TRIBUNAL OFFICE