EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Ms Deborah Conn	AND	Oaklands Residential Care Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY AT Plymouth **ON** 6 October 2021
By Cloud Video Platform

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person
For the Respondent: Miss G Crew of Counsel

JUDGMENT

The judgment of the tribunal is that the claimant's claims for unfair dismissal and for detriment arising from protected public interest disclosures are out of time and are dismissed.

RESERVED REASONS

1. This is the judgment following a Preliminary Hearing which was listed to determine two preliminary issues, namely (i) whether or not the claimant's claims were presented in time, and (if so) (ii) whether the claimant made protected public interest disclosures upon which both claims rely. Following an explanation of the claimant's claims, this hearing also dealt with an application by the claimant to amend her originating application, and that matter is dealt with by separate judgment of today's date.
2. I have heard from the claimant. I have heard from Miss Grew on behalf of the respondent. 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 company owns and manages the Oaklands Care Home in Waterlooville, Hampshire. The claimant Ms Deborah Conn was employed as a Healthcare Assistant for approximately seven weeks from 19 March 2020 until 4 May 2020. The claimant asserts that she suffered detriment and was automatically unfairly dismissed on the grounds of

having made protected public interest disclosures. The respondent denies this and asserts that the claimant was dismissed for gross misconduct within her probationary period following a number of allegations which include breach of data protection regulations; disclosure of confidential information; irregular attendance at work; and calling in sick under false pretences.

4. The claimant confirmed at this hearing today that the protected public interest disclosures upon which she relies, and their consequences, are as follows.
5. Disclosure 1: The claimant asserts that on 20 March 2020 she raised concerns verbally to a senior carer namely Miss Luff that a resident namely Robin was suffering inadequate and dangerous care, and secondly that there was a lack of personal protective equipment for employees. This is said to have resulted in detriment in that the claimant was then alienated and received derogatory treatment from Miss Luff and another employee Amanda.
6. Disclosure 2: The claimant asserts that on 21 March 2020 she reported to the Registered Home Manager namely Sara Sanders that a resident namely Robin was suffering inadequate and dangerous care; that there was a lack of personal protective equipment for employees; and that she was unable to gain the necessary and relevant information from daily care plans and/or client care plans to ensure the safety of residents. The claimant asserts that she suffered detriment as a result, namely being chastised and treated like a child, to the extent that she tendered her resignation which she subsequently agreed to withdraw.
7. Disclosure 3: The claimant asserts that her third disclosure was a repeat of the above information in her email confirming her resignation dated 10 April 2020. She claims to have suffered detriment as a result, namely being denigrated and isolated by work colleagues.
8. Disclosures 4 and 5: On 31 March 2020 the claimant sent an updated detailed report to the CQC explaining her concerns about the care sector generally, but which also included specific information relating to failings at Oaklands. She asserts that she informed Sara Sanders of what she had done on 8 April 2020 and she asserts that these two disclosures resulted in her dismissal.
9. Disclosure 6: The claimant asserts that on her last shift on 27 April 2020 she reported to Sara Sanders that the PPE supplied was still insufficient to protect the staff, and that because she was feeling unwell and was required to isolate, she should not be required to work. The claimant asserts that this disclosure led to her dismissal. As a matter of timing, the respondent decided to dismiss the claimant by reason of gross misconduct at the end of April 2020, and this decision, and its reasons, were communicated to the claimant by letter which she received on 4 May 2020.
10. Although the claimant had not attended a disciplinary hearing, she was offered the opportunity to appeal, and attended an appeal hearing on 21 May 2020. Her appeal was rejected on that date.
11. The claimant also confirmed that there was one further allegation of detriment arising after her dismissal, namely that on 12 June 2020 the respondent reported her to the Police, and she suspects the Information Commissioner's Office (ICO). As a matter of fact, that allegation is factually accurate because Mr Agoye, the respondent's general manager, did make those two reports on 12 June 2020. For the reasons explained in the attached judgment of today's date rejecting the claimant's application to amend the proceedings to include this allegation, this is not a live allegation before this tribunal.
12. The claimant asserts that she tested positive for and suffered Covid-19 symptoms and that she felt too unwell to issue proceedings before the date when she did. However, the claimant has adduced no medical evidence to suggest that she was too unwell to present these tribunal proceedings before she did. In addition, the claimant was able to write extensive emails, including her own detailed grounds of appeal, in the weeks after her dismissal. This included an email to her MP, who responded by providing the claimant with information about whistleblowing, employment related claims, and the ACAS procedures. The claimant also threatened legal proceedings against the respondent. This was all within the relevant time limits. The claimant also had access to the Internet throughout, and she does not deny that she was aware that there were time limits for employment tribunal proceedings and that she was required to make contact with ACAS first. Although she said

that her Covid symptoms "had an impact" in the delay, I do not find that that the claimant's health was in any way an impediment which disabled from issuing proceedings within time.

13. At today's hearing the claimant raised for the first time that she declined to issue proceedings within the time limit because she wished to obtain the necessary evidence beforehand, which the respondent was unreasonably declining to share. That matter was not included in her statement before today's proceedings, and in any event in my judgment is not an impediment to issuing even holding proceedings within the relevant time limit.
14. The effective date of the termination of the claimant's employment was 4 March 2020. The claimant commenced the Early Conciliation process with ACAS on 28 August 2020 (Day A). ACAS issued the Early Conciliation Certificate on the same day, 28 August 2020, (Day B). The claimant presented these proceedings on 1 September 2020.
15. Having established the above facts, I now apply the law.
16. The relevant statute is the Employment Rights Act 1996 ("the Act"). 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.
17. There are similar time limit provisions relating to the claimant's claim for detriment on the ground of having made protected public interest disclosures, which are contained in section 48(3) of the Act, which provides: "An employment tribunal shall not consider a complaint under this section unless it is presented – (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or (b) 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."
18. 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.
19. 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.
20. I have been referred to and 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.
21. In this case the effective date of the termination of the claimant's employment was 4 May 2020. For the unfair dismissal claim, the normal time limit of three months therefore expired on 3 August 2020. The last claim of detriment relates to the refusal of the claimant's appeal

on 21 May 2020. If this is the last in a series of detriments, the normal time limit of three months therefore expired on 20 August 2020. The claimant commenced the Early Conciliation process with ACAS on 28 August 2020 (Day A). ACAS issued the Early Conciliation Certificate on the same day, 28 August 2020, (Day B). The claimant presented these proceedings on 1 September 2020. In circumstances where the normal time limits of three months had already expired before the claimant commenced the Early Conciliation process with ACAS, the claimant does not benefit from an extension of time under the relevant provisions. The claims were therefore presented out of time.

22. 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 her Covid related symptoms caused her delay and/or that she wished to obtain the relevant evidence before presenting proceedings which the respondent unreasonably declined to share.
23. 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).
24. 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:-
25. 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.
26. 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".

27. 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).
28. 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.”
29. In this case it is clear that the claimant was aware within the relevant time limits of her right to bring legal proceedings, that there was a time limit, and that the procedure involved making contact with ACAS obtain the Early Conciliation Certificate. I reject the suggestion that the claimant was too ill to present these proceedings within the relevant time limits because there is no medical evidence to suggest that she was disabled from doing so throughout the limitation period, and in any event the claimant was clearly able to articulate her complaints in significant detail both in her appeal letter and in her emails to her MP.
30. I am satisfied that there was no impediment preventing the claimant from issuing these proceedings within time and that she was aware of the necessary time and some procedures before doing so. I conclude therefore that it was therefore reasonably practicable for the claimant to have brought these proceedings both for unfair dismissal and for detriment within the relevant time limits and that she failed to do so.
31. The claims were therefore presented out of time and are hereby dismissed.
32. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 3 to 14; a concise identification of the relevant law is at paragraphs 16 to 28; how that law has been applied to those findings in order to decide the issues is at paragraphs 29 to 31.

Employment Judge N J Roper
Dated: 6 October 2021

Judgment sent to parties: 21 October 2021

FOR THE TRIBUNAL OFFICE