EMPLOYMENT TRIBUNALS (SCOTLAND)

In the Employment Tribunal (Scotland) at Edinburgh
Judgment of the Employment Tribunal in Case No.4109715/2021
Issued following an Open Preliminary Hearing Held In Person at Edinburgh on 8 October 2021 at 10am with Deliberation on 15 October 2021

Employment Judge J G d'Inverno

Mr C Oliveira	**Claimant** **In Person**
ASA International Limited	**1st Respondent** **Represented by** **Ms G Stevenson,** **HR Manager**
The City of Edinburgh Council	**2nd Respondent** **Represented by** **Ms K Sutherland,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is:-

(First) that the Tribunal lacks jurisdiction in terms of section 48(3) of the Employment Rights Act 1996 ("the ERA") to consider the claimant's complaint, in terms of section 47B of the Act of having suffered detriment on the grounds of protected interest disclosure and the claim is dismissed for want of jurisdiction; and

(Second) the Tribunal lacks jurisdiction, in terms of section 111(2) of the ERA to consider the claimant's complaint, pled in the alternative in terms of section 103A of the Act, of having been automatically unfairly dismissed; and the claim is dismissed for want of jurisdiction.

REASONS

In production

1. This case called for an Open Preliminary Hearing to determine the preliminary issue of the claimant's title to present and the Tribunal's jurisdiction to consider his complaints, by reason of asserted time-bar.

The Nature of the Claims and Procedural Background

2. The claimant was engaged by the first respondent as an agency worker. The dates of that engagement are disputed, but it is clear that his engagement commenced in 20 April/June 2020 and ended in November 2020. He was assigned to work at the Drumbrae Care Home, which was operated by the second respondent. Early Conciliation took place from 17 to 18 May 2021. The claim form was presented on 23 May 2021.

3. As confirmed and recorded in the note of output issued by Employment Judge Sangster following the Closed Preliminary Hearing (Case Management Discussion) which proceeded before her on 21 July 2021, the claimant seeks to give notice of complaints of having suffered detriment and/or dismissal as a result of making a protected disclosure, and a complaint of unauthorised deduction from wages, both in terms of the Employment Rights Act 1996 ("ERA"). Contrary to what appeared on the face of the initiating application ET1 and again as confirmed by the claimant and recorded by Judge Sangster in the course at Closed Preliminary Hearing, the claimant does not give notice of a complaint of victimisation under the Equality Act 2010, ("EqA").

Alleged detriments relied upon

4. The claimant gives notice of reliance upon the following alleged detriments for the purposes of his section 47B ERA complaint;

a. Being informed, on 7 November 2020, that all his booked work (days and nights shifts) had been cancelled;

b. The failure by the respondent to timeously action or respond to his complaints, which failure he considered, occurred and in respect of which failure he raised complaints with external bodies on the 13 December 2020; and

c. The letter from Chief Nurse Jacqueline Macrae (of the second respondent), dated and posted to the claimant on 20 April and an electronic PDF copy of which was sent to the claimant on 4 May, 2021, the same being a determination of the claimant's grievance in terms of which the second respondent partially upheld the same.

5. The claimant expressing a verbally voiced concern, to a care assistant Sandra and a district nurse Sarah on 12 September 2020 (extract and insert surnames from the letter at page 140) that he "*felt I shouldn't been forced to or expected to train external staff and reiterated in a complaint made by him through customer services on 9 February 2021.*"

6. Further, and/or in the alternative to sub-paragraph (a) above, the claimant gives notice of an intention to prove that he was an employee and was unfairly dismissed on the 7 November 2020 as a result of making a protected disclosure, contrary to the provisions of section 103A of the ERA.

7. The claimant's claim for unauthorised deduction from wages is in respect of a payment of £500, which he asserts should have been paid to him by the first respondent as a result of a decision by the Scottish Government to pay such a sum to care workers who worked during the Covid-19 Pandemic in 2020. The first respondent's position is that the claimant was not entitled to this sum, under the Scottish Government Scheme, as he was an agency worker, and that they informed the claimant of this in February 2020.

8. All claims are resisted by the respondent.

Preliminary issues

9. As recorded at paragraph 12(a) and (b) of Judge Sangster's note of 22 July 2021, the two preliminary issues set out at sub-paragraphs a) and b) below, and of which only that at sub-paragraph a) is before the Tribunal for determination at this Open Preliminary Hearing, have been identified as requiring determination, on a prior basis, at two separate and sequenced Open Preliminary Hearings:-

(a)

Were the claimant's complaints, whether of having suffered detriment under s47B of the ERA, or of automatic unfair dismissal under s103A of the ERA, presented within the time limits set out respectively in sections 48(3) or 111(2) of that Act; and, if not, was it reasonably practicable for the claims to be submitted within the primary time limit; and, if not, were the claims respectively presented within such further period of time as the Tribunal considers reasonable? The position of both respondents being that the claims were raised out with the requisite time limits such that the Tribunal has no jurisdiction to consider either.

(b)

If the claims were timeously lodged, what was the employment status of the claimant at the material times for the purposes of his claims and in particular:-

i. Was the claimant in relation to the first respondent and the second respondent, an employee, or, A worker in terms of s230 of the ERA,
ii. A worker under s43K(1) of the ERA,
iii. Or neither an employee nor a worker?

(the position of both respondents being that he was neither, such that the Tribunal has no jurisdiction, on that separate ground, to hear any claims raised by the claimant for detriment under s47B, or complaints of automatic unfair dismissal under section 103A, both ERA.

The Open Preliminary Hearing

10. The issue before the Tribunal for determination at open preliminary hearing on 8 October 2021 was that set out at paragraph 9(a) above; the same, in terms of paragraph 13(a) of Judge Sangster's note, to involve consideration of whether the final detriment complained of, being an alleged detriment said to have occurred at the hands of the second respondent only and being receipt by the claimant of the letter from Chief Nurse Jacqueline Macrae stated variously by the claimant to have been received by him on 20 April 2021 (in his ET1) and/or on 4 May 2021 (when an additional electronic copy was sent to him, was a detriment for the purposes of sec 47B EqA;

11. By e-mail dated 5 October 2021 the claimant gave notice that at the preliminary hearing set down for the 8 October 2021, he intended to seek to argue that the alleged detriments recorded at paragraph 8(a), (b) and (c) of Judge Sangster's note of 21 July 2021 (and at paragraph 4(a), (b) and (c) of this nor of reasons) were part of a series of similar acts or failures for the purposes of section 48(3)(a) of the Employment Rights Act 1996.

Sources of oral and documentary evidence

12. There was placed before the Tribunal the following oral and documentary evidence:-

(a) The claimant gave evidence on his own behalf;

(b) For the first respondent the Tribunal heard evidence from Ms Jenny Frankish, a Director of the first respondent;

(c) For the second respondent the Tribunal heard evidence from Ms Jackie Reid, care home manager;

(d) Parties lodged a hearing bundle extending to some 172 pages to which, neither respondent objecting, and with the Tribunal leave, the claimant added additional documents on two occasions, once, at the

outset of the hearing and subject to the respondents' each exercising a right to re-cross-examine the claimant thereon if so advised, and once, following the conclusion of his own evidential case.

Applicable Law

13. Time limits are applied strictly in the Employment Tribunal. An extension of time is the exception and not the rule ***Becksley Community Centre t/a Leisure Link v. Robertson*** [2003] IRLR 434. The onus is on the claimant to satisfy the Tribunal in complaints of the instant type, that it was "not reasonably practicable" for a complaint under the relevant section to be presented before the end of the applicable three months period and, if so satisfied, that the complaint was subsequently presented "within such further period as the Tribunal considers reasonable."

14. In the instant case, the claimant having engaged with ACAS after the expiry of the principle three month statutory period, the early Conciliation scheme does not operate to extend the applicable statutory period beyond the initial three months.

Complaint of Detriment on the grounds of having made a Protected Disclosure Section 47B ERA

15. The Tribunal's jurisdiction to consider complaints brought in terms of section 47B (protected disclosures) of the ERA, are prescribed in terms of section 48(3) and (4) which are in the following terms:-

> "***48 Complaints to [Employment Tribunals]***
> ……..
> ……..
> *(3) 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.

(4) For the purposes of section (3) –

(a) where an act extends over a period, the (date of the act) means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on; and, in the absence of evidence establishing the contrary, an employer [, a temporary work agency or hirer] shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such in consistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done."

Complaint of having been Automatically Unfairly Dismissed – section 103A ERA

16. The Tribunal's jurisdiction to consider a complaint brought in terms of section 103A of the ERA is prescribed by section 111(2) which is in the following terms:-

"***111 Complaints to [Employment Tribunal]***

……

(2) [Subject to the following provisions of this section], an [Employment Tribunal] shall not consider a complaint under this section unless it is presented to the Tribunal –

(a) before the end of the period of three months beginning with the effective date of termination, 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."

17. The primary and saving provisions, although contained within separate sections, are the same in respect of each of the claims under consideration at open preliminary hearing.

18. The meaning of the words "reasonably practicable" lie somewhere between reasonable on the one hand and reasonably physically capable of being done on the other. In terms of guidance of higher courts the word "practicable" is to be read as equivalent of "feasible"; ***Palmer & Saunders v. Southend-on-Sea Borough Council*** [1984] IRLR 119CA.

19. Whether it was reasonably practicable for a complaint to be presented in time, is an issue of fact for determination by the Employment Tribunal, in all the circumstances of the case. Depending upon the circumstances of a particular case relevant circumstances may include; (a) consideration of the substantial cause of the claimant's failure to comply with the statutory time limit; (b) whether the claimant had been physically prevented from complying with the limitation period, for instance by illness or a post strike or something similar, (c) whether, at the time of dismissal/detriment/failure to act, and if not when thereafter, a claimant knew that he had a right of complaint, (d) whether there was any misrepresentation about applicable time limits by the employer to the employee, (e) whether the employee is being advised or had access to advice at any material time and, if so, from where, the nature of any advice received, (f) the state of the claimant's knowledge as to his rights, and of the existence and applicability of the relevant time limits; that is to say (g) what the claimant knew or what, on reasonable enquiry on his part, he ought to have known including, whether, (h) there was any substantial failure on the part of a claimant or his/her advisor which led to the failure to comply with a time limit. ***Palmer*** (above).

20. The mere fact that an employee was pursuing an internal process including an appeal through internal machinery, does not mean that it was not reasonably practicable for an application to be made in time. ***Palmer*** (above).

21. In the event of ignorance or mistake on the part of the claimant the essential matter or matters about which a claimant is mistaken or of which ignorant, must relate to, the right to bring a claim and not to something that simply goes

to the quality of the claim for example, in financial terms and/or to the advisability of bringing the claim in commercial and industrial relations terms; ***London Underground Ltd v. Noel*** [1999] IRLR 621 CA.

22. Where ignorance or mistaken belief in respect of an essential matter is relied upon it must also be established that the ignorance or mistaken belief was itself reasonable. Either ignorance or mistaken belief will not be reasonable if it arises from the fault of the complainer in not making such enquiries as he reasonably should have made in all the circumstances…….. ***Wall's Meat Company Ltd v. Khan*** [1978] IRLR 499 CA.

23. In deciding whether it was reasonably practicable for a complaint [of unfair dismissal and/or of having suffered detriment because of protected interest disclosure] to be presented within the stipulated time period, the Employment Tribunal should enquire into the circumstances and ask themselves whether the claimant or his advisors were at fault in allowing the time period to pass by without presenting the complaint. If either were at fault then it could not be said to have been impracticable for the complaint to have been presented in time. ***Dedman v. British Building & Engineering appliances Ltd*** [1973] IRLR 379 CA.

Further reasonable period

24. If a Tribunal is satisfied that it was not reasonably practicable for a complaint to be presented before the end of the statutory three month period, there are no absolute time limits on what can regard as a further reasonable period for presenting the complaint, what is reasonable depending on the facts of each case. ***Marley (UK) Ltd & Another v. Anderson***.

25. In deciding what is a reasonable further period, the Tribunal should take all relevant circumstances into account in order to achieve a fair balance. It is not concerned only with the difficulties faced by the claimant. Therefore, an

extended further period may be unreasonable if the employer were faced difficulties of substance in answering the claim. ***Biggs v. Somerset County Council*** [1996] IRLR 203CA.

Continuing acts

26. There may be occasions where, rather than a single or a series of separate single acts of discrimination, or in the instant case as alleged of detrimental acts, there will be a course of detrimental conduct rather than an isolated incident. That is what is envisaged by the wording in section 48(3)(a) of the ERA contains the words "*…….. or, where that act or failure is part of a series of similar acts or failures, the last of them ……...*"

27. Incidents relied upon must be sufficiently connected in time/perpetrator, etc., to constitute instances in a continuing single act of discrimination/detriment.

28. In ***Pugh v. National Assembly for Wales***, the EAT considered that the Employment Tribunal should not take an overly restrictive view of whether there had been a continuing act of discrimination for the purposes of the then Disability Discrimination Act (now Equality Act 2010) in such cases it recommended that Tribunals at first instance should look at the allegations "in the round" and ask whether (on the facts) the employer was responsible for an ongoing state of affairs where disabled persons were treated less favourably. It is for the employee to show an arguable *prima facia* case that the alleged discriminatory acts were part of a continuing act.

29. The term "detriment" is not defined in the ERA 1996. In ***Shamoon v. Chief Constable of the Royal Ulster Constabulary*** [2003] IRLR 285, it was held that a worker suffers a detriment if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work. An "unjustified sense of grievance" is not enough. The reference to a "reasonableness" test in ***Shamoon*** makes the concept of

detriment similar “although not identical” to the concept of less favourable treatment.

Findings in fact

30. On the oral and documentary evidence presented, the Tribunal made the following essential findings in fact, restricted to those relevant and necessary to the determination of the preliminary issue of jurisdiction.

31. The claimant was engaged as a temporary agency worker under a contract for services. The nature of that contract is that ASA Recruitment (ASA International Ltd – the first respondent) is under no obligation to provide work to the claimant and the claimant is under no obligation to accept work offered.

32. The claimant’s first shift with the Drumbrae Care Home, operated by the second respondent, was on 8 June 2020, and his last shift with the same care provider was on 6 November 2020. His P45 was issued via the claimant’s request on 3 February 2021 with a leaving date of 29 November 2020.

33. The claimant engaged with early conciliation, via ACAS from 17 to 18 May 2021, and ACAS issued its enabling Early Conciliation Certificate on 18 May 2021.

34. The claimant first presented his initiating application, ET1, to the Employment Tribunals (Scotland) on 23 May 2021.

35. In terms of his initiating application, as clarified and confirmed by him at Closed Preliminary Hearing on 21 July 2021, the claimant bears to give notice of complaints of:-

(a) Of having been subjected to a detriment by an act of deliberate failure to act by the first and/or second respondents done by them

on the ground that he had made a protected disclosure; and, in the alternative;

(b) Of having been automatically unfairly dismissed in terms of s.103A of the Employment Rights Act 1996 ("the ERA") on the grounds that the reason for his dismissal was that he had made a protected interest disclosure;

36. The claimant asserts that he was dismissed on 7 November 2020 by reason of being informed that his booked work (day and night shifts) had been cancelled, let it be assumed, as the claimant contends for in the alternative, that he was an employee.

Detriments relied upon

37. The detriments given notice of as relied upon by the claimant, for the purposes of the section 47B ERA complaint, are:-

(a) being informed on 7 November 2020 that all his booked work (day and night shifts) had been cancelled;

(b) the failure by the respondents to expeditiously action or respond to his complaints which failure he asserts occurred as at 13 December 2020 on which date he raised complaints with external bodies; and

(c) the letter from Chief Nurse Jacqueline Macrae (of the second respondent), dated 20 April 2021 and sent to the claimant by first class post on that date and a further and electronic copy of which was sent to the claimant, by e-mail attachment, on 4 May 2021 and said by the claimant to have been received by him variously on or about 20 April 2021 and/or 4 May 2021.

38. The letter of 20 April 2021, which is copied and produced at page 140 of the Joint Bundle, is a letter of outcome communicating the determination, by the second respondent, of the claimant's complaint made through customer care on 9 February 2021.

39. The claimant's complaint was three fold:

(a) Firstly, that during an exercise designed as an observation his skills knowledge and ability in relation to the manual handling of patients, carried out by the clinical nurse depute at Drumbrae on 9 February 2021, there had been a lack of communication and transparency, between those carrying out the observation and the claimant, in relation to what the actual purpose of the exercise was; which complaint, the letter of 20 April 2021 communicated had been fully upheld by the respondent;

(b) Secondly, that either the clinical nurse depute and/or the senior care worker, had created and given the impression of a false situation of the senior care worker conducting an assessment of the clinical nurse depute, whereas in fact, they were conducting an observation of the claimant's manual handling skills following the expression of certain concerns to the clinical nurse depute of the claimant's manual handling skills in circumstances where to do so; was not the responsibility of the care home itself which complaint the letter communicates was fully upheld by the second named respondent;

(c) Thirdly that there had been an unacceptable delay on the part of the second respondents in investigating and determining the claimant's complaint of 9 February at 2021 including a complaint that Jackie Reid, the investigating officer had refused to acknowledge the claimant's complaints or had lied to him in responding to his complaint; which complaints the letter of 20 April 2021 communicates was partially upheld, that is to say upheld in respect of the delay albeit in circumstances of Covid related explanations for the delay, but that no evidence had been found which went to substantiate that Jackie Reid, the investigating

officer, had refused to acknowledge or had lied to the claimant in responding to, his complaint.

40. The letter of 20 April 21 communicated that in the course of the internal investigation, the staff involved had been very apologetic, regarding the observation exercise accepting that they had not thought carefully enough about the consequences of their well intentioned actions notwithstanding the fact that their principle intention had been to help the claimant and to avoid causing him unnecessary distress.

41. The letter communicated that the investigating officer, Jackie Reid, had e-mailed the claimant apologising for the delay in responding and investigating his complaint and it further explained that whereas the investigation had commenced with relevant staff while present and available, a Covid outbreak had occurred in the unit resulting in her being unable to complete the investigation in a timely manner, as staff involved were absent until March 2021.

42. The claimant's complaint had included his expressing concern that the occurrence observation exercise carried out of him and the subsequent training undertaken by him, and satisfactorily completed would jeopardise his opportunities of working at Drumbrae and that the actions had effectively stopped him working with the agency.

43. The letter of 20 April 2021 communicated that that was not in fact the case, the observation exercise not having impacted upon the claimant's present or future work activity and rather, that the cancellation of his shifts were due to the Care Home becoming aware that the claimant, while working in the care home had continued to concurrently work in schools for the education department where he was employed full-time, which concurrent working breached the Government Covid Regulations in respect of the mitigation of the risk of cross-infection between communities.

44. The letter communicated a re-assurance that the matters complained of had not or would not jeopardise the claimant's future employment at Drumbrae and that it followed, that when and if the Covid restrictions and risk mitigation protocols were to change such as to permit concurrent working, the claimant would be able to return to work within the care home.

45. As is recorded by Judge Sangster at paragraph 8(c) of her case management order and note of 22 July 2021, at the case management discussion which proceeded before her on that date, the claimant described the letter of 20 April 2021 as one which "*upheld his complaints/grievances in full, and entirely vindicated his position, demonstrating that the witnesses had acted in an unacceptable and dishonest manner.*"

46. The letter of 20 April 2021 communicates the substantial upholding of the claimant's complaints and further communicates re-assurances that the incident giving rise to the complaints had not and would not jeopardise the claimant's future working at the care home.

47. Objectively construed, and applying to the words their normal English language meaning, a reasonable worker would not take the view that they had been disadvantaged in the circumstances in which they had to work by the content and or communication of the letter.

48. The letter of 20 April 2021 did not constitute a detriment for the purposes of section 47B of the ERA.

49. The letter communicated that it was the first named respondents who made the decision to withdraw the claimant from Drumbrae Care Home when the risk to cross-infection posed by his continuing to simultaneously work in both schools and care homes was identified.

50. The claimant being informed, by the first named respondents on 7 November 2020 that his booked work shifts had been cancelled on the one hand and the delay on the part of the respondents in investigating and determining the claimant's complaints were not connected incidents such as to result in their falling to be regarded as a series of incidences of a continuing act of discrimination/detriment for the purposes of section 48(3)(a) of the ERA.

51. The first of the said detriments (cancellation of booked work shifts) was at the hands solely of the first named respondent and the second named detriment was at the hands of the second named respondent. The matters complained of, the delay to which is said to constitute the second detriment, were concerned with were wholly unconnected to and were not the cause of the first detriment which, as the letter of 20 April 2021 confirms, was caused by the claimant's simultaneously working in breach of the Scottish Government Covid protocols.

52. The alleged detriment of cancellation of booked work shifts by the first named respondent on 7 November 2020 and the second alleged detriment of delay on the part of the second named respondents in actioning/responding to the claimant's grievance and alleged protected disclosure dated 21 October 2020, are separate and are stand-alone instances of alleged detriment in respect of which the time period during which at first instance it was competent to present a complaint in terms of section 47B ERA began to run respectively on 7 November at 2020 in the case of the cancellation of shifts and on 13 December 2020 being the date as at which the claimant advised external bodies that he considered the delay to be a detriment.

53. The three month statutory time limit or time period expired on 5 February 2021 in relation to the cancellation of shifts on 7 November 2020 and on 13 March 2021 in relation to the second respondent's alleged failure to act in respect of the claimant's complaints said by him to constitute a detriment as at 13 December 2020.

The Alternatively Pled Complaint of Automatically Unfair Dismissal

54. In respect of the claimant's alternatively pled case that he was an employee of, and was automatically unfairly dismissed by, the first named respondent on 7 November 2020, the three month statutory period for presentation of such a complaint at first instance, first instance expired on 5 February 2021.

Impact of Early Conciliation

55. First engagement by the claimant with early conciliation, on 17 May 2021, occurred on a date which fell after the date of the expiry of the relevant three month time periods, the early conciliation scheme does not operate to extend any of the time periods.

56. As at the date of expiry of the relevant primary statutory time periods the claimant was aware of the existence of the Employment Tribunals (Scotland) and of his right to present complaints to it of:-

a) having been automatically unfairly dismissed in terms of section 103A of the ERA in circumstances where he alleged that the reason for his dismissal was that he had made a protected interest disclosure and;
b) of having suffered a detriment, other than dismissal, by any act or deliberate failure to act, on the ground that he had made a protected disclosure.

57. As at the dates of expiry of the relevant statutory three month time limit the claimant, on the balance of probabilities knew, or ought reasonably to have known that the right to present such complaints was subject to a three month minus one day time limit and further that the time limit fell to be measured; (a) in the case of the alleged dismissal from the date of the alleged dismissal from 7 November 2020 and, (b) in the case of detriments other than dismissal, from the date upon which the act or failure to act founded upon occurred that

is, in the case of alleged failure to investigate his complaints, from 13 December 2020.

58. The claimant had access to the internet throughout the initial three-month period and beyond. (a) He was aware of the existence of the Employment Tribunals (Scotland) website. (b) He was aware of the requirement to engage with ACAS before raising an Employment Tribunal claim and had access to the ACAS website which has a prominent section on time limits which alert persons accessing the website to the existence and duration of the three month minus one day statutory limitation period in respect of the majority of claims, and of six months in respect of claims for redundancy payment.

59. The claimant had access to the Citizens Advice Bureau website and consulted the Citizens Advice Bureau, to whom he copied the e-mail of 21 October 2020 to which he attached a letter of even date within which he asserts that he made the protected disclosure relied upon by him.

60. The claimant spoke with the Citizens Advice Bureau by telephone at or about that time (21 October 2020). He wished to make a face-to-face appointment. The CAB staff member to whom he spoke explained, as was clearly displayed on the CAB website, that due to Covid restrictions they were not currently offering face-to-face appointments and offered the claimant a virtual appointment.

61. The claimant declined to make a virtual appointment or to seek advice further from the Citizens Advice Bureau. He could have done so, in the event that he had been in any doubt as to the time limits which would have applied to the presentation of his now late presented complaints. He ought reasonably to have done so in the circumstances.

62. In the course of his evidence the claimant did not at any point assert that he was ignorant of his right of action or of the existence and length of applicable statutory time limits for presentation of his complaints.

63. In evidence the claimant explained that the reason he did not raise his proceedings within the initial three month time limit that doing so was "*not my priority at that time*".

64. The claimant stated that he was following internal procedures which he considered to be the reasonable course of action to pursue and was waiting to receive an outcome of his grievance complaint first.

65. The claimant sent his whistleblowing complaint to the second named respondent.

66. The contract entered into between the first respondent and the claimant, which is copied and produced at pages 86 to 91 of the bundle, confers upon parties; (a) at clause 9.1, the right to terminate the agency worker's assignment at any time without prior notice or liability; and, (b) at clauses 4.1 to 4.1.5 obligations imposed upon the agency worker, including an obligation to take all reasonable steps to safeguard his own health and safety and that of any other person who may be present or affected by his or her actions on assignment and to comply with the health and safety policies and procedures of the hirer.

67. The claimant's continuing, throughout the period during which he was working in the Drumbrae Care Home, to be simultaneously fully employed and working in schools, contrary to the then pertaining Scottish Government prevention of cross-infection protocols, constituted a breach of those obligations.

68. In cancelling the claimant's pre-booked shifts, as at 7 November 2020, upon becoming aware of the claimant's concurrent working in schools, the first named respondents did so because of that continuing breach of obligation on the part of the claimant. They did not do so on the grounds that the claimant

had made a protected interest disclosure to the third party second named respondent.

69. The principle reason for the claimant not presenting his complaints of automatic unfair dismissal in terms of section 103A of the Employment Rights Act 1996 and/or of having suffered detriment other than dismissal on the ground that he had made a protected interest disclosure in terms of section 47B of the ERA, within the respective initial three month limitation periods, was his conscious and continuing decision to defer considering doing so until after he had pursued internal remedies to which he hoped he might achieve would be a satisfactory outcome without the need to raise proceedings before the Employment Tribunal.

70. It was reasonably practicable for the claimant to have presented his complaint of alleged automatic unfair dismissal and his complaint of having suffered detriment other than dismissal on the ground of his having made a protected disclosure to the Employment Tribunal respectively before the end of the three month period beginning with the effective date of termination of his employment that is by 6 February 2021 and of the date of the alleged failure to act that is by 13 March 2021.

71. There was no physical impediment which prevented him from doing so nor was he prevented from doing so by ignorance of any material fact in circumstances where it was reasonable for him to be ignorant of the same.

72. The claimant does not offer to prove any matter of fact which if proved would go to establish expressly that either the cancellation of his booked shifts by the first named respondent, or the failure to act expeditiously in the conduct of enquiry into his whistleblowing complaint on the part of the second respondent, was done on the ground that he had made that alleged protected disclosure.

73. The claimant does not give notice of offering to prove any primary facts from which, if proved, the Tribunal would be entitled, absent another explanation, to conclude that the first or second named respondents respectively so cancelled the claimant's booked shifts or so failed to act in relation to the investigation of his alleged protected disclosure, on the ground that he had made that disclosure.

Summary of submissions for the claimant

74. The claimant submitted:-

a) that the Tribunal had an unfettered discretion to allow his claims to be received though late;

b) that as one of the respondents had been allowed an extension of time to submit their response form ET3, it followed and was only fair that he also be allowed an extension of time to submit his claims;

c) that because of the occurrence Covid-19 pandemic the Tribunal should, as a matter of course give more time to all parties,

d) that submitting claims to the Tribunal had not been his priority during the initial three month time periods but rather his priority was to take time to follow internal procedures and,

e) because the respondents had not satisfied him in terms of those internal procedures both in relation to the time taken to determine his grievance and in the outcome, he should be allowed an extension of time to present his complaints;

f) that for him to have taken the time that he had to present his complaints and to have taken that approach of not giving priority to submitting his complaints until after he had received the grievance outcome, was reasonable and the fact that he had acted reasonably meant that his complaints were not time-barred;

g) that the Tribunal should have been given extra powers because of Covid-19 on extending the time limits;

h) that if he realised that the Tribunal might not accept his claims when he submitted them late, he would have submitted them on time and he would do so for future claims.

i) that separately and in any event, because the Employment Tribunal was a public body, it would not have been able, because of Covid 19, to have received or registered his complaints during lockdown even if he had taken steps to submit them within the initial three month time limits.

75. The claimant concluded by submitting that his claims, in the above circumstances, were not time-barred.

Summary of submissions for the respondents

76. The second named respondent's representative referred the Tribunal to the following case authorities in the course of submission all of which the Tribunal considered to be both relevant and of assistance:-

1. ***Jesudason (appellant) v. Alder Hey Children's NHS Foundation Trust*** [2020] EWCA Civ73;
2. ***Shamoon v. Chief Constable of The Royal Ulster Constabulary*** [2003] UKHL113;
3. ***Mr J J Cullinane v. Balfour Beatty Engineering Services NRL Ltd*** [2011] WRL1151660 [2011];
4. ***House of Clydesdale Limited (appellant) v. J L Foy (respondent)*** [1976] IRLR391;
5. ***Wall's Meat Company Limited (appellants) v. Khan (respondent)***;
6. ***Arthur v. London Eastern Railway Limited (trading as One Stansted Express)*** [2006] EWCA Civ1358;
7. ***Trevelyans (Birmingham) Limited v. Norton*** [EAT] [1991];
8. ***Porter (appellant) v. Banderidge Limited (respondents)*** [1978] IRLR 271;
9. ***Palmer & Saunders (appellants) v. Southend-on-Sea Borough Council (respondent)*** [1984] IRLR 119.

77. There was no basis in the evidence presented before the Tribunal to support a finding that either the content of or the issuing of the letter of 20 April 2021 of which the claimant complained in this respect was to his detriment.

78. The respondents' representatives' variously submitted as follows.

79. In relation to the alternatively pled case of automatically unfair dismissal in terms of section 103A of the ERA, said to have occurred by the claimant on 7 November 2020, and the claimant having first engaged with ACAS on 17 May 2020 and the initiating application ET1 being first presented on 23 May 2021, that the claim had been presented out of time and the Tribunal lacked jurisdiction to consider it in terms of section 111(2)(a). Thus, she submitted the claimant required to satisfy the Tribunal firstly that it had not been reasonably practicable for the complaint to have been presented within the applicable initial three month period and that it had further been presented within such further period as was reasonable in the circumstances.

80. In relation to the complaint of having suffered detriment (other than dismissal) in terms of section 47B ERA, that the detriments relied upon did not fall within the terms of section 48(4) and further that the last of the detriments relied upon, being the letter of 20 April 2021 did not fall to be regarded as a detriment as approved in ***Shamoon v. Chief Constable of The Royal Ulster Constabulary*** and that accordingly;

(a) The Tribunal lacked jurisdiction to consider the complaint in terms of section 48(3)(a) of the ERA and the claimant required to satisfy the Tribunal in terms of section 48(3)(b) that it had not been reasonably practicable for the complaint to be presented before the end of the relevant three month period being respectively the 6 February and the 13 March 2021; and further, (b) it having been presented on 23 May 2021 that it had been presented within such further period as was reasonable.

81. That although the question of an act or deliberate failure to act constituted a detriment fell to be regarded from the subjective view point of the worker, there was in terms of the guidance of the higher courts, an element of objectivity to be applied to the assessment; and, that so considered the letter of 20 April 2021 which substantially upheld the claimant's grievances and provided him with reassurance on the matters about which he had expressed concerned, did not fall to be regarded as constituting, and did not constitute, a detriment in the circumstances.

82. That in relation to the two remaining detriments these did not fall within the terms of section 48(4) and, in any event even if they did, the latest of them occurred after the expiry of the relevant three month period.

83. That while it was for the respondents to show, in terms of section 48(2) of the ERA the ground upon which the alleged detrimental act and failure to act were done, that the respondents had discharged the burden of proof on the evidence presented establishing, in relation to each, grounds which were unconnected with the claimant having made an alleged protected interest disclosure.

84. That the principal reason which the claimant had advanced for his not taking steps to present his complaints timeously was that doing so was not his priority at the time. Rather as he had explained in evidence he was pursuing internal procedures which he considered to be a reasonable course of action and that it was only when he decided that the outcome of his grievance when received was not satisfactory, that he took steps to submit his claim. That that of itself did not result in it not being reasonably practicable for him to do so rather, it was a result of a conscious decision on his part. It was not a sufficient explanation, in the circumstances, to bring the claims within the terms of section 48(4)(b).

85. That at no point in his evidence or submissions had the claimant asserted that he was ignorant of his right to bring complaints of the type which he subsequently presented late to the Employment Tribunal; nor that he was ignorant of the existence or duration of the relevant time limits or from when they would fall to be measured.

86. There was no evidential basis upon which the Tribunal could make a finding in fact that the claimant was so ignorant.

87. Separately and in any event the evidence which had been presented all went to indicate, on the balance of probabilities, that the claimant was aware not only of his rights but of the existence, duration and applicability of the time limits.

88. Separately and in any event, the evidence presented supported a finding in fact that the claimant ought reasonably to have been aware of those matters. That is to say, let it be assumed that the claimant was in ignorance of his rights/time limits etc, that that ignorance was not, of itself, reasonable in the circumstances and thus, did not result in it not being reasonably practicable for him to submit his claims within the initial time limits.

89. Of the other reasons advanced by the claimant the respondents' representatives submitted these were either unfounded in fact or misconceived *viz*:-

a) the Employment Tribunal had not been given "extra powers" to extend the time limits in Covid although Covid was a factor which, where relevant in the particular circumstances of a case, could be taken into consideration by the Tribunal in the exercise of its discretion;
b) the Employment Tribunal was able to and did continue to receive and register applications throughout the Covid lockdowns;

c) there was no rule to the effect that because one of the respondents, following the claimant's late presentation of the claim, sought and had been allowed a short extension of time to submit its response form ET3, that the claimant should be automatically and retrospectively entitled to an extension of time to submit his claims. The tests we applied were different;

d) While it was accepted that there had been delay on the part of the second respondents in investigating and determining the claimant's grievance that, of itself did not entitle the claimant to delay the presenting of his complaints.

e) There was no suggestion that the respondents had in any way misrepresented the position regarding time limits to the claimant.

f) The claimant's evidence, at its highest, had been only the respondents had not proactively informed him of time limits relating to Employment Tribunal proceedings, there being no such obligation to do so was incumbent upon the respondents to do so.

g) The claimant had failed, on the evidence, to satisfy the Tribunal that it had not been reasonably practicable for him to present his complaints within the relevant timescales prescribed by sections 111 and 48 of the ERA.

h) Separately and in any event the claimant had failed to address entirely, the question of the extent of the further period of time which had elapsed between the expiry of the time limits and the presentation of his claims.

90. The respondents' representatives invited the Tribunal to dismiss the claims for want of jurisdiction.

Discussion and disposal

The issue for disposal

91. The issue before the Tribunal for determination at open preliminary hearing is recorded in the following terms:-

a) Were the claimant's complaints/claims, whether having suffered detriment (other than dismissal) under section 47B ERA, or, presented in the alternative, of automatically unfair dismissal under section 103A of the ERA, presented within the time limits set out respectively in sections 48(3) and 111(2) of that act?; and if not,
b) Was it reasonably practicable for the claims to be presented within the applicable primary time limits?; and, if not,
c) Were the claims presented within such further period of time as the Tribunal considers reasonable?

92. The position of both respondents is that the claims were raised outwith the requisite time limits and, in consequence, that the claimant lacks title to present them and the Tribunal lacks jurisdiction to consider them.

93. The Tribunal has determined these issues having first heard the evidence not only having first heard relevant evidence, not only from the claimant, but from witnesses of both the first and second named respondents.

Does the Tribunal have jurisdiction in terms of section 48(3)(a) and section 111(2)(a)?

94. The Tribunal has found in fact that the section 111(2)(a) time limit expired in relation to the alternatively pled complaint of automatic unfair dismissal on the 6 February at 2021 and that the section 48(3)(a) time limit, in respect of the complaint of having suffered detriment in terms of section 47B of the ERA, expired on 13 March 2021; Whereas, the claimant first engaged with ACAS in relation to early conciliation on 17 May, and first presented his initiating application ET1 on 23 May 2021.

95. The Tribunal concludes in light of those findings in fact that it lacks jurisdiction to consider the claims in terms of section 48(3)(a) and section 111(2)(a) of the ERA respectively.

96. Accordingly, the claimant required to satisfy the Tribunal that the circumstances of his presentation brought his claims within the terms of section 48(3)(b) and 111(2)(b) ERA respectively, by satisfying the Tribunal; firstly that it was not reasonably practicable for the complaints to have been presented within the initial three month time limit and if it was not, secondly, that they were subsequently presented within such further period as the Tribunal considers reasonable.

Section 48(4) of the ERA and the alleged detriment of 20 April/4 May 2021

97. In reaching the above primary conclusion in relation to the section 47B ERA complaint of having suffered detriment, the Tribunal require to consider and to determine the following sub-issues.

(a) Whether the last of the alleged detriments founded upon namely, the letter communicating the outcome of his grievance, dated 20 April and sent to the claimant by post on or about that date and further copied electronically to the claimant on 4 May 2021, constituted a detriment for the purposes of section 47B of the 1996 Act; and,

(b) Whether the alleged detriments relied upon by the claimant being a cancellation of his booked shifts by the first named respondents on 7 November 2020, the failure by the respondents to timeously action/investigate and determine his complaints, said by the claimant to have amounted to a detriment as at 13 December 2020, and the 20 April 2021, letter were sufficiently similar acts or a series of sufficiently connected acts, as to place them within the terms of section 48(4) of the ERA and such as, let it be assumed that the letter of 20 April 2021 did constitute a detriment, to extend the last day of the section 48(3)(a) period to the 4 May, which failing to the

20 April 2021 and thus bring all or any of the alleged detriments relied upon, within the primary three month time limit.

98. There is no statutory definition of detriment for the purposes of section 47B of the 1996 Act. There is however substantial judicial guidance at the highest level, to which I was referred by the first respondent's representative – see ***Shamoon v. Chief Constable of The Royal Ulster Constabulary*** [2003] ICR337 and the authorities reviewed and approved therein which indicate variously:-

- "a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment" and,
- "if the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought in my opinion, to suffice," **per Lord Scott of Fosscote** in ***Shamoon v. Chief Constable of The Royal Ulster Constabulary*** [2003] ICR337 and,
- "an unjustified sense of grievance cannot amount to detriment" **per Lord Hope of Craighead** in ***Shamoon*** at paragraph 35."

99. Thus the question of what amounts to a detriment in this context falls to be viewed from the stand point of the complaining worker but the test is not entirely a subjective one, or indeed an arbitery one which falls to be passed or failed depending solely on the complaining worker's perception. Lord Hope of Craighead in ***Shamoon*** described the test as being one of "materiality". An objective element is thus introduced.

100. As the Tribunal has found in fact, the letter of 20 April 2021 is relied upon by the claimant, of itself, constituting the detriment.

101. At paragraph 8(c) of Judge Sangster's case management note, issued by her following the closed preliminary hearing which proceeded on 21 July 2021, the claimant is recorded as explaining - "*that this letter upheld his complaints/grievances in full and entirely vindicated his position,*

demonstrating that the witnesses had acted in an unacceptable and dishonest manner. He could not explain why he felt this could or would constitute a detriment by the second respondent."

102. In his own evidence before the Tribunal at Open Preliminary Hearing the claimant did not expand upon why he considered that the letter itself constituted detriment.

103. The letter of 20 April 2021 is a letter communicating the outcome of the investigation into the claimant's complaints and the determination of his grievance. I do not consider that a reasonable worker would or might take the view that that of itself was something to his detriment.

104. The letter substantially upholds the claimant's grievances. I do not consider that a reasonable worker would or might take the view that in so far as it did uphold his grievances, it was to his detriment.

105. In so far as the letter; (a) confirmed that it had found no evidence that Jackie Reid had refused to acknowledge or had lied to the claimant in responding to his whistleblowing complaint, and, (b) no evidence to support the claimant's concern that the incident would jeopardise the claimant's future working at the Drumbrae Care Home, and, (c) in so far as the author went on to reassure the claimant that the incident did not jeopardise his future working at Drumbrae, and (d) that if and when the Covid regulations and protocols for control of the risks of cross-infection changed, the claimant would be able to return to work within the Care Home.

106. I do not consider that a reasonable worker would only take the view that the same was to his detriment.

107. In so far as the claimant's position may have changed from that recorded by Judge Sangster as communicated by him on 21 July 2021 such that he is now experiencing a sense of grievance in relation to the letter and its content,

and I observe that it was not clear from his own evidence that that was the case, I considered that such a sense of grievance was unjustified in the circumstances presented in evidence.

108. I accordingly hold, as found in fact, that the letter of 20 April 2021 did not and does not constitute a detriment for which the claimant would be entitled to rely for the purposes of a section 47B ERA complaint.

Series of connected incidents?

109. It having determined that the only act which is said to have occurred within the relevant three month period does not amount to a detriment for the purposes of section 47B of the ERA it is unnecessary that the Tribunal consider whether the remaining act and alleged failure to act, both of which occurred outwith the three month period, are part of a series. For completeness sake, however, and in recognition of submissions of parties on the point, I do so.

110. In order to determine whether the acts are part of a series, some evidence is needed to determine what link, if any, there is between the acts which occurred within the three month period and the acts which occurred outwith it. The employee must prove that the act in question was in fact done or that there was a deliberate failure to act and that he suffered detriment, but it is for the employer to show the ground on which any act, or deliberate failure to act, was done: section 48(2) ERA.

111. The Tribunal heard relevant evidence from the claimant and from each of the first and second named respondents' witnesses.

112. As the Tribunal had found in fact the acts are linked by the fact that they are said to have been "committed" against the claimant but that of itself is insufficient to make them part of a series or sufficiently similar for the

purposes of section 48(4) of the 1996 Act. It is necessary to look at all the circumstances surrounding the acts.

113. In doing so and on the evidence presented, the Tribunal has found that they were not all committed by fellow employees or indeed at the hands of the same respondent. The act of cancelling the claimant's booked shifts on 7 November 2020 was committed by the first named respondent, the failure to act in expeditiously investigating and the separate act of issuing the letter of 20 April 2021 were "committed" by the second named respondents.

114. The first and second named respondents are entirely separate legal entities in law. Such connection as may be said to exist between them arises from the fact that the second named respondent has work opportunities which, from time to time, are filled/taken up by agency workers identified by the first named respondents. I do not consider that that connection, of itself, is sufficient to render the alleged detriments relied upon as sufficiently similar, or a series of acts/failures to act, for the purposes of section 48(4).

115. The second respondent's failure to expeditiously progress investigation of the claimant's complaints was caused by Covid related absences of relevant employees involved. The cancellation of the claimant's then booked shifts, on 7 November 2020, was done by the first named respondent because they became aware of the risk of cross-infection posed by the claimant continuing to breach Scottish Government cross-infection protocols by simultaneously working in the second respondent's care home while also working full-time in schools. Neither the act of the first respondent nor the alleged failure to act of the second respondent founded upon was done on the ground that the claimant had made a protected disclosure. The fact that they are allegedly all committed against the claimant of itself is insufficient to make them part of a series of or similar acts. It is necessary to look at all the circumstances surrounding the acts. They were not all committed by fellow employees indeed they were committed by separate legal entities namely that first and second respondents, (a) The only connection between the first and second

respondents is that the second respondents have work opportunities which, from time to time are filled by agency workers identified by the first named respondents. (b) In relation to the act and deliberate failure relied upon, the same were not organised or concerted in some way as between the first and second respondents. (c) The Tribunal has found in fact why the first and second respondents respectively did what they did and has found that neither acted or failed to act on the grounds that the claimant had made a protected disclosure. (d) While it is possible, depending on the facts of a particular case, that a series of apparently disparate acts can be shown to be part of a series of acts or to be similar to one another in a relevant way by reason of them all occurring on the ground of a protected disclosure having been made, having held enquiry into those matters, and on the evidence presented, the Tribunal has found, in fact, that the acts/failure to act founded upon in this case are not so connected.

116. There was no evidence that went to support, nor indeed, in fairness to the claimant neither did he assert, that the actions of the first and second named respondents were organised or concerted in some way. That is a position supported by the enquiry held by the Tribunal into, and the findings which it has made as to, why the first named respondent and the second named respondent respectively did what is alleged it being for the respondent to show the actual ground upon which an act or failure to act was done .

117. As the Tribunal has found in fact on the evidence presented, none of the acts nor the failure to act were done on the ground that the claimant had made a protected disclosure.

118. While it is possible, depending upon the facts in a particular case, that a number of apparently disparate acts can be shown to be part of a series or to be similar to one another in a relevant way by reason of them all being done on the ground of a protected disclosure having been made, in the instant case and on the evidence presented, the Tribunal has found that that is not so.

119. I accordingly hold that none of the acts/deliberate failure to act, said to be detriments and founded upon by the claimant, including the letter of 20 April 2021 (let it be assumed that the same had been found to constitute a detriment, which it has not), are sufficiently connected to the others to fall within the terms of section 48(4) of the ERA.

Whether it was reasonably practicable for the claims to have been presented within the primary three months time periods

120. Time limits are applied strictly in the Employment Tribunal. An extension of time is the exception and not the rule. The onus is on the claimant to satisfy the Tribunal, in the case of discrimination claims that it is just and equitable to hear the claim which is presented late. ***Becksley Community Centre t/a Leisure Link v. Robertson*** [2003] IRLR 434; and in claims such as arising in the instant case, that it was not reasonably practicable for the claims to be presented within the initial three month time limit.

121. Whether it was so reasonably practicable in the circumstances of any particular case, is an issue of fact for determination by the Tribunal. In the instant case, that falls to be determined on the evidence presented at open preliminary hearing. Relevant factors to be considered included; the length and reasons for the delay, the promptness with which the claimant has acted once he or she knew the facts giving rise to the cause of action and the steps taken by the claimant to take advice, what the claimant knew or, upon reasonable enquiry ought to have known, about his right of action i.e. right to present a complaint to the Employment Tribunal, about the existence and extent of and applicability of relevant time limits and, let it be assumed that the claimant was ignorant on some or other of those material matters, whether in the circumstances that ignorance was of itself, reasonable.

122. In relation to the question of fact; "The test is empirical and involves no legal concept. Practical common sense is the key note and legalistic footnotes may have no better results than to introduce a lawyer's complications into what should be a layman's pristine providence." – ***Wall's Meat Company Ltd v. Khan*** [1979] ICR 52 per Lord Shaw.

123. The term reasonably practicable falls to be regarded as meaning "reasonably feasible". ***Palmer & Another v. Southend-on-Sea Borough Council*** [1984] ICR 372, ***Asda Stores Limited v. Kowser*** EAT165/07,

124. The onus of establishing that presentation within the applicable time period was not reasonably practicable rests on the claimant, per ***Porter v. Banbridge Limited*** [1979] ICR 943 – "*That imposes a duty upon him to show precisely why it was that he did not present his complaint*".

125. Lady Smith explained it in these words:-

> "*…….the relevant test is not simply a matter of looking at what was possible but whether, on the facts of the case, it was reasonable to expect that which was possible to have been done.*"

126. At no point in the presentation of his evidence, or in submission, did the claimant assert that he was ignorant of or in error as to any of, his right of action, (to present a complaint to the Employment Tribunal), of the existence of the Employment Tribunal, the existence of time limits relating to claims of the type which he was presenting, or of the dates by which they would begin to run, in relation to the matters upon which he now seeks to present claims.

127. That the claimant was not so ignorant or in error or misunderstanding or ought not reasonably to have been, appears consistent with the other evidence in the case which established; that he had access to and did speak with the Citizens Advice Bureau within the initial three months period seeking a face-to-face meeting but, having been offered a virtual meeting because of the

then Covid restrictions, declining to make a virtual appointment. He had access to the internet, to the Employment Tribunal and ACAS websites on both of which immediate prominence is given to the existence of time limits and their applicability and, in relation to the Employment Tribunal, at the material time information in relation to the submitting of claim forms online or otherwise in the context of the Covid lockdown.

128. Separately and in any event regardless of whether the claimant was or was not in ignorance or error, such ignorance or error would not, in the circumstances fail to be regarded as reasonable, the correct factual position being readily available to the claimant had he made reasonable enquiry.

129. Rather, in answer to the question why had he not timeously submitted his claims, the claimant stated in evidence that it was because "*that was not my priority at the time*". He explained that he was following internal procedures which course of action he considered to be reasonable, by which the Tribunal understood him to mean he was pursuing and awaiting the outcome of the internal grievance/complaints, and that because he had been acting reasonably in that regard he should be entitled to an extension of time and to submit his complaints though late once he formed the view that the outcome of the internal procedures was not to his satisfaction.

130. I reject that contention. There was no evidence presented that went to support a finding in fact that the respondents had actively misled or misrepresented to the claimant any material matter relating to his rights of action or in relation to any potentially applicable time limits attaching to the exercise of those rights.

131. In submission the claimant stated that the respondents had not proactively told him about the existence of time limits, in relation to his potential claims, but the respondents are under no obligation so to do. While it is open to a party to decide to pursue internal remedies in the hope that these might avoid the need to present claims to the Employment Tribunal, a decision to do so

in circumstances where an individual knows or ought reasonably to have known that in doing so they may jeopardise the right to present claims does not, of itself, entitle the claimant to an extension of time.

132. The claimant advanced a number of other contentions which he argued should be regarded as resulting in his complaints not being time-barred *viz*:-

a) that one of the respondents had required to seek and had obtained a short extension of time to submit its response form ET3 following the claimant's late presentation of his claims. The Tribunal having exercised its discretion such as to allow that extension it followed therefore that he the other party in the case was entitled or, to have at least in fairness shouldn't be given (tit for tat), an extension of time in relation to the late presentation of its claims. I reject that contention there being no such rule of procedure or of substantive law and the test to be satisfied in respect of the two competing situations being different.

b) that even if he had taken steps to present his claim, the Employment Tribunal "*being a public body would have been unable to receive his complaint because of Covid restrictions*". I reject that contention as being wholly unfounded in fact. The Employment Tribunal has continued to receive and register applications throughout the Covid pandemic.

c) that the Employment Tribunal should have had additional powers due to Covid to extend the statutory time limits and since it had not was reasonable that his extension of time should be allowed. I reject that contention. The Employment Tribunal is a statutory court whose jurisdiction is prescribed by Parliament. Parliament

has conferred no "additional powers" of the type referred to upon Employment Tribunals. Notwithstanding, Employment Tribunals are able to and do take account of the impact of the Covid pandemic upon the reasonable practicability test where, on the facts of any particular case, it is relevant to do so in the exercise of its discretion.

d) the claimant stated in evidence that had he realised that he would not be entitled to an extension of time in circumstances where one of the respondents had been given an extension in relation to the submission of its ET3, he would have submitted his claims timeously. That contention to which the claimant returned in submissions, in my consideration does not result in it not having been reasonably practicable for the claimant to present his complaint. It, rather, tends to support the conclusion that it was so reasonably practicable and that the claimant's failure to so present the complaints was the result of a conscious decision on his part that he would not give priority to do so at the material time.

133. Taking account of the above and, following evidential enquiry and on the evidence presented I find that the claimant has failed to satisfy the Tribunal that it was not reasonably practicable for him to have presented his complaints within the relevant applicable primary three month time limits. I hold on the evidence that it was reasonably practicable for the claims to be presented within time and, in consequence, that the Tribunal lacks jurisdiction, respectively in terms of section 48(3) and section 111(2) of the Employment Rights Act 1996, to consider the claimant's complaint of having suffered detriment under section 47B of the Act and the claimant's complaint, pled in the alternative, of having been automatically unfairly dismissed in terms of under section 103A of the ERA which claims are accordingly dismissed for want of jurisdiction.

Employment Judge: Joseph d'Inverno
Date of Judgment: 08 November 2021
Entered in register: 09 November 2021
and copied to parties