Case No. 1400804/2021

# EMPLOYMENT TRIBUNALS

**BETWEEN**

| **Claimant** | | **Respondent** |
|---|---|---|
| Mr N Stubbs | AND | The Lucky Onion LLP |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**HELD AT** Bristol **ON** 10 September 2021

**EMPLOYMENT JUDGE J Bax**

**Representation**

**For the Claimant:** Mr N Stubbs (in person)
**For the Respondent:** Mr D Patel (counsel)

## JUDGMENT

1. The claim of unfair dismissal was presented out of time, and it was reasonably practicable for the Claimant to have presented it in time. The Tribunal did not have jurisdiction to hear the claim and it is struck out.

2. The claim of breach of contract was presented out of time and it was reasonably practicable for the Claimant to have presented it in time. The Tribunal did not have jurisdiction to hear the claim and it is struck out.

## REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not the Claimant's claims of unfair dismissal and breach of contract were presented in time. It was also listed for secondary applications to strike out the claim or for a deposit order in the alternative on the basis of the prospects of success.

## Background

2. The Claimant started employment with the Respondent in July 2018, and he resigned in November 2018. The Respondent said the Claimant's employment ended on 4 November and the Claimant said it was 21 November. It was agreed that the effective date of termination was to be treated as 21 November 2018 for the purposes of the hearing. The Claimant notified ACAS of the dispute on 6 August 2020 and the certificate was issued on 10 August 2020. The claim was presented on 11 February 2021.

3. In the claim form the Claimant said that his claim was based on a breach of verbal contractual arrangements with the Respondent in relation to reducing his hours when he was studying for his degree at university. When he started his course, the Respondent did not comply with what had been agreed. He eventually handed in his notice. It was suggested that he made a protected disclosure in relation to failing to comply with a legal obligation. He also said that he only found out about ACAS, his rights and the Employment Tribunal in July 2020. He was evicted in August 2020 and was homeless and unable to acquire stable accommodation until 4 February 2021.

4. In the response the Respondent says the dates of employment were 9 July 2018 to 4 November 2018. The Respondent held no record of a grievance. The Claimant was employed on a zero hours contract and had the right to refuse the hours requested. The Claimant wanted to increase his hours and walked out of the meeting, cleared his locker and was not seen again. It was assumed that he had terminated his employment and a P45 was sent. The Claimant disputed the contents of the Response.

5. On 21 April 2021, Respondent applied to strike out the claim or in the alternative that deposit orders were made on the basis that the claim was time barred, had no or little reasonable prospects of success, was vexatious and it was not longer possible to have a fair hearing. At the hearing the strike out application was limited to the prospects of success.

6. On 11 June 2021, Employment Judge Cadney directed that the case would be listed for a preliminary hearing to determine the Respondent's applications and the Claimant was ordered to provide a witness statement in relation to time limits. Despite reminders, the Claimant did not provide a witness statement, but it was agreed he could give oral evidence in relation to those matters.

7. At the start of the hearing, the Claimant accepted that he did not have 2 years' service with the Respondent but said that he fell within one of the exceptions, namely whistleblowing.

Further information in relation to the alleged protected disclosures

8. The Claimant confirmed that he was alleging that he made a protected disclosures in November 2018. He was undertaking an open university degree when he started work for the Respondent. The Claimant says that in order to undertake his degree work it was agreed with the head chef that he would enter a zero hours contract rather than entering different contracts for the summer holiday and term time. He said it was agreed with the head chef that he would work all hours required during the summer holiday, however on the start of term he would have different hours but on a minimum basis. When the term started in October 2018 he was told by the head chef what his hours of work would be. He then said that was not what had been agreed and he had been given fewer hours than the agreement. His case was that he believed this tended to show there had been a breach of a legal obligation. The Claimant's case was that he believed it was in the public interest because companies should comply with contracts, and it could happen again, and it was a matter of honesty and integrity. The head chef responded by telling him that 'those were the hours'. The Claimant said he made a further disclosure to HR, who said they were unaware of any such agreement. Discussions took place to see in a solution could be found by undertaking different positions, however there could not, and the Claimant resigned.

**Time limits**

9. I heard oral evidence from the Claimant, and he was cross-examined.

The facts

10. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

11. The Claimant says his employment ended on 21 November 2018 and it was agreed that time would be considered on that basis. He was undertaking a degree in business management.

12. The Claimant is socially isolated, in that before he started working for the Respondent he had cut himself off from family and previous friends.

13. When the Claimant left the Respondent's employment, he believed that there had been a breach of contract. He had been employed by many previous employers and had been dismissed or resigned on many

occasions. I accepted that he would generally have 3 to 5 different employers each year. The Claimant considered that what had occurred to him was normal.

14. Although the Claimant considered that there had been a breach of contract, I accepted his evidence that he did not have an inclination to find out what he could do in relation to it, and it did not occur to him to find out what his rights were.

15. After he left the Respondent he worked for Hearns postal delivery for a couple of weeks. In December 2018 he was asked to leave his accommodation. He tried to work in France for the ski season, but was unable to and returned to the UK in January 2019. He then lived in a hostel for a short period before renting accommodation again.

16. In November 2019 the Claimant started working for Sainsburys. During his employment with Sainsburys he was involved in disciplinary proceedings and instructed a solicitor. The Claimant was dismissed from that position in July 2020.

17. As a consequence of the disciplinary proceedings with Sainsburys the Claimant became aware that unfair dismissal claims, even if an employee has less than 2 years service, could be brought in certain situations. By June 2020, the Claimant realised, after having conducted research, that what had occurred with the Respondent was unlawful and that he could bring a claim that he had been unfairly dismissed on the basis of whistleblowing. He also realised that he did not need a lawyer to do this, that the time limit to bring such a claim was 3 months to bring such a claim unless it was not reasonably practicable to do so, and he needed to contact ACAS. He in fact contacted ACAS in relation to a claim against Sainsburys at that time. Although unusual, the Claimant checked his notes when giving evidence and confirmed that this realisation took place in June 2020.

18. In June 2020 the Claimant looked into possible claims against many previous employers and he was also dealing with the disciplinary proceedings with Sainsbury. The Claimant was also facing the possibility of being evicted from his accommodation. He was in fact evicted over the weekend of 21 August 2020.

19. The Claimant said that he did not notify ACAS about the dispute with the Respondent in June 2020, because he was looking at claims against all previous employers, however he accepted that it was feasible for him to have done so at that time. He later changed his evidence and said it was not feasible to have contacted ACAS until August because he was still reading legislation and working though documents he found online and that it was not until August he realised he had a feasible claim against the

Respondent, this was contradicted by his earlier evidence in which he was clear that he had undertaken research and discovered his rights in June 2020 and confirmed it again after checking his notes. I rejected the Claimant's latter evidence. He accepted that he knew of the time limits and that he could bring a claim against the Respondent as of June 2020.

20. From 21 August 2021 the Claimant was living in hostels and did not have a permanent address. I accepted that the Claimant did not have a 'care of' address he could use with a friend or family member. He presented the claims as soon as he had a permanent address in February 2021. The Claimant thought that he needed a permanent address to bring a claim, but did not make any enquiries with ACAS or the Tribunal as to what he should do.

21. During the whole period, the Clamant had access to e-mail and the internet.

22. The Respondent did not say anything to the Claimant about the possibility of bringing claims.

23. The Claimant has recently become unemployed and is in receipt of state benefits and does not have any savings. He had no disposable income from those benefits after paying for his outgoings.

Claimant's submissions in relation to time limits

24. The Claimant submitted that he was trying to understand the process between June and August 2020. He said it was unreasonable that the Respondent did not make him aware of his legal rights and it was reasonable to wait to find a permanent home before issuing proceedings.

Submissions in relation to strike out and deposit

25. The Respondent submitted that the Claimant would be unable to establish the public interest element of the test. The Claimant was the only person on this type of contract. In relation to causation, it was said that it was illogical that the Respondent refused to change its mind because the Claimant was saying they had breached his contract.

26. The Claimant submitted that the public interest would be made out because the Company could do it again. His suggestion regarding causation was that the Respondent refused to honour the earlier agreement.

**The Law**

Minimum service

27. S108(1) of the Employment Rights Act 1996 ("ERA") states that an employee does not have the right to not be unfairly dismissed, unless they have been continuously employed for 2 years. S108(3) provides that the 2 year service requirement does not apply in specified situations which includes dismissal for making a protected disclosure under s. 103A ERA

Time

28. Section 111(2) of the ERA 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.

29. Under the Employment Tribunals (Extension of Jurisdiction England and Wales) Order 1994 an employee may bring a claim for breach of contract, Regulation 7 provides : [Subject to [[article] 8B], an employment tribunal] shall not entertain a complaint in respect of an employee's contract claim unless it is presented— (a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or (b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, … (c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.

30. 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. Unfair dismissal and breach of contract under the extension of jurisdiction order are both relevant proceedings and require an early conciliation certificate

31. Section 207B ERA 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. There is a similar provision in the Extension of Jurisdiction Order.

32. 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 [1978] IRLR 499, Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances [1974] 1 All ER 520) 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 [1978] IRLR 271 CA. In addition, the Tribunal must have regard to the entire period of the time limit (Wolverhampton University v Elbeltagi [2007] All E R (D) 303 EAT).

33. In Palmer and Saunders v Southend-on-Sea BC [1984] IRLR 119, 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 [1982] ICR 200 at p 204, on this point, were preferred to those expressed in Lawal:-

34. 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.

35. A Claimant's complete ignorance of his or her right to claim may make it not reasonably practicable to present a claim in time, but the Claimant's ignorance must itself be reasonable. As Lord Scarman commented in Dedman v British Building and Engineering Appliances Ltd [1974] 1 All ER 520*, CA*:

"*…does total ignorance of his rights inevitably mean that it is impracticable for him to present his complaint in time? In my opinion, no. It would be necessary to pay regard to his circumstances and the course of events. What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would not be appropriate to disregard it, relying on the maxim "ignorance of the law is no excuse." The word "practicable" is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance. But what, if, as here, a complainant knows he has rights, but does not know that there is a time limit? Ordinarily, I would not expect him to be able to rely on such ignorance as making it impracticable to present his complaint in time. Unless he can show a specific and acceptable explanation for not acting within four weeks, he will be out of court.*"

36. Where ignorance of the time limits is claimed, the question is whether that ignorance was reasonable. In John Lewis Partnership v Charman UKEAT/0079/11, it was accepted that it would not be reasonable if the Claimant ought reasonably to have made inquiries about how to bring an

Employment Tribunal claim, which would have inevitably put them on notice of time limits. The question comes down to whether the Claimant should have made such inquiries immediately following his dismissal.

37. 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".

38. Subsequently in London Underground Ltd v Noel [1999] IRLR 621, 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).

39. 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 UKEAT/0537/10 (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.”

Strike out and deposit

40. The Employment Tribunal Rules of Procedure 2013 are in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and are referred to in this judgment as “the Rules”. Rule 37(1) provides that: (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds: - (a) that it is scandalous or vexatious or has no reasonable prospect of success;

41. Rule 39 provides that where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument. Under Rule 39(2) the Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

No reasonable prospect of success

42. Under rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, a tribunal can strike a claim out if it appears to have no reasonable prospect of success. It is a two stage process; even if the test under the rules is met, a judge also has to be satisfied that his/her discretion ought to be exercised in favour of applying such a sanction. Striking out a claim is a draconian step and numerous cases have reiterated the need to reserve such a step for the most clear and exceptional of cases (for example, *Mbuisa-v-Cygnet Healthcare Ltd* UKEAT/0119/18).

43. The importance of not striking out discrimination cases save in only the clearest situations has been reinforced in a number of cases, particularly *Anyanwu-v-South Bank Students Union* [2001] UKHL 14 and, more recently, in *Balls-v-Downham Market School* [2011] IRLR, Lady Justice Smith made it clear that "no" in rule 37 means "no". It is a high test.

*44.* In *Ezsias-v-North Glamorgan NHS Trust* [2007] EWCA Civ 330 the Court of Appeal held that a similar approach should be taken with whistleblowing cases and stated that it would only be in exceptional cases that a claim might be struck out on this ground where there was a dispute between the parties on the central facts. Sometimes it may be appropriate to resolve key factual dispute by hearing evidence even at a preliminary hearing (as in *Eastman-v-Tesco Stores* [2012] All ER (D) 264).

45. In Cox v Adecco & Others UKEAT/0339/10/AT, HHJ Taylor after a review authorities summarised the general propositions for a strike out application at paragraph 28 as:

    (1) No-one gains by truly hopeless cases being pursued to a hearing;
    (2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;
    (3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;

(4) The Claimant's case must ordinarily be taken at its highest;
(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;
(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;
(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;
(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;
(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.

Deposit orders

46. Where a tribunal considers that any specific allegation, argument or claim has little reasonable prospect of success it may make a deposit order (rule 39). If there is a serious conflict on the facts disclosed on the face of the claim and response forms, it may be difficult to judge what the prospects of success truly are (Sharma v New College Nottingham [2011] UKEAT/0287/11/LA). Nevertheless, the tribunal can take into account the likely credibility of the facts asserted and the likelihood that they might be established at a hearing (Spring v First Capital East Ltd [2011] UKEAT/0567/11/LA).

47. Under rule 39(2)When considering an application for a deposit order it is also necessary to make reasonable enquiries into the paying party's ability to pay the deposit and to have regard to such information when deciding the amount of the deposit.

Protected disclosures

48. Under section 43A of the Act a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following – (a) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

49. Under Section 43C(1) a qualifying disclosure becomes a protected disclosure if it is made in accordance with this section if the worker makes the disclosure – (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to – (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

50. An essential part of the test to determine whether was a protected disclosure is whether the Claimant believed that the disclosures had been '*in the public interest*.' In other words, whether the Claimant had held a reasonable belief that the disclosures had been made for that purpose. As to the assessment of that belief, it is necessary to assess objective reasonableness of the Claimant's belief at the time that he possessed it (see Babula v Waltham Forest College [2007] IRLR 3412 and Korashi v Abertawe University Local Health Board [2012] IRLR 4. That test requires the consideration of the Claimant's personal circumstances and asking the question; whether it was reasonable for them to have believed that the disclosures were made in the public interest when they were made.

51. The '*public interest*' was not defined as a concept within the Act, but the case of *Chesterton-v-Normohamed* [2017] IRLR 837 was of assistance. The Court of Appeal determined that it was the character of the information disclosed which was key, not the number of people apparently affected by the information disclosed. There was no absolute rule. Further, there was no need for the 'public interest' to have been the sole or predominant motive for the disclosure. As to the need to tie the concept to the reasonable belief of the worker:

> "*The question for consideration under section 43B (1) of the 1996 Act is not whether the disclosure per se is in the public interest but*

*whether the worker making the disclosure has a reasonable belief that the disclosure is made in the public interest*" (per Supperstone J in the EAT, paragraph 28).

The Court of Appeal dismissed the appeal. At paragraph 31 Underhill LJ said that he did not think "*there is much value in adding a general gloss to the phrase 'in the public interest. … The relevant context here is the legislative history explained at paragraphs 10-13 above. That clearly establishes that the essential distinction is between disclosures which serve the private or personal interests of the worker making the disclosure and those that serve a wider interest*."

52. Further at paragraph 36 to 37

"36. …*The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.*

*37. Against that background, in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under s.43B(1) where the interest in question is personal in character [5]), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case…"*

Reference was made to the following factors which could be taken into account.

a. the numbers in the group whose interests the disclosure served
b. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed
c. the nature of the wrongdoing disclosed, and
d. the identity of the alleged wrongdoer.

**Conclusions**

Time Limits

*When should the claims have been presented?*

53. On the basis that the Claimant's employment ended on 21 November 2018, the claim should have been presented by 20 February 2019, subject to

pausing by reason of early conciliation via ACAS. The Claimant notified ACAS on 6 August 2020, which post-dated the primary limitation date and he did not get the benefit of any extension of time for the early conciliation period. The claim form was presented on 11 February 2021 and was therefore presented approximately 2 years out of time.

*Whether it was reasonably practicable to present the claim in time and if not was it presented within a reasonable period thereafter?*

54. The Claimant believed, when he left the Respondent's employment, that his contract had been breached, however he did not take any action to discover whether he had any course of redress until 2020. The Claimant was in an unusual position in that he was socially isolated and had many previous employers and I accepted that he considered that such incidents were normal and that he was unaware that he could do anything. The Claimant had access to the internet during the whole period and could have made enquiries as to whether he had any rights, but did not have the inclination to do so. The Claimant relied upon a lack of knowledge, until June 2020 and then that he had a period of having no fixed abode, as the reason why the claim was not presented in time.

55. In June 2020, the Claimant was aware of his rights to bring a claim for unfair dismissal on the basis of whistleblowing and that the 2 years of service requirement did not apply. He was also aware of the existence of ACAS and that a claim needed to be brought to the Tribunal within 3 months. At that time, he was dealing with disciplinary proceedings with Sainsburys and looking into the possibility of other claims with previous employers and dealing with the situation with his landlord. It was a difficult and pressured time for the Claimant. However, he accepted that it would have been feasible for him to have notified ACAS of the dispute in June 2020 and although he later tried to change his position he knew he could bring a claim by that time and of the time limits.

56. The Respondent had not misrepresented any relevant matter to the Claimant. Although the Claimant is of the view that an employer should explain his legal rights, there is no obligation on an employer to tell an employee that they can bring a claim against it. I accepted that the Claimant received some advice from a solicitor in relation to Sainsburys but not in relation to the Respondent.

57. The Claimant was aware that there had been a breach of contract when he left the Respondent's employment. He accepted that he could have made enquires, but they would have said that he needed 2 years service to bring a claim of constructive dismissal. I did not accept that submission, the information was potentially available to the Claimant, and it would have been reasonably feasibly to have made enquiries, particularly because he

believed that there had been a breach of contract. He might have acted that way because of a previous pattern with employers, however he did not have any inclination to make an enquiry. If the Claimant had made some enquiries on the internet he could have found out that he could bring a claim. To do nothing, when he knew there had been a breach of contact, was unreasonable. It was reasonably feasible to make such enquiries and therefore it was reasonably practicable for him to have presented the claim in time.

58. Even if I was wrong in that regard, the Claimant failed to present the claim within a reasonable period after the expiry of the time limit. He was aware in June 2020, that he could bring a claim, the time limits to do so and the need to contact ACAS. He waited until August to notify ACAS. The Claimant had other significant pressures at that time, however he was aware that the dispute needed to be notified to ACAS and what the time limits were. The Claimant having notified ACAS about the dispute with Sainsburys in June 2020 was relevant. It would have been reasonably feasible for the Claimant to have notified ACAS of the dispute in June and presented his claim within a couple of weeks of receiving the certificate. Therefore, a reasonable period would have expired by the beginning of July 2020.

59. Even if I am wrong in that respect, the Claimant received the ACAS certificate on 10 August 2020. He did not present the claim straight away. He unfortunately was evicted on 21 August and had no fixed abode. The Claimant still had access to the internet, but did not make any enquires as to how he could present his claim. It would have been reasonable to make such enquiries and the Claimant acted unreasonably by failing to do so. In the circumstances a reasonable period would have ended by the beginning of October 2020.

60. The burden of proof was on the Claimant. It was reasonably practicable to present the claims in time and in any event they were not presented within a reasonable period after the time limit expired. Accordingly, time was not extended, the claim was presented out of time, and it was struck out for lack of jurisdiction.

Prospects of success – strike out and/or deposit

61. Although unnecessary to determine this application, I concluded that the Claimant had little reasonable prospects of success in establishing that he had made a protected disclosure. The breach of obligation was an alleged breach of his own contract of employment. The public interest requirement was introduced to remove, from the ambit of protection, purely personal matters. The Claimant was the only employee on this type of contract and no one else was affected by it. Contracts are to be complied with, however that does not mean that every breach of a contract is in the public interest.

I took into account that it would be unusual to strike out a whistleblowng claim where there was a dispute of fact, and I was not satisfied that there were no reasonable prospects of success. However, given the purely personal nature of what had been alleged the Claimant had little reasonable prospects of success in establishing he had made a protected disclosure.

62. Further the Claimant had difficulty in explaining how the sole or principal reason for the Respondent acting as it did, was because he made a protected disclosure. His argument was related to the refusal to honour the original verbal agreement. The Claimant had little reasonable prospects of success in establishing the causative link.

63. In the circumstances I would have made a deposit order as a condition of bringing his unfair dismissal claim and taking into account his means it would have been set at £10.

Employment Judge J Bax
Dated: 10 September 2021

Judgment sent to parties: 13 October 2021

FOR THE TRIBUNAL OFFICE