Case No: EA- 2020-000801-JOJ (Previously UKEATPA/0836/20/JOJ)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20 July 2021

Before:

HIS HONOUR JUDGE AUERBACH

- -

Between:

(1) WELLS CATHEDRAL SCHOOL LTD	**Appellants**
(2) MR M STRINGER	
- and -	**- and -**
(1) MR M SOUTER	**Respondents**
(2) MS K LEISHMAN	

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Mr D Leach (instructed by Harris & Harris Legal Services LLP) for the **Appellants**
Mr R Johns (instructed by BBS Law Ltd) for the **Respondents**

Hearing date: 20 July 2021

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The employment tribunal did not err in deciding that it was just and equitable to extend time in respect of the presentation by the claimants of their respective discrimination claims, in all the circumstances of their particular cases. **Robinson v The Post Office** [2000] IRLR 804, **Apelogun-Gabriels v London Borough of Lambeth** [2002] ICR 713 and **Miller v The Ministry of Justice**, UKEAT/003/15/LA considered.

HIS HONOUR JUDGE AUERBACH

Introduction and Background

1. I shall refer to the parties as they are in the employment tribunal as the claimants and the respondents, or by name. The respondents are Wells Cathedral School Limited, which runs the school of that name, and Mr M Stringer, the Director of Music at the school. The claimants are Mr Souter and Ms Leishman. They are husband and wife. Ms Leishman worked as a visiting violin teacher at the school from 2009 until she resigned on 4 January 2019. Mr Souter worked as Head of Strings and a music teacher from 2008 until his resignation on 25 April 2019.

2. Ms Leishman presented a claim form on 26 April 2019 including complaints of constructive unfair dismissal and of disability discrimination said to have occurred during her employment. Mr Souter presented a claim form on 26 July 2019 complaining of constructive unfair dismissal and of disability discrimination during the course of his employment. He relied on his wife's disability by association. There were also separate money claims and counterclaims as between Mr Souter and the school which are not relevant to this appeal. Both claimants were represented by the same solicitors. The underlying claims that are live have yet to come to a full merits hearing.

3. This appeal by the respondents is against the decision of the employment tribunal that it was just and equitable to extend time in respect of the presentation of both claimants' **Equality Act 2010** claims. While noting that no findings of fact have yet been made by the tribunal, I will say something about the background to the complaints and the allegations in outline.

4. Ms Leishman alleges that a campaign has been waged against her and Mr Souter, principally by Mr Stringer, ever since his appointment in 2015. She was diagnosed with, and treated for, cancer in October 2016 and had an extended period of absence, returning to the school in September 2017. She complains that upon her return she was not permitted to resume teaching her full roster of

students, and further that, at a meeting in October 2017, allegations about her capability and what were alleged, she says, to be parents' concerns, were raised, but, on her case, not in good faith.

5. In 2018 an informal capability process was begun against Ms Leishman. Following that she made a subject access request. There was a meeting in March 2018 under the informal capability procedure by which time she had a union representative involved. As a result of her subject access request, she received copies of internal emails which she considered demonstrated that there had been a plan to undermine her and her husband, and to find a way to remove them from the school, going back as far as 2016. These allegations are disputed by the respondents.

6. On 4 August 2018 Ms Leishman presented an internal grievance complaining principally about the alleged conduct of Mr Stringer, including relying on the disclosed emails. By that time, she had consulted solicitors who assisted her in drafting that grievance. On 30 October 2018 a grievance outcome was sent to her solicitors, which was not in her favour. She appealed. The appeal outcome on 21 December upheld the original grievance decision. On 4 January 2019 she resigned. Having completed ACAS early conciliation she presented her claim form on 26 April that year.

7. Mr Souter also claims that there was a longstanding campaign against him as well as his wife. He claims that, following a bereavement in September 2017, he was forced against his wishes to take compassionate leave, and subsequently put on an informal capability programme on the basis of alleged complaints by students. He says that he became aware of the internal email correspondence relating to him after his wife obtained that material in response to her subject access request.

8. Mr Souter was signed off work with stress from January 2018 and presented his own grievance in July. By that time, he too had had some support from his union and had instructed the same solicitors as his wife, who assisted with his grievance. On his account, there was then protracted correspondence between his solicitors and those of the school about next steps in the grievance

process, ultimately leading to grievance hearings on 26 February and 1 March 2019. In April his solicitors were informed that the panel appointed to consider his grievance had withdrawn and were not going to make a decision on it. Following that, he resigned on 25 April. Following completion of the ACAS early conciliation process, he presented his claim on 26 July.

9. Case management hearings in October 2019 and June 2020 reviewed the complaints and the issues. It was identified that there was a time point in both cases which turned on whether the tribunal considered it just and equitable for a primary time limit of greater than three months to be applied in respect of any or all of the claimants' **Equality Act** claims. It was determined that this should be decided as a substantive issue at a preliminary hearing.

The Tribunal's Decision

10. That preliminary hearing took place before Employment Judge Livesey in August 2020. Both sides were represented by counsel, being Mr Johns for the claimants and Mr Leach for the respondents, both of whom have appeared again before me today. Both claimants gave evidence and were cross-examined on the time point. There were no witnesses for the respondents.

11. The judge gave an oral decision and a written judgment and reasons were subsequently produced. Also, in my bundle was a transcript of what the judge said when giving oral reasons. Such a transcript will not ordinarily be provided. Rather, if written reasons are requested and produced, then these stand as the definitive written record of the tribunal's reasons for its decision. It is therefore not clear to me why a transcript of the reasons given orally was provided. However, both counsels have correctly made their submissions on this appeal by reference to the judge's written reasons.

12. The tribunal decided that, in respect of all of the complaints of discrimination under the **Equality Act 2010** made by both claimants, time should be extended, as it was just and equitable to do so. I will set out the relevant passage from the tribunal's decision in full.

"3. The relevant facts

The complaints

3.1 The First Claimant's complaints of harassment were based on emails dated 5 October 2016 and 3 and 8 November 2017 (see paragraph 18.1 [142]). The Claimant first saw those emails in mid-March 2018 when his wife's Subject Access Request ("SAR") was answered by the Respondents. He digested the contents of the SAR over the following weeks and said that he was probably aware of the material emails at least by the end of April 2018. He was certainly aware of them by July because they featured within the grievance which he co-wrote with his solicitors on 2 July [280-5].

3.2 The complaint of direct discrimination was based upon the additional allegation that he had been required to take compassionate leave back in September 2017 (paragraph 20.1[143]).

3.3 The Second Claimant's complaint of harassment concerned the allegation that she was denied her right to return to a full teaching load, an allegation which extended from September 2017 until June or July 2018. She also brought eight complaints of direct discrimination (paragraph 21.1 [143-4]); they concerned the same emails covered by the First Claimant's claim and others disclosed as part of her SAR, the same workload issue covered by her s.26 complaint and some other factual events which occurred in 2017 or 2018, all before the end of the summer term. Finally, there were two additional complaints under s.15 which concerned events of 11 October 2017 and/or events extending between that date and 4 January 2018.

3.4 There was significant overlap between the complaints of discrimination referred to above and the breaches of implied term which were relied upon to found the complaints of constructive unfair dismissal (see, in particular, those allegations at paragraphs 15.1.4, 15.1.5, 16.5.3, 16.5.7 and 16.5.9 [139-141]).

Advice

3.5 Both Claimants had advice from their union and solicitors. The First Claimant said that he had advice from his union from February 2018 and from solicitors from May or June. His solicitors saw the relevant emails and then assisted him with the drafting of his grievance letter, which included the following [284];

> "*Whilst I have been advised that both myself and my wife have very strong legal cases against WCS, I have no inclination at this time to embark on legal proceedings if the issues (and those of my wife) can be resolved quickly*".

He said that he did not know what those claims were precisely. He said that that paragraph had not been written to achieve a settlement but that he had merely wanted to return to work after the issues had been resolved. He simply wanted to have a 'voice.'

3.6 The Second Claimant had union advice from Ms Barefoot for several months, and certainly from March 2018. She received solicitors' advice at the same time as her husband. They too co-drafted her August grievance letter [291-2];

> *"I have not, as yet, been able to decide how my situation might best be resolved although, now having taken legal advice, I am advised that I would have a very strong legal case to pursue against the school. However, I would prefer if possible, to try and reach some understanding with the school as I am concerned that, if I embark on legal proceedings, this could not in any way benefit my current state of health. I hope legal action can, if possible, be avoided".*

She said that she wanted to keep the possibility of a settlement open and that she made an active decision not to embark upon proceedings at that point.

The delay

3.7 The Claimants' grievances were issued on 2 July [280—5] and 4 August 2018 [289-292] respectively, after all of the allegations of discrimination now pursued had crystallised. Both grievances included the allegations *as* allegations of discrimination and referred to the potential strength of the legal claims which might have been founded upon them.

3.8 The Claim Forms were issued on 24 April and 26 April 2019 respectively. It was accepted that the ACAS conciliation process occurred too late to afford the Claimants' extensions of time. Accordingly, most of the complaints were over a year old by the date of issue and/or had been known to the Claimants for at least that period (the emails disclosed through the SAR).

3.9 There was no explanation for the reason for the delay within the Claimants' evidence. Mr Johns contended that the First Claimant had received advice to bring a grievance during his closing submissions. Neither he, Mr Leach nor the Judge had a note of that evidence having been given by him but that was nevertheless Mr Johns' recollection. Irrespective of whether that was right, more importantly, it was not suggested that he had received advice to delay the issuing of proceedings until he had completed his grievance or that he was told that he was not permitted to have issued until the internal process had been exhausted. There was no suggestion that he had received any negligent advice.

Prejudice

3.10 From the Claimants' point of view, if the complaints dismissed, they would obviously lose their right to have them determined on their merits. They did not point to any other particular areas of prejudice that they might have suffered through their evidence.

3.11 Similarly, the Respondents did not identify any particular evidential or other prejudice that they would have suffered if the claims had continued, beyond the obvious additional cost and expense of having to defend the complaints.

3.12 Many of the allegations concerned written documents. That evidence would not dim or fade with time. Although the complaints of discrimination did not map onto or repeat the allegations of contractual breach within constructive unfair dismissal claims precisely, there was substantial overlap (see above). Those which were repeated would have to have been heard in any event, albeit in a different context.

4. Legal Principles

4.1 Under section 123 of the Equality Act, a complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act to which the complaint related (s.123(1)(a)). Should a claim have been brought outside that period, it was nevertheless possible for a claimant to pursue it if the tribunal considered that it was just and equitable to extend time (s.123(1)(b)). There was no presumption in favour of an extension. The onus remained on a claimant to prove that it was just and equitable to extend time.

4.2 Time limits were not just targets, they were 'limits' and were generally enforced strictly. A good reason for an extension generally had to be demonstrated (*Robertson v Bexley Community Centre* [2003] IRLR 434, CA), albeit that the absence of a reason would not necessarily have been determinative (*ABMU v Morgan* [2018] IRLR 1050, CA).

4.3 Tribunals had been encourages to consider the factors listed within s.33 of the Limitation Act 1980 (the *British Coal v Keeble* factors), although it was not mandatory to do so; the length and reasons for the delay, the extent to which the Claimants had sought professional help and the extent to which information was not known to them until later and the degree to which the Respondents ought to have been blamed for any late disclosure. Consideration also had to be given to whether the Claimants had dragged their feet once they knew of all of the relevant information and, if so, to what extent.

4.4 It used to be thought that the touchstone was the issue of prejudice and whether and to what extent delay had caused prejudice to either side but, as was made clear in *Miller v MoJ* UKEAT/0003/15, at paragraph 13 by Laing J, whilst that was another, important factor to take into account, it was not determinative.

4.5 In addition to the factors set out above, there were other matters specifically covered in the parties' skeleton arguments, C2 and R2, which had to accounted for.

5. Conclusions

5.1 Amongst the factors that were raised in argument, there were two which were not considered to have been particularly relevant.

5.2 The first concerned the merits of the claims. Neither party made specific submissions on any aspect of the claims which they considered were weak or strong.

5.3 In his reply to Mr Johns' submissions, Mr Leach had suggested that the limitation issue was best addressed after the Respondents' applications under rules 37 and 39, a suggestion which had not been made on 8 June or earlier in the hearing. He did not pursue the request and nevertheless did not make specific submissions on the strengths of any specific complaint. Mr Johns simply made the point that, as complaints of discrimination in a school, they were of public importance.

5.4 The Claimants' health was also raised obliquely in submissions by Mr Johns but he did not seek to argue that either of them were hampered or prevented from issuing sooner because of their health. It had to be remembered that the First Claimant's claim of unlawful deductions from wages and breach of contract, which had been determined at the start of the Preliminary Hearing, had been based upon the proposition that he had not been too ill to work from July 2018. Both Claimants had instructed solicitors and had co-written detailed letters of grievance by early August at the latest.

5.5 The matters which particular significance in the balancing exercise were as follows;

> 5.5.1 The length of delay:
> The delay was significant here. It was not just a matter of days or weeks. It was measured in months in respect of many of the allegations, and years in the case of some;
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> 5.5.2 The Claimants' awareness of the relevant facts:
> The Claimants had knowledge of the factual matrix which supported their claims by Spring or Summer of 2018;
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> 5.5.3 Advice received:
> Neither Claimant argued that they had received negligent advice. It was not a case like *Chohan v Derby Law Centre* [2004] IRLR 685. The way in which the advice was expressed within the grievance letters certainly suggested that both had made decisions not to issue proceedings sooner;
>
> 5.5.4 The Grievances:
> Although a grievance did not automatically enable a claimant to say that it was not just and equitable to have issued in time if the grievance process had exhausted the limitation period (see *Apelogun-Gabriels v Lambeth LBC* [2002] EWCA Civ 1619), it could have been a relevant factor.

> The grievances were relevant in two ways here; they reflected the Claimants' desire to pursue an internal process with a view to resolving their differences with their employer. Although that course of action was no longer a mandatory precursor to proceedings in the tribunal, it was still to have been encouraged. But secondly and more importantly, the grievances served to crystallise the allegations and put the Respondents on notice that the Claimants considered that their treatment had been discriminatory, that they had received advice, had contemplated proceedings and were pursuing internal procedures first. It gave the Respondents the opportunity to take steps to investigate and preserve evidence around the allegations;
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> 5.5.5 Prejudice:
> The point in paragraph 5.5.4 heavily fed into the issue of prejudice. These were not claims which had been sprung on the Respondents from the depths of history. They were complaints which were on foot from July and August 2018 as allegations of discrimination. There was no suggestion that the cogency of the evidence had been affected, either documentary or oral.
>
> 5.6 All of the arguments were finely balanced, but those set out in paragraphs 5.5.4 and 5.5.5 weighed more heavily in the Claimants' favour. Extensions of time were justified in this case and all allegations were allowed to proceed to a final hearing."

13. I observe that there is a typographic error in paragraph 3.8 regarding the dates on which the relevant claim forms were presented, which are as I have given them.

14. The judge went on to make deposit orders in respect of certain elements of the complaints. Because deposits were not paid, those elements then fell away. It was common ground before me that I still need to decide whether there was an error of law in the decision that the judge gave with respect to all of the complaints which were live, at the time when he gave it. I note also that, as the judge noted in his decision, this was not a case where it was suggested that the potential merits of the claims should have a bearing either way on whether time should be extended.

The Grounds of Appeal and the Arguments

15. The notice of appeal identifies and develops two numbered grounds. The headline grounds are set out in the following terms:

> "**Ground 1: The tribunal misdirected itself and/or misapplied section 123(1)(b) EqA 2010 and/or reached a perverse conclusion in extending time for the presentation of the claimants' discrimination/harassment claims on the basis that they knowingly chose to pursue internal grievances first instead."**
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> **"Ground 2: The tribunal misdirected itself and/or misapplied section 123(1)(b) EqaA 2010 and/or reached a perverse conclusion in treating the absence of forensic prejudice to the Respondents as decisive in the exercise of the discretion to extend time**."

16. These grounds were permitted to proceed to a full hearing by Choudhury P, who also allowed reference to an extract from the cross-examination of Mr Souter to be included in the appeal hearing bundle. I have heard argument this morning from respective counsel, having also read their skeleton arguments. I will summarise what seem to me to have been the main submissions on each side.

17. The main points advanced for the respondents by Mr Leach were as follows. Firstly, where, as was found here, a claimant has knowingly decided to let the internal grievance process run its course first, before then presenting their claim to the tribunal, that will not by itself properly justify an extension of time. That is so even where, as found here, no forensic prejudice has been caused to the respondents by the delay. Something more is required. One example would be if the delay is attributable to the individual having been wrongly advised about the time limit or the effect of pursuing an internal grievance on when time starts to run. But nothing of that sort was claimed or found in this case. Mr Leach relied on **Robinson v The Post Office** [2000] IRLR 804 and **Apelogun-Gabriels v London Borough of Lambeth** [2002] ICR 713 in support of these points.

18. More generally, he submitted that the absence of forensic prejudice to the respondents from the delay was not in any event by itself sufficient properly to warrant an extension of time. He relied in particular on a passage in **Miller v The Ministry of Justice,** UKEAT/0003/15/LA. In the present case, submitted Mr Leach, the claimants did not assert that there had been any other relevant feature going beyond the fact of their having first pursued internal grievances and the fact of the absence of

any forensic prejudice to the respondents. That being so, their conscious decisions not to pursue tribunal claims while they were pursuing their grievances should have been treated as weighing *against* an extension of time. All other factors also weighed against an extension.

19. The tribunal also wrongly took into account that in their grievances the claimants had set out in factual detail the complaints that they subsequently pursued in the tribunal, and that they were making allegations of discrimination. This was really, said Mr Leach, all part of the same point, as the tribunal relied on the fact that, because the respondents had been fully warned by virtue of the grievances, of the detailed nature of the tribunal complaints that the claimants might later seek to bring, they were enabled to gather and preserve evidence, and so suffered no forensic prejudice.

20. Mr Leach submitted that there was really ultimately only one overarching point on which the tribunal relied, namely the fact that each of the claimants had pursued an internal grievance first. This could be seen from paragraph 5.5 of the reasons, in which the judge identified the specific factors that he put into the balance in this case. All of the factors said to support an extension of time arose from the tabling of the grievances, as could be seen from paragraphs 5.5.4 and 5.5.5.

21. Mr Leach submitted that if the tribunal's approach was right in law, then in any case where a claimant took a deliberate decision to complete an internal process before presenting their tribunal claim, that would automatically lead to an extension of time, so long as there was no forensic prejudice to the respondents caused by the delay. That was contrary to authority, as it would be a self-fulfilling act, by which a claimant could guarantee themselves an extension.

22. Nor could weight properly be placed on the claimants' contentions that they had sought in good faith to resolve their concerns through internal process, which a view to avoiding tribunal claims, if possible. The burden was on the claimants to show a good reason for granting an extension

of time. To entertain such arguments would effectively wrongly put the burden on the respondents to show that the claimants were acting cynically or not in good faith when they raised their grievances.

23. **Robinson** was an example of a case where an internal appeal process was pursued, there was no forensic prejudice to the employer, but the tribunal concluded that there was no sufficient basis to extend time, a decision upheld by the EAT. The same conclusion should have been reached here.

24. Mr Johns' principal points on behalf of the claimants were as follows. Firstly, this appeal was challenging the exercise of a discretion. As is well established, there is strictly limited scope for the EAT to intervene in such a decision, on *Wednesbury* or perversity grounds only. This was particularly pertinent where the judge had heard evidence and made findings of fact supporting his decision.

25. Secondly, it was of course right that presenting an internal grievance does not *automatically* lead to an extension of time, but the judge did not err by thinking that it did. However, weight can properly be given to the fact that an internal grievance has been presented and pursued first. **Robinson** and **Apelogun-Gabriels** do not indicate that there is some particular additional feature that must be found to be present in order for weight to be given to this aspect. There was no reason why the tribunal could not regard matters associated or connected with the grievance or the grievance process itself as relevant factors in a given case.

26. In this case, the judge properly took account of the fact that the grievances had given the respondents very full and clear particulars of the factual allegations and complaints that were later relied upon before the tribunal, and had put them squarely on notice that the claimants both alleged that they had been the victims of unlawful discrimination. Further, the judge properly noted as part of the background in this case that these same allegations featured as part of the factual allegations said to support their respective claims that they had been constructively dismissed.

27. Further, the judge was entitled to take account of his view that the claimants were to be commended for making sincere efforts to resolve their issues through the internal grievance process. The lack of forensic prejudice to the respondents was also properly regarded as relevant. Nothing in **Miller** indicated that it could not be. In summary, all of the factors said to weigh on the claimants' side of the scales were properly identified and relied upon. The decision was not perverse. There was no basis for the EAT to intervene.

Discussion and Conclusions

28. As to the law, the starting point as always, is the language of the statute. Section 123(1) **Equality Act 2010** provides that, subject to adjustment in respect of the ACAS early conciliation process, a complaint may not be brought after the end of

> "(a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable."

29. Those provisions therefore require the employment tribunal to decide what other limitation period, if any, it thinks is just and equitable in the particular case. That decision must of course be taken judicially, but the statute itself gives no further guidance as to how to apply that test. However, the authorities have, of course, laid out a number of useful principles and points of guidance over the years that should be followed by employment tribunals. A number of them are usefully distilled in the decision of Elisabeth Laing J, as she then was, in **Miller** at paragraph 10:

> "There are five points which are relevant to the issues in these appeals.
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> i) The discretion to extend time is a wide one: Robertson v Bexley Community Centre [2003] EWCA Civ 576; [2003] IRLR 434, paragraphs 23 and 24.
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> ii) Time limits are to be observed strictly in ETs. There is no presumption that time will be extended unless it cannot be justified; quite the reverse. The exercise of that discretion is the exception rather than the rule (ibid, paragraph 25). In Chief Constable of Lincolnshire v Caston [2010] EWCA Civ 1298; [2010] IRLR 327 Wall LJ (with whom Longmore LJ agreed), at paragraph 25, put a gloss on that passage in Robertson, but did not, in my judgment, overrule it. It follows that I reject Mr Allen's submission that, in Caston, the Court of Appeal "corrected"

> paragraph 25 of Robertson. Be that as it may, the EJ in any event directed himself, in the first appeal, in accordance with Sedley LJ's gloss (at paragraph 31 of Caston), which is more favourable to the Claimants than the gloss by the majority.
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> iii) If an ET directs itself correctly in law, the EAT can only interfere if the decision is, in the technical sense, "perverse", that is, if no reasonable ET properly directing itself in law could have reached it, or the ET failed to take into account relevant factors, or took into account irrelevant factors, or made a decision which was not based on the evidence. No authority is needed for that proposition.
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> iv) What factors are relevant to the exercise of the discretion, and how they should be balanced, are for the ET (DCA v Jones [2007] EWCA Civ 894; [2007] IRLR 128). The prejudice which a Respondent will suffer from facing a claim which would otherwise be time barred is "customarily" relevant in such cases (ibid, paragraph 44).
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> v) The ET may find the checklist of factors in section 33 of the Limitation Act 1980 helpful (British Coal Corporation v Keeble [1997] IRLR 336 EAT; the EAT (presided over by Holland J) on an earlier appeal in that case had suggested this, and Smith J (as she then was) recorded, at paragraph 8 of her Judgment, that nobody had suggested that this was wrong. This is not a requirement, however, and an ET will only err in law if it omits something significant: Afolabi v Southwark London Borough Council [2003] ICR 800; [2003] EWCA Civ 15, at paragraph 33."

30. I add that the point made there about **British Coal Corporation v Keeble** [1997] IRLR 336 has since been restated by the Court of Appeal in **Abertawe Bro Morgannwg University Health Board v Morgan** [2018] ICR 1194, to which the present tribunal referred, and in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23. Crucially, as **Miller**, drawing in turn on **DCA v Jones** [2007] IRLR 128, explains, and this line of authorities cautioning against a mechanistic use of the so-called **Keeble** checklist emphasises, what factors are relevant in the given case is case-sensitive, and so must be identified by the tribunal, case by case.

31. As a matter of law, there is no particular feature that must necessarily be present in order for a just and equitable extension to be granted, nor that, if present, is automatically sufficient to warrant such a grant. However, some factors are, as it is put, customarily *relevant*. In every case the implication of refusing to extend time will be that the claimant will not be able to have a complaint adjudicated on its merits, as they would, had time been extended. Conversely, the effect of granting

an extension of time will be that a respondent will be obliged to defend a complaint on its merits, and exposed to the risk of losing, in a way that would not be so, were time not to be extended.

32. There are also some essential legal considerations that flow from the statutory time limits framework itself, that form part of the general backcloth in every case, in particular, the inherent importance attached to observance of time limits for litigating, and finality in litigation, even where, as here, there is considerable flexibility in the test that the tribunal must apply when deciding whether or not to extend time. It is also established that the onus is on a claimant to persuade a tribunal that there is some good reason why it would be just and equitable to extend time in the given case.

33. Beyond those basic principles, what factors are relevant and how to weigh them up in the given case are matters for the employment tribunal. There are some factors that may often be considered relevant, such as the extent of the delay and what the reason for the delay is. But the authorities stress that even here the tribunal should beware of taking a mechanistic approach. I would add that the concept of what is or is not a good or a bad reason for delay is inherently malleable, variable and fact-specific. As indeed the discussion in **Morgan** observes, it is not always essential that the tribunal be satisfied that there is a particular reason that it would regard as a good reason.

34. Mr Leach submits, however, that the mere fact of a grievance having been raised internally can never of itself be decisive, nor can the mere fact of lack of forensic prejudice to the respondent in and of itself be decisive. I turn then to look more closely at the authorities that he relied upon.

35. In **Robinson**, Mr Robinson's disability discrimination complaint relating to his dismissal was out of time and he sought to rely on the fact of an ongoing internal appeal procedure. The tribunal found that there would have been no forensic prejudice caused to the respondent by the delay, but was not persuaded to extend time. The EAT upheld its decision. It considered **Aniagwu v London Borough of Hackney and Another** [1999] IRLR 303, which it was argued stood for the proposition

that where a claimant has attempted to use the internal grievance procedure first, then there *must* be an extension of time. The EAT considered and rejected that proposition in the following passage.

> "(28) As we have seen, there was advice of the Union which he ignored in that respect. Plainly, those matters were in the Tribunal's mind because they were all express findings of fact by the Tribunal itself. It cannot be said in the case at hand that the Tribunal did not deal with those issues. It was plainly put into the scales by the Tribunal and to that extent, as we have said, Aniagwu does not assist Mr Robinson. But in Aniagwu the Employment Appeal Tribunal also said this:
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> "It seems to us that that is entirely compatible with the reason given by the applicant, as to why he had delayed, and if the tribunal had asked themselves whether, in those circumstances, the applicant had acted reasonably, it seems to us that every tribunal would have concluded that he was well entitled to take the view that it would be sensible to seek to redress his grievance through the internal grievance procedure before embarking on legal proceedings. That was the position he had made plain to Hackney in the internal documents and it seems to us that every industrial tribunal, unless there was some particular feature about the case, or some particular piece of prejudice which the employers could show, would inevitably take the view that that was a responsible and proper attitude for someone to take, albeit that he had an extant complaint of race discrimination. He was looking to have his grievance resolved rather than to go to law."
>
> (29) That is not, and does not purport to be, a proposition of broad applicability such that wherever and so long as there is an unexhausted internal procedure, then delay to await its outcome necessarily furnishes an acceptable reason for delaying the presentation of an IT1 such as would, of itself and without more, lead to relief under section 68 (6) of the Race Relations Act or by analogy, section 76 (5) of the Sex Discrimination Act or, as we are concerned with, paragraph 3 of schedule 3 of the Disability Discrimination Act. Parliament could so easily have so provided in any one of those three Acts. It would also have been able to qualify the reasonable practicability test of section 111 (2) of the Employment Rights Act, to take account of the possibility there, but that has not been done in any of those Acts. It has done no such thing. It is not as if delay by reason of the incomplete nature of an internal appeal is a novel point. The point had come up in Singh v The Post Office [1973] ICR 437 and MacDonald v The South Cambridgeshire Rural District Council [1973] ICR 611. Sir Hugh Griffiths even suggested that the then Act of 1971 should be amended, so that time did not run until after domestic process had been exhausted, and the same idea was repeated, the same recommendation to the legislature was repeated, in Bodha v The Hampshire Area Authority [1982] ICR 200, 205 F – G per Browne-Wilkinson J, sitting with lay members of the Employment Appeal Tribunal.
>
> (30) Given that background it cannot be that Parliament was unalive to the point. Particularly notable is the consideration that the recommendations

in those cases was not adopted even in relation to a brand new jurisdiction such as Disability Discrimination where Parliament had, so to speak, a clean slate. However, it is not as if there are not reasons running to the contrary to the recommendations which those eminent judges made to the legislature. So long as it is tolerable that some employers have no formal appeals processes then it does provide a complication which might act unfairly if, in cases where there is a formal appeals procedure, the time bar can effectively be extended by the use of the appeal and possibly by delays in the appeal. Were it to be a rule that a complaint could invariably safely be delayed until the final conclusion of an internal appeal, that might encourage time-wasting and a legalistic approach to time and delays in internal appeals procedures which are generally best directed to being expeditious and inexpensive and able to be well conducted without lawyers but by laymen.

(31) We can only conclude that Parliament has quite deliberately not provided that invariably the running of time against an employer should be delayed until the end of domestic processes. According, when delay on account of an incomplete internal appeal is relied upon as a reason for delaying an IT1 or failing to lodge it in time, and where that is not merely alleged but upheld as a matter of fact, if that allegation and that fact is fairly considered by the Employment Tribunal and put into the balance when the justice and equity of the matter is considered, that ordinarily will suffice for the Employment Tribunal to escape error of law as to that issue. We find some comfort in arriving at that conclusion from the earlier cases, unreported but at the EAT, London Borough of Islington v Mrs S. Dean, a judgment delivered on 1 December 1999 and London Borough of Waltham Forest & Others v Mr F Omilaju of which we have been given a transcript which appears to date it as 17 January 2000.

(32) The Tribunal here plainly had in mind the consideration that Mr Robinson was minded to pursue his appeal rather than launching IT1 proceedings but it is not as if there were not matters to be put into the balance on the other side of things. As Mr Burns points out, the Tribunal held that Mr Robinson knew about the time limit, was advised by his Union about it at least twice during the three-month period but he chose to concentrate on the internal appeal; that in doing so he ignored Union advice; that he was not incapable of looking after his own affairs; that he was in fact able to deal with them, so far as concerned the internal appeal promptly and vigorously. It is to be borne in mind also that time limits in employment cases are, in general, strictly enforced - see London Underground v Noel [1999] IRLR 621, 624 para 21 CA and see also, Aziz v Bethnal Green [2000] IRLR 111, in the Court of Appeal, which again illustrates a strict approach to time limits, albeit different time limits, in the employment law field."

36. In **Apelogun-Gabriels** the Court of Appeal indicated that **Aniagwu** was a decision that turned on its own particular facts, but added that if there is a conflict, the correct analysis is that set out in **Robinson**. In particular, at paragraph 16 Peter Gibson LJ said this:

> "First, the Applicant says that the EAT was wrong to treat Robinson rather than Aniagwu as stating the law. He says that an EAT cannot overrule the decision of another equal tribunal, that is to say another EAT. The Applicant may not have understood how the doctrine of precedent applies to EATs in relation to other EAT decisions. An EAT will normally treat an earlier EAT decision as authoritative unless it is convinced that the decision is wrong, in which case it can depart from it in the same way that a High Court judge can depart from the earlier decision of another High Court judge. For my part, I regard the decision in Robinson as being plainly correct. If one considers what was said in Aniagwu it may be that the headnote to the Industrial Relations Law Reports is not quite accurate in appearing to suggest that it was laying down some general principle to be followed in all cases by tribunals, as the Tribunal with which we are concerned appears to have thought. Instead, as it seems to me, what was said in Aniagwu was intended to be limited to the particular circumstances of that case, and on those facts the EAT was expressing the opinion that every industrial tribunal, unless there was some particular feature about the case or some particular prejudice which the employers could show, would take the view that to await the outcome of the grievance procedure was an appropriate course to take. To the extent that Aniagwu goes any further than that and lays down some general principle that one should always await the outcome of internal grievance procedures before embarking on litigation, in my judgment Aniagwu was plainly wrong. It has long been known to those practising in this field that the pursuit of domestic grievance or appeal procedures will normally not constitute a sufficient ground for delaying the presentation of an appeal. The very fact that there have been suggestions made by eminent judges in 1973 and in 1982 that the statutory provisions should be amended demonstrates that, without such amendment, time would ordinarily run whether or not the internal procedure was being followed. For my part therefore, I can see no error whatever in what Lindsay J said in the present case in relation to this matter, that is to say that the fact, if it be so, that the employee had deferred commencing proceedings in the tribunal while awaiting the outcome of domestic proceedings is only one factor to be taken into account. It is clear from the Tribunal's decision that the Tribunal was applying what it thought was a general approach laid down in Aniagwu, and that was erroneous. I see no real prospect of success on this first ground of appeal."

37. Mr Leach relies in particular on what was said in **Robinson** at paragraph 29. He also referred me to **Hunwicks v Royal Mail Group plc** UKEAT/0003/07/ZT at paragraph 5:

> "It is clear that the advice that the Appellant says, without contradiction, that she was given by her Union was wrong. It is plain that the Union, perhaps venially, failed to appreciate that because the act complained of was so far in the past the case was not one which fell within the regime of the new regulations, so that the relevant time limit was six months and not three. Nor, even if the new regulations had applied, would it have been entirely safe advice to defer bringing proceedings until the outcome of the grievance procedure (though that would depend on what the date of the act complained of was and how long the procedure took): it remains the law that the non-exhaustion of domestic internal procedures will not necessarily be treated as a sufficient reason for extending time in cases where the Tribunal has jurisdiction to do so on the basis of what is just and equitable, and it is indeed arguable that normally it will not be - see Robinson v Post Office [2000] IRLR 804 and the observations of Peter Gibson LJ, which arguably go somewhat further, in Apelogun-Gabriels v London Borough of Lambeth & another [2002] ICR 713, particularly at page 719."

38. This latter passage says, I note, no more than that the fact that there are ongoing internal procedures will "not necessarily" be a sufficient reason and will "normally" not be sufficient. Similarly, the use, in paragraph 29 of **Robinson**, of the phrase "of itself and without more" must be read in the context of the passage as a whole, the sense of which is that the mere fact that an internal grievance process is still ongoing at the time when the tribunal claim is presented, is not, in and of itself, *necessarily* enough to guarantee that an extension will be granted. But this *dictum* does not impose any other strictures on what features of the overall picture in the given case may lead the tribunal to conclude that an extension of time should just and equitably be made.

39. This approach surely reflects the reality that employment tribunals are not in practical reality presented merely with the bare fact of someone having initiated an internal process, or of that process being ongoing at a given point in time, as unadorned facts on their own. The reality is that there will always be some wider factual context, chronology or narrative that will be peculiar to that particular case, whether relating to the nature of the process available to the employee, how it was invoked, what the complaints were, how they were set out, how the process has unfolded so far, with what

outcomes, if any, and so forth. The tribunal therefore needs to consider what aspects of the overall factual features of the process, and its context, it finds to be relevant in the given case.

40. As the authorities discuss, the tribunal also needs to have regard to the competing policy considerations. It is, in principle, desirable that parties be encouraged to resolve their disputes, so far as reasonably possible, by mechanisms short of litigation. But there is also a public policy in those who may be on the receiving end of litigation benefitting, so far as possible, from the certainty and finality which the enforcement of time limits potentially gives them.

41. Other factors that may be considered relevant, when reliance is placed on the pursuit of an internal process, cannot be exhaustively listed or identified. But, I do not see why the tribunal should be precluded from considering, if it thinks it relevant, whatever view it may form about the way the internal process has been approached by either party. That the tribunal may properly, from one case to another, form a very different general view of this, can be seen from reading the factual background to the decisions in **Aniagwu** and **Robinson**, for example.

42. In any event, it would be undesirable to require tribunals to draw a distinction between features of the case that are wholly distinct from the pursuit of the grievance process, as such, and features that were facets of, or related to, it. There may be some cases where that distinction can readily be applied, but there will be others where it cannot. Tribunals should not need to get bogged down in seeking to determine whether some feature is or is not connected to, or associated with, the grievance process, in order to determine whether it can carry weight in the scales. Nor do I accept that this approach wrongly places an evidential burden on the respondent. It is still for a claimant to advance their case for an extension, and to put forward the factual basis on which they say it is founded.

43. There is, in conclusion, no legal rule that, in order for time to be extended, there must be some additional feature identified as present, and weighing in the claimant's favour, that is identified as

being distinct from some facet of the internal grievance process. The authorities say no more than that the mere, bare, fact that a grievance process has been initiated and pursued first, and/or may still be being pursued, is not automatically, in and of itself, enough.

44. I turn to the particular aspect of forensic prejudice to the respondents. Reliance was placed by Mr Leach on the following observation at paragraph 13 of **Miller**:

> "In other words, if there is no forensic prejudice to the Respondent, that is (a) not decisive in favour of an extension, and (b), depending on the ET's assessments of the facts, may well not be relevant at all. It will very much depend on the way in which the ET sees the facts; and the facts are for the ET."

45. Reading the whole of paragraphs 12 and 13, it can be seen that this observation was by way of a response to an argument that it would be an error for a tribunal not to mention the question of forensic prejudice at all. Elisabeth Laing J's answer is that that would not necessarily be an error. Insofar as she says in paragraph 13 that, "the absence of forensic prejudice is not decisive" once again the point here is that the mere proposition or finding that there has been no forensic prejudice is not in and of itself necessarily decisive, because no one factor necessarily is.

46. I add that absence of forensic prejudice is also not something that will be presented to the tribunal as a sterile, bald proposition, or feature, devoid of any context. There will be a context in any given case, including factors such as the particular nature of the complaints or allegations, the sort of evidence that might be needed to make them good or to defend them, to what extent that might consist of documentary or witness evidence, and so on. The tribunal needs to consider in a given case how the picture looks in overall substance, as to whether, or in what way, the respondent may or may not suffer forensic prejudice if a claim that would otherwise be out of time is allowed to proceed.

47. Nor do I accept that it would be an error of law to rely upon the fact or circumstances of presentation of an internal grievance process coupled with the fact, if found, of lack of forensic

prejudice to the respondent, in a case where the latter is said to have flowed from the former. These two features are in principle different things. There can be a lack of any forensic prejudice in a case where no internal grievance has in fact been pursued. Conversely, there may be cases where an internal grievance has been pursued, but the respondent nevertheless finds itself at a disadvantage by the time the application to extend time is made. Even if, in the given case, it is found that it is the fact of the grievance having been presented, that has enabled any potential forensic prejudice to be avoided, there is no rule that the tribunal must look elsewhere for sufficient cause to extend time.

48. This does not mean that a claimant can secure a guaranteed extension of time merely by presenting a grievance and at least until the internal process has run its course, unless the respondent can show some forensic prejudice has arisen. Whether or not it is just and equitable to extend time, including in such a case, will depend on the tribunal's weighing in the balance of all the factors that it regards as relevant in the given case. In some cases, these features may not be enough in all the circumstances to persuade the tribunal to extend time, as in **Robinson**. But in other cases, they may.

49. Elisabeth Laing J stated the point with concision at paragraph 30 of **Miller**:

> "It is not the function of the EAT, on an appeal on a point of law, to give detailed instructions to ETs about how they are to exercise a wide discretion which Parliament has given to them, and not to the EAT. It is clear from DCA v Jones that it is for the ET to decide (subject to Wednesbury) what factors are relevant to the exercise of its discretion. What weight it decides to give to those factors, having decided that they are relevant in any case, is, axiomatically, a question for the ET."

50. I turn to the present tribunal's decision. The judge expressly found that the following were of particular significance in the balancing exercise, as set out in the reasons at paragraphs 5.5 and 5.6. Weighing against the claimants' applications were the length of the delay in relation to the various matters of which they sought to complain, the fact that they knew all of the factual matters of which they sought to complain by the time that they presented their respective internal grievances, the fact that they both had legal advice by that time and knew they had the right to present claims to the

employment tribunal, and, one way or another, took conscious decisions not to present those claims at or around the time when they presented their grievances.

51. Particular factors found in favour of the claimants were, firstly, the judge's view that they were actuated by a genuine desire to seek to resolve their differences with the school internally and that this was to be encouraged; secondly, the conclusion that the content of the grievances were such as to put the respondents fully on notice of the factual allegations that they faced and that these were regarded as involving discriminatory treatment, and that this contributed to a situation in which the respondents were not exposed to forensic prejudice by the delay. I agree with Mr Leach that in this sense, there is an overlap between the second feature referred to in paragraph 5.5.4 and what the tribunal says about prejudice at paragraph 5.5.5, as indeed the tribunal itself stated when observing that one heavily fed into the other. But that does not mean that it was wrong to rely on both features.

52. Further, while, at the start of paragraph 5.5, the judge identified the matters following were those which were of "particular significance in the balancing exercise", other factors are referred to in the course of the reasons overall, and various findings of fact and context set out earlier in the reasons inform the reader's understanding of what is being referred to in this final section. I note in particular, that the judge took on board the customary prejudice to each side of granting or refusing the application, in paragraphs 3.10 and 3.11, including, it must be inferred, the prejudice to the respondents of having to defend and be at risk of claims that would not apply if they were still treated as out of time. Also part of the background, appearing under the heading of "prejudice" at paragraph 3.12, is the point that some of the factual allegations would have to be heard in any event when considering the constructive dismissal claims, albeit as the tribunal noted, in a different context.

53. The section headed, "Legal Principles" also touches at points on some factual features that are peculiar to these particular cases, as can be seen in 4.3 where there is a reference to the extent to which the claimants had sought professional help, the extent to which information was not known

until later, to whether the respondents could be blamed for any late disclosure, and whether the claimants had dragged their feet once they knew all of the relevant information. Reference is also made to the fact that there were other points mentioned in the parties' skeleton arguments. These passages in turn draw on the earlier findings of fact, including about how and when the claimants became aware of the content of the internal emails dating from 2006 and 2007 about which they sought to complain, about when they first got legal advice and when they presented their grievances.

54. So, while I accept that the factors identified and discussed in paragraph 5.5 are the ones that the tribunal regarded as of particular significance to the ultimate balancing exercise, and as being capable of being the deciding factors on either side, it would be wrong to read this section without any regard at all to what came before. But even if I am wrong about that, the outcome of this appeal does not turn on that point, as I do not think that the judge erred by treating pursuit of an internal grievance as conferring an automatic extension. The judge said in terms at paragraph 5.5.4 that this was not the law, correctly citing **Apelogun-Gabriels**. Nor did the judge make the error of thinking that the lack of forensic prejudice to the respondents would point to an automatic extension. The judge correctly cited **Miller** at paragraph 4.4 and said that this was not determinative, though it heavily fed into his conclusion at paragraph 5.5.5. He did not say that either of these features was in and of itself decisive. Rather, at paragraph 5.6, he set out that it was these two factors together that weighed more heavily in the claimants' favour than the factors against them.

55. Even if, on one reading, the tribunal thought that the combination of these two factors alone was decisive in this case, without regard to any other background or contextual considerations mentioned earlier in the decision at all, it was not an error law to come to that conclusion.

56. Much was made in argument of the fact that the tribunal found that the claimants had taken conscious decisions when initiating their grievances not also to initiate litigation in the tribunal at that time. But the judge did not find, for example, that the respondents had been led to believe that they

would *never* pursue tribunal claims. The letters they wrote, from which the judge cited passages, at paragraphs 3.5 and 3.6, did not rule it out. Mr Souter wrote that he had "no inclination at this time" to litigate and that his "preference" was to get the matter resolved and return to work. Ms Leishman indicated that she "preferred" to resolve matters internally "if possible" and wanted to "avoid" legal action. See also the references there to the evidence that each of them gave on this point.

57. So the judge properly, in the concluding section at paragraph 5.5.4, said that they were pursuing internal procedures *first*. This, I observe, chimes with the wider factual picture of the timing of the start of the litigation in both cases, which in Ms Leishman's case followed upon the exhaustion of her internal right of appeal and in Mr Souter's case followed upon the information that the panel that heard his grievance had withdrawn from the process and were not proposing to give any decision.

58. The judge clearly was of the view that the attempts by the claimants to pursue internal resolution through the grievance process were genuine. This was a matter for appraisal by the tribunal on the particular facts of the case. The judge did say, at paragraph 3.9, there was no explanation for the delay in presenting the claims, but he also referred at 3.7 to the grievances having been pursued. The thrust of 3.9 appears to me to be more that other factors, such as negligent or misleading advice, which potentially might have explained the delay, did not in fact apply in this case.

59. In any event, the judge correctly identified at paragraph 4.2, that the lack of a "good" reason is not necessarily fatal in law, citing **Morgan**. Even if the judge perhaps did not consider that the *precise* timing of the presentation of the tribunal claims in each case had been fully explained, it seems to me that the overall conclusion he reached at paragraph 5.5.4 is that the efforts of these claimants to resolve their issues through internal process were genuine, and carried some weight in their favour. The judge was entitled to take that approach.

60. The judge was also entitled to attach weight to the particular circumstances in which it was accepted and concluded that there was no forensic prejudice to the respondents. Once again, this involved a fact-sensitive appraisal of the particular facts of this case. Particular features in this case, which the judge referred to, were that the grievances, prepared with legal help, gave a clear and full factual account of the allegations relied upon, set out on their face allegations of discrimination and referred to the possibility of legal claims. This was surely what he had in mind when he said at paragraph 3.7 that they had "crystallised". It was this feature which led to the lack of forensic prejudice – see paragraphs 3.11, 5.5.4 and 5.5.5 – as well the fact that the allegations were heavily dependent on documentary evidence, such as the emails on which the claimants sought to rely, and matters to do with the chronology of events that were clearly not factually in dispute.

61. It is certainly not a given in every case that there will be a strong basis for concluding that the initiation of a grievance combined with other factual features means that there is no significant forensic prejudice to the respondent caused by the delay. But the judge's findings about that in this case were matters to which he was entitled to attach considerable significance, as he plainly did.

62. Finally, I observe that the judge himself said, at 5.6, that the arguments were finely balanced. I do not take that to have been merely a rhetorical flourish. I take it that he found it difficult to call and close to the margin. But it was a matter for his appreciation as to which side of the line to come down. Perhaps his reasoning could have been a little fuller; but there is no error of principle as to the law, and, reading this decision in the round, the necessary elements of the reasoning are all present, they are sound, and the decision is not perverse or *Wednesbury* unreasonable.

Outcome

63. This appeal is therefore dismissed.