Case No: 3306251/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr A. Zabolotnov	v	(1) Medical Defence Shield Limited (2) Joydeep Grover (3) Sarah Dodds (4) Amardeep Nibber

Heard at: Cambridge **On:** 20th June 2022

Before: Employment Judge Mr. A Spencer (sitting alone)

Appearances:
For the Claimant: In person
For the Respondent: Mr Heard (Counsel)

JUDGMENT

1. The evidence referred to in paragraphs 31.1 to 31.5 of the Reasons set out below is not admissible.

2. The claim form against all respondents is rejected pursuant to Rule 12 in Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

REASONS

Introduction

1. The claimant presented his claim form to the tribunal on 22 April 2021. He brings complaints of breach of contract, unauthorised deduction of wages, sex discrimination and race discrimination against the first respondent (his former employer) and three individuals employed by the first respondent.

The Preliminary Issues

2. This case was listed before me for a hearing on 20 June 2022. The hearing was a preliminary hearing to determine a number of preliminary

issues. The preliminary issues are set out in a case management order made by Employment Judge Laidler following a hearing on 7 December 2021. They are recorded in the Judge's order as follows:

2.1 **Issue 1**: Whether all the complaints against the first respondent are out of time and whether the tribunal has jurisdiction to determine them.

2.2 **Issue 2**: Whether complaints of breach of contract and/or an unauthorised deduction from wages can be brought against individual named respondents who were not the claimant's employer.

2.3 **Issue 3**: Whether the matters alleged to amount to a breach of contract are capable of being such and whether such claims having no reasonable prospects of success should be struck out or in the alternative whether such claims having little reasonable prospect the claimant should be ordered to pay a deposit as a condition of continuing to advance those claims.

2.4 **Issue 4**: Whether the two protected acts relied upon by the claimant as set out in the list of issues can amount to protected acts within the meaning of section 27 of the Equality Act 2010 and if not whether the claim of victimisation on the grounds of sex and/or race should be dismissed as having no reasonable prospect of success or such claims having little reasonable prospect the claimant should be ordered to pay a deposit as a condition of continuing to advance those claims.

2.5 **Issue 5**: To conduct further case management in relation to the claims that proceed.

3. These issues changed by the outset of the hearing. To avoid confusion, I will refer to the issues identified by Judge Laidler (set out above) as "The Original Issues" and the new issues that arose at the hearing as "The Additional Issues". The issues changed in four respects:

3.1 It was agreed during the course of the hearing that Issue 1 of the Original Issues should be expanded to include consideration of whether the complaints against all respondents (as opposed to just the first respondent) are out of time and whether the tribunal has jurisdiction to determine them. The respondents applied to expand the issue in this way. The claimant agreed that the issue could be expanded in this way. Both parties had attended the hearing ready to make submissions on the issue (as expanded). Further, the arguments and evidence were substantially the same for the claims against all respondents.

3.2 The issue of further case management (Issue 5 of the Original Issues) will need to be considered at a further case management hearing. There was insufficient time at the hearing for this to be dealt with.

3.3 A further issue arose during the course of the hearing. This concerned the admissibility of evidence for today's hearing. The claimant sought to rely on material that the respondent argued was without prejudice. I heard submissions from both parties as to whether this evidence should be admissible or not. I deal with this issue below and refer to it as "Additional Issue 1".

3.4 A further issue was raised in the respondent's counsel's skeleton argument within the section referring to time limits. However, this is a separate issue to the time limit issue. That separate issue is whether the claims against the respondents should have been or should now be rejected by the tribunal. I deal with this issue below and refer to it as "Additional Issue 2".

Evidence and Submissions

4. I took into account a considerable number of documents. In particular:

4.1 a bundle of documents for the preliminary hearing prepared by the respondent

4.2 a separate bundle of documents prepared by the claimant which was supplemented by four further documents provided by the claimant at the outset of the hearing.

4.3 the claimant's witness statement.

4.4 a skeleton argument and authorities bundle provided by the respondent's counsel.

5. I heard evidence from the claimant to the extent that it was relevant to the preliminary issues. He confirmed the contents of his witness statement under affirmation. I had the benefit of seeing the evidence tested under cross examination and the opportunity to ask the claimant questions myself.

6. I heard submissions from the claimant and the respondent's counsel.

The Facts

7. The facts that are relevant to the preliminary issues are as follows:

8. The first respondent is a not-for-profit organisation which provides clinical defence and employment services to doctors and dentists based in the UK.

9. The second respondent, Dr. Joydeep Grover is the first respondent's medical director.

10. The third respondent, Miss Sarah Dodds is a qualified solicitor employed by the first respondent as Head of Legal. Miss Dodds was the claimant's line manager.

11. The fourth respondent, Mr. Amardeep Nibber, was initially employed by the first respondent as a legal assistant and went on to undertake a training contract and to qualify a solicitor in June 2020.

12. The claimant was employed by the first respondent as a legal assistant from 22 August 2019 until he was dismissed by the first respondent on 12 November 2020. The claimant was initially employed on the basis of a three-month probation period. This period was extended before it was successfully completed.

13. During the course of his employment the claimant made complaints. He raised a complaint by email to the third respondent on 26 November 2019 about the fourth respondent twisting and mis-spelling the claimant's name. The claimant also raised a grievance by letter dated 11 September 2020.

14. The claimant was dismissed on 12 November 2020.

15. The claimant referred this matter to ACAS for early conciliation on 13 November 2020. The referral related to the first respondent only. The early conciliation period was extended and ended on 27 December 2020. ACAS issued the relevant early conciliation certificate under reference number R218768/20/88.

16. On 16 November 2020 the claimant submitted a Data Subject Access request to Dr Grover seeking extensive documentation. This request was made with a view to preparing the claim to this tribunal. The request was answered on 15 December 2020. The claimant took the view that further documentation should be provided and raised this with the respondents who responded by declining to provide anything further.

17. The claimant confirmed in cross examination that he intended to present a claim form to the tribunal in January 2021. He also confirmed in answer to my questions that by then he knew that there was a time limit within which to present the claim form and that the applicable time limit was 3 months. The claimant began preparing his ET1 form in January 2021. He required some advice and guidance on certain points and sought legal advice. He applied for legal aid in early January 2021. His application was refused shortly after this.

18. The claimant sought to find a solicitor who could advise him. He contacted Curzon Green solicitors by email on 12 January 2021 to seek advice. They agreed to provide initial advice for a fee of £250.

19. The claimant referred the matter to ACAS for early conciliation again on 14 January 2021. He made referrals to ACAS in respect of the second, third and fourth respondents. ACAS issued the early conciliation certificates the same day (14 January 2021) and issued three certificates (one in respect of each of the second third and fourth respondents) under numbers R103593/21/21, R103595/21/03 and R103597/21/82

20. Acting on the claimant's behalf, Curzon Green referred the matter to ACAS for early conciliation again on 10 February 2021. Referrals were made in respect of all four respondents. The early conciliation period was

extended and ended on 24 March 2021. ACAS issued the early conciliation certificates (one respect of each of the second third and fourth respondents) under numbers, R112003/21/88 R112020/21/32, R112023/21/05 and R112028/21/57.

21. Pre action correspondence continued between Curzon Green and the first respondent until mid-April 2021. No resolution was reached.

22. The claimant presented his claim form to the tribunal on 22 April 2021, naming all four respondents.

23. The ACAS early conciliation numbers given by the claimant in the claim form in respect of the four respondents were as follows:

First Respondent: R112003/21/88
Second Respondent: R112020/21/32
Third Respondent: R112023/21/05
Fourth Respondent: R112028/21/57

These were the certificates relating to the second reference to early conciliation in respect of each respondent.

24. The claimant's evidence before me was clear – he intended to present his claim form to the tribunal in January 2021 and began drafting it then. The reasons why the claim form was not presented until 22 April 2021 were:

24.1 The claimant seeking legal advice about how to complete his claim form; and;

24.2 The attempts to resolve the dispute via ACAS and pre-action correspondence; and

24.3 The claimant alleged that the respondent deliberately delayed and prolonged those negotiations and used them as a means of, as he put it, "sniffing out as much information as possible to plug the litigation holes".

Conclusions:

25. Taking the various issues in turn, my conclusions are as follows:

Additional Issue 1: Admissibility of Evidence

26. Mr. Heard for the respondents asserted that I should exclude the material referred to at paragraphs 4, 5 and 6 of his skeleton argument. This material related to:

26.1 certain facts set out in the claimant's particulars of claim; and

26.2 certain documents included in the claimant's hearing bundle; and

26.3 evidence in certain numbered paragraphs of the claimant's witness statement.

27. In each case the argument was the same. The parties' positions were: –

    27.1 The respondent argued that the material disclosed the content of settlement negotiations between the parties and as such was without prejudice and should not be admissible in evidence; and

    27.2 The claimant did not deny that the material was without prejudice. However, he sought to argue that the material was relevant to the preliminary issues (and to the timing issue in particular). He said that the material showed that the respondents were deliberately delaying and prolonging settlement negotiations. The claimant argued that the respondent's delay had caused or contributed to his delay in presenting the claim form to the tribunal.

28. The majority of the material is plainly without prejudice. For example, the documents that the claimant sought to rely on include correspondence from the claimant's solicitor. Parts of that correspondence are expressly marked "without prejudice" and clearly include matters that relate to settlement negotiations between the parties. Further, the paragraphs referred to in the particulars of claim and the claimant's witness evidence also seek to give evidence of negotiations and discussions that took place on a without prejudice basis. As such, the majority of the material is plainly without prejudice. It is privileged material. It is open to the parties to waive that privilege. The claimant has waived such privilege by seeking to adduce such material in evidence. However, the respondent has not waived that privilege. As such the material is not admissible in evidence unless the so called "unambiguous impropriety" exception to the without prejudice rule applies.

29. The "unambiguous impropriety" exception allows without prejudice material to be considered in evidence where the without prejudice rule would "*act as a cloak for perjury, blackmail or other unambiguous impropriety"* (see **Unilever PLC v Procter & Gamble Co.** 1999 EWCA Civ 3027). This is a public policy issue. In such circumstances the public policy consideration in maintaining without prejudice privilege is outweighed by the public interest in exposing such inappropriate behaviour. The case law on the subject was referred to in the recent decision of the Employment Appeal Tribunal (EAT) in **Swiss Re Corporate Solutions Ltd. v Sommer** 2022 EAT 78. As confirmed in that decision "*case law has repeatedly emphasised that a high bar is to be surmounted before there can be such an incursion into the scope of privilege".* In the **Sommer** case, the EAT cited with approval the comments of Lord Justice Males at paragraphs 31, 57 and 62 of the judgment in **Motorola Solutions Inc v Hytera Communications Corp Ltd** [2021] EWCA Civ 11 WLR 679.

30. The only evidence before me as to the propriety of the respondent's behaviour came from the claimant. The respondent did not provide any evidence on the point. They deny that the without prejudice negotiations were conducted in the inappropriate way alleged by the claimant. However, I am not persuaded that the respondent's behavior met the high threshold required for the without prejudice rule to be disapplied. I have read and considered the material concerned. The claimant may have

perceived that the respondent was not negotiating in good faith and was using the negotiations to test his case and to plug gaps in their own case. However, the evidence put forward by the claimant does not prove this sufficiently. The claimant merely makes a bare assertion that the respondent's behaviour was inappropriate. The content of the various documents does not support that assertion. The claimant has failed to meet the high threshold required.

31. For these reasons, the majority of the material objected to by the respondent shall be excluded on the grounds that it is without prejudice and privileged. For the sake of clarity:

    31.1 Only the beginning and end of paragraph 41 of the particulars of claim is admissible. When the without prejudice material is excluded paragraph 41 should read "*On 13 November 2020, I made an application to ACAS and ACAS issued certificates automatically on 27 December 2020*".

    31.2 Only the first sentence of paragraph 43 and 44 of the particulars of claim is admissible. The second sentences of each paragraph are without prejudice material and are inadmissible.

    31.3 The "without prejudice and subject to contract, save as to costs" sections of the letters from Curzon Green to the first respondent in the following letters are without prejudice and inadmissible:

        (a) The undated letter beginning at page 229 of the claimant's bundle of documents;

        (b) The letter dated 6 April 2021 beginning at page 234 of the claimant's bundle;

        (c) The letter dated 16 April 2021 beginning at page 239 of the claimant's bundle;

    31.4 The email exchanges with ACAS at pages 249 to 251 of the claimant's bundle.

    31.5 The following paragraphs in the claimant's witness statement are inadmissible:

        (a) 335, 337, 338, 340, 344 (excluding the wording from "at the same time" to the end of the paragraph), 348, and 352.

32. This material must be removed or redacted from any further bundles put before the tribunal.

Additional issue 2: should the claims against the respondents have been rejected and should they now be rejected?

33. This issue was raised in the skeleton argument from the respondent's counsel. Initially, it was framed as a question in relation to the first respondent's claim only. This was because it was advanced under the

time limit issue (Original Issue 1) and that issue was originally worded so as to relate to the claim against the first respondent only. However, as the parties agreed that Original Issue 1 should be expanded to include the claims against all four respondents it follows that the scope of this issue is similarly expanded to consider the position in relation to all four respondents.

34. This issue arises from the rules enacted in 2014 which require the parties to employment disputes to refer their dispute to ACAS for early conciliation before presenting a claim to the tribunal.

35. The legislation makes this a mandatory requirement. In other words, a claimant may not present a valid claim to an employment tribunal in most cases without first referring the matter to ACAS for early conciliation. This is apparent from section 18A of the Employment Tribunals Act 1996 which states, so far as is material:

(1) Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter.

…….

(4)If—

(a)during the prescribed period the conciliation officer concludes that a settlement is not possible, or

(b)the prescribed period expires without a settlement having been reached,

the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective claimant.

…….

(8)A person who is subject to the requirement in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4).

……..

(10)In subsections (1) to (7) "prescribed" means prescribed in employment tribunal procedure regulations.

36. The purpose of the early conciliation scheme is to encourage settlement of employment disputes at an early stage and to avoid employment tribunal proceedings. This is plainly a sensible aim. However, this case represents one of a number of examples of the legislation and the Employment Tribunal rules of procedure creating satellite disputes over technical points and decisions which may not have been intended when the legislation was enacted. However, this tribunal must apply the law as it currently stands.

37. Details of the early conciliation certificates obtained by the claimant in this case in respect of the various respondents are summarised in the table below:

EC certificate sequence	Which Respondent?	Day A	Day B	EC certificate number included on claim form?
First	R1	13 Nov 20 [R/1] *(R218768/20/88)*	27 Dec 20	No
First	R2	14 Jan 21 [C/14] *(R103593/21/21)*	14 Jan 21	No
First	R3	14 Jan 21 [C/16] *(R103595/21/03)*	14 Jan 21	No
First	R4	14 Jan 21 [C/18] *(R103597/21/82)*	14 Jan 21	No
Second	R1	10 Feb 21 [R/4] *(R112003/21/88)*	24 Mar 21	Yes
Second	R2	10 Feb 21 [R/3] *(R112020/21/32)*	24 Mar 21	Yes
Second	R3	10 Feb 21 [R/2] *(R112023/21/05)*	24 Mar 21	Yes
Second	R4	10 Feb 21 [R/5] *(R112028/21/57)*	24 Mar 21	Yes

38. The claimant obtained two early conciliation certificates (EC Certificates) against each respondent.

39. The respondents assert that by operation of law, only the first of these certificates is valid. They rely on the decisions of the EAT in two cases in this respect: ***The Commissioners for HM Revenue and Customs v Garau*** *[2017] ICR 1121*; and ***E.On Control Solutions Limited v Caspall*** *[2019] 7 WLUK 319*.

40. The narrow issue in ***Garau*** focused on the impact of a second early conciliation referral upon the limitation period and in particular whether the limitation period was extended by a second such referral. This is apparent in the head note of the judgment which summarises the decision as follows:

"The early conciliation certificate provisions introduced from 6 April 2014 do not allow for more than one certificate of early conciliation per "matter" to be issued by ACAS. If more than one such certificate is issued, a second or subsequent certificate is outside the statutory scheme and has no impact on the limitation period. The Employment Judge was wrong to hold otherwise."

41. The respondent's counsel seeks to go further and argue that ***Garau*** is authority for the proposition that a second certificate for a matter is not valid for any purposes (i.e. not just for the purposes of limitation).

42. I accept that submission. It is supported by the ***Garau*** judgment and paragraph 21 in particular which states:

> *"21. It follows, in my judgment, that a second certificate is not a "certificate" falling within section 18A(4). The certificate referred to in section 18A(4) is the one that a prospective claimant must obtain by complying with the notification requirements and the Rules of Procedure schedule to the 2014 Regulations."*

43. Further, in the ***Caspall*** case the EAT clearly took the same view, At paragraph 33 of ***Caspall*** Her Honour Judge Eady QC (as she then was) cites ***Garau*** as authority for the proposition that:

> *"33. Where a certificate is issued under section 19A(4), there cannot thereafter be a second valid EC certificate regarding "that matter"……"*

44. I therefore accept the respondent's argument that the second certificate in this case is not valid in the sense that it should not be treated as the necessary certificate referred to in section 18A(4). The early conciliation certificate relating to this "matter" for the purposes of section 18A(4) is the first certificate obtained for each respondent.

45. All this lays the foundation for the respondent's argument. They note that when the claimant presented his claim form to the tribunal, he gave the second early conciliation certificate number at section 2.3 of the claim form as regards his claim against each respondent. They are not a valid early conciliation certificates for the "matter" following ***Garau***.

46. It is on this basis that the respondents assert that the Claim Form should have been rejected by the tribunal when it was first presented in April 2021. The respondents rely on rules 10(1)(c)(i) and rule 12(2) of the Employment Tribunals Rule of Procedure. The relevant parts of those rules state:

> *10. Rejection: form not used or failure to supply minimum information*
>
> *(1) The Tribunal shall reject a claim if—*
> *…….*
> *(c) it does not contain all of the following information—*
> *(i) an early conciliation number;*
> *(ii) confirmation that the claim does not institute any relevant proceedings; or*
> *(iii) confirmation that one of the early conciliation exemptions applies.*
> *(2) The form shall be returned to the claimant with a notice of rejection explaining why it has been rejected. The notice shall contain information about how to apply for a reconsideration of the rejection.*

and

> *12. Rejection: substantive defects*
>
> *12.—(1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be—*
> *……..*

(c) one which institutes relevant proceedings and is made on a claim form that does not contain either an early conciliation number or confirmation that one of the early conciliation exemptions applies;
(d) one which institutes relevant proceedings, is made on a claim form which contains confirmation that one of the early conciliation exemptions applies, and an early conciliation exemption does not apply;
(da) one which institutes relevant proceedings and the early conciliation number on the claim form is not the same as the early conciliation number on the early conciliation certificate;
(e) one which institutes relevant proceedings and the name of the claimant on the claim form is not the same as the name of the prospective claimant on the early conciliation certificate to which the early conciliation number relates; or
(f) one which institutes relevant proceedings and the name of the respondent on the claim form is not the same as the name of the prospective respondent on the early conciliation certificate to which the early conciliation number relates.
(2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (a), (b), (c) or (d)](c) of paragraph (1).
(2ZA) The claim shall be rejected if the Judge considers that the claim is of a kind described in sub-paragraph (da) of paragraph (1) unless the Judge considers that the claimant made an error in relation to an early conciliation number and it would not be in the interests of justice to reject the claim.
(2A) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraph (e) or (f) of paragraph (1) unless the Judge considers that the claimant made an error in relation to a name or address and it would not be in the interests of justice to reject the claim.
(3) If the claim is rejected, the form shall be returned to the claimant together with a notice of rejection giving the Judge's reasons for rejecting the claim, or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection.

47. The respondent asserts that as the second early conciliation certificate for each respondent was invalid, the tribunal should have rejected the claim form when it was presented.

48. The respondents rely on the decision in ***E.On Control Solutions Limited v Caspall***. That case is authority for proposition that if an employment tribunal claim form contained an inaccurate ACAS early conciliation certificate number, the tribunal was mandated by the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Sch.1 para.10(c) and para.12(1)(c) to reject the claim.

49. The facts of ***Caspall*** were different to those in the present case. However, I consider that the legal position established in ***Caspall*** applies here. The position is summed up in paragraph 51 of the ***Caspall*** judgment which states:

"51. In the present case, the Claimant had provided the requisite information to ACAS for the purpose of the EC process and had obtained an EC certificate pursuant to section 18A(4) Employment Tribunals Act 1996. That should have enabled him to launch his ET claim against the Respondent but, in order to be able to do so, he still needed to comply with the relevant employment tribunal procedure regulations. Specifically, the Claimant needed to present his claim on the prescribed form and to include the accurate EC certificate number. ……he had failed to do so. The first claim gave an inaccurate EC certificate number, which related to a different Claimant and a different claim; the fourth claim gave a number for an EC certificate that was simply invalid (the second certificate having no validity for section 18A purposes, see Serra Garau)."

50. Here, the position is the same – the claimant in this case gave an EC certificate number in his claim form that was invalid for the reasons set out above.

51. As such, the tribunal should have rejected the claim form under rule 10. The tribunal did not however reject the claim form at the rule 10 stage. The question is – should the tribunal reject the claim now? As observed by the EAT in ***Caspall***, Rule 12 obliges the tribunal to reject the claim if an Employment Judge considers one or more of the sub paragraphs in Rule 12(1) apply. That obligation is not stated to be limited to a particular stage in the tribunal process. It is expressed in general terms and arises at whatever stage the Judge makes that decision.

52. In the circumstances, the claim against all four respondents must be rejected under Rule 12. I will instruct the tribunal administration to issue the appropriate notice to the claimant. The consequence of this is that there is no longer a "live" claim against any of the respondents unless and until the claimant makes a successful application for reconsideration under Rule 13.

53. In these circumstances, I considered whether I should go on to deal with the remaining issues. I considered that in circumstances where I have heard evidence and submissions on these issues and I am in a position to consider them it would assist the parties for me to set out the decisions I would have made in relation to the remaining issues had the claims not been rejected.

Original Issue 1: Whether all the complaints against all respondents are out of time and whether the tribunal has jurisdiction to determine them.

54. There are time limits within which a claimant must present their claim form to the tribunal. Subject to a limited discretion to entertain late claims, the employment tribunal has no jurisdiction to consider a claim that is not presented within the applicable time limit.

55. The claims in this case are for breach of contract, unauthorised deduction form wages and discrimination. I deal separately with each claim as follows:

The Breach of Contract Claims;

56. Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 sets out the time limits within which a complaint of breach of contract must be presented to the tribunal as follows:

Time within which proceedings may be brought

7. An industrial tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented—

(a)within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or

(b)where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or

(c)where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.

57. I do not accept the respondent's submission as to when the three-month period begins. The respondent asserts that the three-month period begins when the alleged breach of contract takes place. This would, of course, be the position for a common law claim for breach of contract in the County Court. However, the jurisdiction of this tribunal is conferred by statute. The wording of Article 7(a) is clear as to when the three-month limitation period begins for the purposes of this tribunal. It begins with the effective date of termination. That date is 12 November 2020. The three-month limitation period expired on 11 February 2021.

58. The referral of the matter to ACAS for early conciliation has the effect of extending that time limit. In this case, for the reasons given above (and following the decision in ***Garau***), it is the first referral to early conciliation that operates to extend the limitation period. The second referrals do not result in any further extension of time.

59. The first set of referrals to ACAS were made within the three-month limitation period. They were made on 13 November 2020 (first respondent) and 14 January 2021 (second, third and fourth respondents).

60. In the circumstances, the deadline for the claimant to present his claim form to the tribunal in respect of the claims was:

    60.1 27 March 2021 in respect of the claim against the first respondent; and

    60.2 14 February 2021 in respect of the claims against the second, third and fourth respondents.

61. It follows from this, that the claimant was out of time when presenting his claim form on 22 April 2021.

62. In those circumstances, the tribunal must consider Article 7(c) by asking itself:

    62.1 Was it reasonably practicable for the claimant to have presented the claim form in time? ; and

    62.2 If not, was the claim form presented within such further time as was reasonable?

63. The approach to be taken to applying these questions is helpfully set out at paragraphs 12 to 15 of the respondent's skeleton argument.

64. I conclude that it was reasonably practicable for the claimant to have presented the claim form in time. At the material time the claimant had worked in a legal environment, he understood that there was a time limit to bring the claim and knew what that limit was. He had the benefit of legal advice from a firm of solicitors. There was no intervening event or

circumstances which prevented it being reasonably feasible to have presented the claim form in time. The reasons for delay identified at paragraph 24 above are not sufficient for it to be not reasonably practicable to have presented the claim in time.

65. In the circumstances, the second question is irrelevant and the tribunal would have no jurisdiction to hear the breach of contract claims against any of the respondents.

The Unauthorised Deduction from Wages Claims

66. The time limit for presenting such claims to the tribunal is set out in section 23 Employment Rights Act 1996 which states:

Unauthorised deductions from wages

(2)Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a)in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b)in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3)Where a complaint is brought under this section in respect of—

(a)a series of deductions or payments, or

(b)a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(3A)Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).

(4)Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

67. Essentially, the test is the same as the test for breach of contract. The dates on which the ordinary 3-month limitation period expired are different as the time limit runs from the date of the relevant deductions (or the last in a series of deductions). In particular:

67.1 The claimant complained that the respondent should have

increased his salary from £16,000 p.a. to £18,000 p.a. from 22 November 2019 (i.e. 3 months after his employment started which is when the claimant says his probation period should have ended). The clamant complains that the salary remained at the lower level until it was finally increased in January 2020. This would represent a series of deductions, month on month until January 2020 when that series of deductions ended. Thus, the three-month limitation period would have expired in April 2020; and

67.2 The second alleged deduction was an alleged failure to pay holiday pay accrued at termination of employment under Regulation 14 Working Time Regulations. That payment would have fallen due on the date of termination of employment (i.e. 12 November 2020). Thus, the three-month limitation period expired on 11 February 2020.

68. Again, the claim form in relation to those complaints was presented out of time. Again, for the same reasons as set out above it was reasonably practicable for the claims to have been presented in time and so the tribunal would have no jurisdiction to hear either of the unauthorised deduction from wages claims against any of the respondents.

The Discrimination Claims

69. The applicable statutory provision concerning time limits is section 123 Equality Act 2010 which states:

123 Time limits

(1) Subject to section 140B proceedings on a complaint within section 120 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.

……

(3)For the purposes of this section—

(a)conduct extending over a period is to be treated as done at the end of the period;

(b)failure to do something is to be treated as occurring when the person in question decided on it.

(4)In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a)when P does an act inconsistent with doing it, or

(b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

70. The discrimination claims arise from a series of events which ended with the claimant's dismissal on 12 November 2020. For the purposes of section 123 (3) they must potentially be "conduct extending over a period". Thus, the tribunal should treat the date of dismissal (being the date the conduct ended) as the start of the applicable three-month limitation period.

71. It follows, that the claimant form was against presented out of time as the time limits for the discrimination claim will be the same as those set out in paragraph 60 above.

72. When considering whether to entertain a discrimination claim out of time the test is whether it is just and equitable to extend time.

73. The respondent's counsel helpfully set out the legal approach that the tribunal should take at paragraphs 16 to 20 of his skeleton argument.

74. The factors which weigh in favour of granting the claimant additional time are:

    74.1 The prejudice which will be caused to the claimant if he is unable to pursue his claim;

    74.2 It is unlikely that the cogency of the evidence will have been affected by the delay. Certainly, this argument was not advanced by the respondent

75. The factors which weigh against the claimant are:

    76.1 The length of delay is considerable in the context of an overall limitation period of 3 months.

    76.2 There are no good reasons for the delay (see paragraph 24 above);

    76.3 The claimant has not acted promptly. He intended to present his claim in January 2021 and delayed in doing so until 22 April 2021;

    76.4 The claimant had the benefit of professional advice at all material times. He knew about the time limits. He also knew (or ought to have known given that he had the benefit of legal advice) that the second set of referrals to ACAS for early conciliation had no effect in terms of extending the limitation period;

    76.5 The public policy interest in enforcing time limits prescribed by statute;

    76.6 The prejudice to the respondent in allowing the claim to proceed notwithstanding that it was presented late;

    76.7 The apparent weakness of the case. Thus far, the claimant has asserted that he was treated differently than other employees but has yet to advance evidence to show facts from which the tribunal could decide, in the absence of any other explanation, that the

reason for that difference in treatment was discriminatory.

76. Weighing up the various factors I conclude that it would not have been just and equitable for the tribunal to allow the discrimination claims to proceed out of time.

Original Issue 2: Whether complaints of breach of contract and/or an unauthorised deduction from wages can be brought against individual named respondents who were not the claimant's employer.

77. The claimant raises six complaints breach of contract. In summary they are as follows:

77.1 Alleged breach of contract 1: the claimant alleges that it was a breach of clauses 3.1, 3.2 and 3.3 of his contract of employment with the first respondent by not ending the claimant's probation period on 22 November 2019 which was three months after his employment commenced.

78.2 Alleged breach of contract 2: the claimant alleges that it was a breach of clause 3.1 of his contract of employment for the first respondent to extend his probation period by applying clause 3.2 of the same contract.

78.3 Alleged breach of contract 3: the claimant alleges that it was a breach of clause 3.2 of his contract of employment for the respondents to fail to provide him with written confirmation that his probation period was extended.

78.4 Alleged breach of contract 4: the claimant alleges that it was a breach of clause 10.3 of his contract of employment for the respondents to enroll him into their pension scheme on 4 December 2019 at a time when they were also extending the claimant's probation period.

78.5 Alleged breach of contract 5: the claimant alleges that it was a breach of clauses 15, 2.1 and 2.3 to do what he refers to as "creating and conducting secret prioritisation". What is meant by this is that the respondents are alleged to have favored other legal assistants over the claimant by giving them additional responsibility and authority that was not given to the claimant.

78.6 Alleged breach of contract 6: the claimant asserts that certain wording set out in the job advertisement for his role became a term of his contract of employment and that the respondent breached that term. Specifically the claimant confirmed to me during the hearing that the wording in the advertisement that he relied on was the wording that stated that the benefits of the role included "Excellent on the job training and internal development". The claimant asserts that the respondents failed to provide this and that this amounted to a breach of contract.

78. In addition to the above claims for breach of contract the claimant also relies on the same maters relied on as complaints of unauthorised deductions from wages as set out at paragraph 67 above. These matters are also said to be breaches of contract.

79. The claimant's case as against the second, third and fourth respondents is misconceived. The claimant expressly refers to his contract of employment as the basis for his claims of breach of contract. That contract was entered into between the claimant and the first respondent only. Such claims may only be brought against the other party to the contract. Even on the claimant's own case the second, third and fourth respondents were not parties to the contract. As such no claim for breach of contract can possibly lie against them.

80. Furthermore, in relation to the unauthorised deduction from wages claim, section 13 Employment Rights Act 1996 gives workers the right not to have unauthorised deductions made from their wages. The section states:

> **13 Right not to suffer unauthorised deductions.**
>
> (1) An employer shall not make a deduction from wages of a worker employed by him

81. The use of the word "employer" clearly precludes such claims from being brought against anyone other than the employer. The second, third and fourth respondents were not the claimant's employer and the claims cannot be brought against them.

Issue 3: Whether the matters alleged to amount to a breach of contract are capable of being such and whether such claims having no reasonable prospects of success should be struck out or in the alternative whether such claims having little reasonable prospect the claimant should be ordered to pay a deposit as a condition of continuing to advance those claims.

82. The tribunal has the power to strike out claims in certain circumstances. That power arises under rule 37 which states:

> Striking out
>
> 37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
>
> (a) that it is scandalous or vexatious or has no reasonable prospect of success;

83. Further, the tribunal has the power to require a party to make a payment (known as a deposit) as a condition of continuing with a particular claim or issue. That power arises under rule 39 which states:

> Deposit orders
>
> 39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may

make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

84. The tests for striking out or making a deposit order are different. However, both tests require a tribunal to undertake an assessment of the strength of the particular claim or issue.

85. Taking each of the breach of contract claims in turn:

86. Alleged breach of contract 1: the claimant alleges that it was a breach of clauses 3.1, 3.2 and 3.3 of his contract of employment with the first respondent by not ending the claimant's probation period on 22 November 2019 which was three months after his employment commenced.

87. The relevant clauses in the claimant's contract of employment state as follows:

3.1 the first three months of your employment will be a probationary period (the probationary period) during which we will monitor your performance and conduct.

3.2 if we are not satisfied with your performance or conduct during the probationary period, we may discretion extend the probationary period by a period of up to a further three months. If so, you will receive written confirmation of the extension. Reference to the probationary period in this contract includes any extension of it.

3.3 When you have completed your probationary period to our satisfaction, we will confirm your continued employment in writing.

88. The express terms of the claimant's contract of employment gave the first respondent a discretion to extend the probationary period by up to a further three months. That discretion is not fettered by any other express wording of the contract.

89. Where a contractual discretion is not fettered in any way it is settled law that such a discretion must be exercised without arbitrariness, capriciousness, perversity or irrationality. The claimant's case is that the exercise of the relevant discretion was tainted by discrimination. There is a strong argument that exercising a discretion in a discriminatory way would amount to behaviour that was arbitrary, capricious perverse or irrational. This would be a highly fact sensitive claim as the tribunal would need to determine why the first respondent chose to exercise its discretion in the way it did. I would not have been persuaded that this claim was so weak as against the first respondent such as to warrant striking out or a deposit order.

90. I would, however, have struck out this claim as against the other respondents. The claim could not have succeeded against them as they were not parties to the contract.

91. Alleged breach of contract 2: the claimant alleges that it was a breach of clause 3.1 of his contract of employment for the respondents to extend his

probation period by applying clause 3.2 of the contract. It is difficult to see any material distinction between this alleged breach of contract and alleged breach of contract 1. The allegations effectively amount of the same thing. Again, for the same reasons, I would not have been persuaded that this claim was so weak as to warrant striking out for making a deposit order in respect of the claim against the first respondent.

92. However, I would have struck out this claim as against the other respondents. The claim could not succeed against them as they were not parties to the contract.

93. Alleged breach of contract 3: the claimant alleges that it was a breach of clause 3.2 of his contract of employment for the respondents not to provide him with written confirmation that his probation period was extended.

94. This claim clearly has sufficient merit to make it inappropriate to strike out or make a deposit order in respect of the claim against the first respondent. There is an express term of the contract requiring the first respondent to confirm the extension of the probation period in writing. The first respondent accepts that it failed to do comply with this requirement. The first respondent therefore accepts that the contract was breached. The claim must have sufficient merit.

95. I would have struck out this claim as against the other respondents. The claim could not succeed against them as they were not parties to the contract.

96. Alleged breach of contract 4: the claimant alleges that it was a breach of clause 10.3 of his contract of employment for the respondents to enroll him into their pension scheme on 4 December 2019 at a time when they were also extending the claimant's probation period.

97. This claim has no merit whatsoever. On any analysis it was not a term of the claimant's contract that the first respondent was required to wait for the claimant to complete his probation period before enrolling him into their pension scheme. The relevant clause the claimant's contract of employment states:

"10.3 after completion of the probationary period, you will be entitled to take part in the firms matched contributory scheme."

98. This clause, properly construed, merely gives the claimant an entitlement to take part in the pension scheme upon completion of his probationary period. It does not create any contractual bar preventing the respondents from allowing the claimant to participate in the pension scheme earlier than this.

99. Alleged breach of contract 5: the claimant alleges that it was a breach of clauses 15, 2.1 and 2.3 of his contract of employment for the respondents to do what he refers to as "creating and conducting secret prioritisation". What is meant by this is the respondent's alleged conduct in favoring other legal assistants over the claimant by giving them additional responsibility

and authority that was not given to the claimant.

100. This claim is misconceived in the way it has been advanced by the claimant as a breach of contract claim. It is a complaint of discrimination rather that breach of contract. There is nothing in the relevant terms of the claimant's contract of employment would prohibit the behaviour the claimant complains of. I would have struck out this claim for those reasons or alternatively have made a deposit order as a condition of continuing with this claim.

101. Alleged breach of contract 6: the claimant asserts that certain terms set out in the job advertisement for his role became a term of his contract of employment and that the respondents breached that term. Specifically the claimant confirmed to me during the hearing that the wording in the advertisement that he relied on was the wording that stated that the benefits of the role included "Excellent on the job training and internal development". The claimant asserts that the respondents failed to provide this and that this amounted to a breach of contract.

102. There is no real prospect of the claimant persuading the tribunal that the wording of the job advertisement was incorporated into the terms of his contract of employment . It is notable that the contract contained an entire agreement clause paragraph at 17.2. I would have struck out this claim for those reasons or alternatively have made a deposit order as condition of continuing with this claim.

Issue 4: Whether the two protected acts relied upon by the claimant as set out in the list of issues above can amount to protected acts within the meaning of section 27 of the equality act 2010 and if not whether the claim of victimisation on the grounds of sex and/or race should be dismissed as having no reasonable prospect of success or such claims having little reasonable prospect the claimant should be ordered to pay a deposit as a condition of continuing to advance those claims.

103. A successful claim for victimisation under section 27 of the Equality Act 2010 requires two key elements: –

103.1 Firstly the claimant must have done a "protected act" (as defined); and

103.2 Secondly the respondent must subject the claimant to a detriment because they did the protected act.

104. Thus, a victimisation claim must fail if the claimant is unable to show that they have done a protected act.

105. The term "protected act" is defined in section 27 Equality Act 2010 as follows:

> (2)Each of the following is a protected act—
>
> (a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

106. In this case the claimant relies on two complaints that he submitted to the first respondent. He says both complaints were "protected acts" as defined in section 27. The two complaints are: –

106.1 A complaint raised in the email sent by the claimant to Sarah Dodds On 26 November 2019; and

106.2 A written grievance submitted by the claimant on 11 September 2020.

107. Taking these two documents in turn: -

Email sent by the claimant to Sarah Dodds On 26 November 2019.

108. In this email the claimant complains that the fourth respondent misspelled his name in correspondence. The claimant refers to this being offensive in his culture and also complains that the mistakes are unprofessional.

109. The claimant accepts that this email does not amount to a protected act for the purposes of sections 27(2)(a) or (b). This question is whether the email amounts to "doing any other thing for the purposes of or in connection with" the Equality Act 2010 or whether it contains an allegation (whether or not express) that the fourth respondent contravened the Equality Act.

110. I would have found that the claimant was not doing a protected act by sending this email. The email makes no reference to the Equality Act. It makes no reference to any protected characteristic such as race or sex. It contains nothing that either expressly or impliedly to suggest that the conduct complained of was discriminatory. It is not capable of constituting a protected act for the purposes of section 27.

The written grievance submitted by the claimant on 11 September 2020.

111. In this document the claimant raised a grievance. He repeated his complaints about the fourth respondent misspelling his name and complained that Ms. Dodds had not taken appropriate action about this since his initial complaint. The claimant also complained about the extension of his probationary period. He suggested that other legal assistants were prioritised over him in various ways and complained of unequal treatment. Again, there was no reference to any specific protected characteristic such as sex or race. However the claimant did refer to such treatment is being "discriminative treatment". The express reference to the conduct complained of being discriminatory would have been sufficient to bring the complaint within the scope of section 27. The claimant was

clearly complaining of discrimination In the workplace. The respondent's counsel referred to the decision of the EAT in **Beneviste v Kingston University** EAT 0393/05. In that case the EAT upheld the tribunal's decision that the grievances could not amount to protected acts, saying that a claim does not identify a protected act in the true legal sense 'merely by making a reference to a criticism, grievance or complaint without suggesting that the criticism, grievance or complaint was in some sense an allegation of discrimination or otherwise a contravention of the legislation'. The significant difference in the present case is that the claimant was not only setting out extensive details of the behaviour that he was complaining about but also expressly alleged that this behaviour amounted to discrimination.

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Employment Judge Mr. A. Spencer

Date: 15th July 2022

Judgment sent to the parties on

21/7/2022

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For the Tribunal office