EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondents**
Mr David Spencer	AND	Mitie Limited (1) Magnox Limited (2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY BY VHS ON 25 July 2022

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: **In person**
For the Second Respondent: **Ms C McCann of Counsel**

JUDGMENT

The judgment of the tribunal is that:
1. The claimant's claim against the second respondent for detriment arising from protected public interest disclosures was presented out of time and is dismissed; and
2. Accordingly the second respondent is dismissed from these proceedings.

RESERVED REASONS

1. The claimant has presented one claim against the second respondent, namely for detriment arising from protected public interest disclosures. This is the judgment following a Preliminary Hearing to determine whether or not this claim was presented in time.
2. I have heard from the claimant. I have heard from Ms McCann on behalf of the respondent. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to any factual and legal submissions made by and on behalf of the respective parties.
3. The claimant commenced employment with a company called Interserve on 13 March 2019, and on 1 February 2021 his employment was transferred to the first respondent Mitie Ltd. The second respondent Magnox Limited was a client of the first respondent. At all material times the claimant was an employee of the first respondent, but he was assigned to and worked for the second respondent as a Project Facilitator on its Winfrith Site. The

agreement between the first respondent and the second respondent included provisions under which the second respondent could insist that the first respondent removed its employees from the second respondent's site to which they had been assigned.

4. Between 2019 and early 2021 the claimant had raised four separate concerns and grievances directly with the second respondent relating to various health and safety matters. The claimant contends that these were protected public interest disclosures.
5. By email dated 27 January 2021 Mr Ayling of the second respondent instructed the first respondent to remove the claimant from its Winfrith Site. The reason given was because "the behaviour and disproportionate challenge of the Project Facilitator regarding his role appointments and work environment is untenable". The first respondent then suspended the claimant, and by letter dated 26 February 2021 Mr Stacey of the first respondent wrote to the claimant to confirm that the second respondent had requested that he should be permanently removed from the contract "due to their concerns regarding your on-site behaviour". The first respondent explained: "Mitie has investigated the allegations and although no formal action against you was warranted, we are contractually obliged to honour the request for your removal. Regrettably, despite a robust attempt, we have been unable to change the client's mind on the subject … Please note that your suspension is not a disciplinary sanction and you will not be suspended for longer than necessary … You should be aware that dismissal is a possibility if we are unable to find alternative employment for you …"
6. The claimant then commenced a period of sickness absence until 1 May 2021, but he remained suspended on full pay. The claimant attended two meetings on 12 May and 24 May 2021 which included discussions about potential redeployment. On 30 July 2021 Mr Corner of the first respondent requested the second respondent to reconsider its position, but by email dated 2 August 2021 Mr Ayling of the second respondent confirmed that its decision would not be changed. The claimant attended two further meetings on 7 and 22 September 2022 but in the absence of any suitable alternative employment the first respondent dismissed the claimant by letter dated 8 October 2022. The letter confirmed that it was a summary dismissal, but that the claimant would receive 12 weeks' notice pay in lieu of notice, and his accrued holiday pay. The claimant appealed the decision to dismiss him, but his appeal was rejected.
7. Throughout this time the claimant was a member of Unite the Union and had access to advice and assistance from their regional office. He also had access to the Internet, and he made contact with ACAS in connection with potential claims.
8. The claimant first made contact with ACAS in connection with a potential claim against the second respondent on 22 December 2021. ACAS issued the early conciliation certificate on 1 February 2022. The claimant then presented these proceedings on 9 February 2022. The proceedings brought claims of unfair dismissal and for unlawful deductions/breach of contract in respect of the notice payment against the first respondent his former employer. He also included a claim of detriment arising from public interest disclosures against the second respondent only. In short, the claimant claims that the second respondent subjected him to detriment, namely the requirement that he be removed off site, because of his protected public interest disclosures.
9. Having established the above facts, I now apply the law.
10. The relevant statute is the Employment Rights Act 1996 ("the Act"). Under section 47B of the Act a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
11. Section 48(3) of the Act provides that an employment tribunal shall not consider a complaint under this section unless it is presented: (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

12. With effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.
13. Section 207B of the Act provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.
14. I have been referred to and have considered the following cases, namely: Palmer and Saunders v Southend-on-Sea BC [1984] ICR 372; Porter v Bandridge Ltd [1978] IRLR 271 CA; Wall's Meat Co v Khan [1978] IRLR 499; London Underground Ltd v Noel [1999] IRLR 621; Dedman v British Building and Engineering Appliances [1974] 1 All ER 520; Cullinane v Balfour Beattie Engineering Services Ltd UKEAT/0537/10; London International College v Sen [1993] IRLR 333 CA; Asda Stores Ltd v Kauser UKEAT/0165/07; Schultz v Esso Petroleum Ltd [1999] IRLR 488 CA; and McKinney v Newham London Borough Council [2015] ICR EAT.
15. In this case the respondent's decision to remove the claimant from site was confirmed in writing to the claimant by the first respondent on 26 February 2021. That decision was reviewed but confirmed on 2 August 2021. The normal time limit of three months from this act therefore expired at midnight on 1 November 2021. The claimant first made contact with ACAS in connection with a potential claim against the second respondent on 22 December 2021 (Day A). ACAS issued the early conciliation certificate on 1 February 2022 (Day B). The claimant does not enjoy any extension of time under the ACAS Early Conciliation provisions because the normal time limit of three months had already expired on 1 November 2021 before he made contact with ACAS. The claimant then presented these proceedings on 9 February 2022. The claimant's claims against the first respondent were presented within time, but the claim against the second respondent is on the face of it just over three months out of time.
16. The grounds relied upon by the claimant for suggesting that it was not reasonably practicable to have issued proceedings within the relevant time limit are that he was unaware that the time limit for a potential claim against the second respondent was running, and that he did not think he could bring a claim until after he had been dismissed by the first respondent and was no longer receiving pay.
17. The question of whether or not it was reasonably practicable for the claimant to have presented his claim in time is to be considered having regard to the following authorities. In Wall's Meat Co v Khan Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the claimant, see Porter v Bandridge Ltd.
18. In Palmer and Saunders v Southend-on-Sea BC the headnote suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the Industrial Tribunal taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, in determining whether or not it was reasonably practicable to present the

complaint in time, an Industrial Tribunal may wish to consider the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit. The Industrial Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used. Contrary to the argument advanced on behalf of the appellants in the present case and the obiter dictum of Kilner Brown J in Crown Agents for Overseas Governments and Administrations v Lawal [1978] IRLR542, however, the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time. The views expressed by the EAT in Bodha v Hampshire Area Health Authority on this point were preferred to those expressed in Lawal:-

19. To this end the Tribunal should consider: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.
20. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) concluded that "reasonably practicable" does not mean reasonable (which would be too favourable to employees), and does not mean physically possible (which would be too favourable to employers) but means something like "reasonably feasible".
21. Subsequently in London Underground Ltd v Noel, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing so. As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of practicability … the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204).
22. The Employment Tribunal must make clear findings about why the claimant failed to present his originating application in time, and then assess whether he has demonstrated that it was not reasonably practicable to have presented it in time (London International College v Sen [1993] IRLR 333 CA).
23. If the claimant professes ignorance of his right to make a claim and/or the legal regime in respect of time limits, the overarching question for the tribunal is whether that state of mind (that is the ignorance or the mistake) was itself reasonable. It is not likely to be reasonable if it arises from a failure to make such enquiries as ought to have been made in all the circumstances (Wall's Meat Co Ltd v Khan).
24. If the claimant is relying on ill-health, then he must discharge the burden of demonstrating that any ill-health meant that it was not recently practical to have presented the originating application in time. This will ordinarily require evidence to support both the existence of the health condition relied upon; and secondly that this prevented the claimant from submitting the claim in time (or where appropriate within a further reasonable period) see Asda Stores Ltd v Kauser; Schultz v Esso Petroleum Ltd.

25. Underhill P as he then was considered the period after the expiry of the primary time limit in Cullinane v Balfour Beattie Engineering Services Ltd (in the context of the time limit under section 139 of the Trade Union & Labour Relations (Consolidation) Act 1992, which is the same test as in section 111 of the Act) at paragraph 16: "The question at "stage 2" is what period - that is, between the expiry of the primary time limit and the eventual presentation of the claim - is reasonable. That is not the same as asking whether the claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted - having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months."
26. In this case the claimant knew that the detriment of which he complains had arisen on 27 January 2021 and was reconfirmed on 2 August 2021. During this time the claimant had access to advice and support from his trade union and had access to the Internet. He is not incapacitated by any illness to the extent that he was unable to pursue a potential claim, and indeed he was able to raise a subsequent grievance and attend meetings for these reasons and for potential redeployment during this period.
27. The claimant suggested he did not issue proceedings within time because he did not know that he could do so then (pending his subsequent dismissal). In my judgment there was no physical impediment which prevented the claimant from complying with the time limit, and it is not the case that the claimant was the subject of any misrepresentation or any negligent advice. The question arises as to whether it was reasonably practicable, in the sense that it was reasonable feasible, for the claimant was issued these proceedings within time. Even giving the claimant the benefit of the doubt to the effect that confirmation of his exclusion from site on 2 August 2021 was a second detriment which started time running again then, it was still in my judgment recently feasible for the claimant have presented this claim against the second respondent within three months of that date. This is particularly the case given that the claimant was dismissed within that limitation period and was able to seek advice as to his position. The claimant has not demonstrated that it was not reasonably practicable to have presented the claim in time, and any suggestion that the claimant was ignorant of the relevant time limits is not reasonable because it arises from a failure to make such enquiries as could and ought to have been made in all the circumstances.
28. In conclusion therefore I find that it was really practicable for the claimant to have presented these proceedings against the second respondent within time. He did not do so. The claim against the second respondent was presented out of time and is hereby dismissed. Accordingly, the second respondent is removed from these proceedings.

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Employment Judge N J Roper
Date: 25 July 2022

Judgment sent to Parties on
29 July 2022 by Miss J Hopes

FOR THE TRIBUNAL OFFICE