EMPLOYMENT TRIBUNALS

Claimant: Mr M Parsons

Respondent: SSGC Ltd

Heard at: Liverpool (preliminary hearing in public via CVP)

On: 10 August 2022

Before: Judge Brian Doyle

Representation:
Claimant: In person
Respondent: Ms H Barney, Counsel
Mr A Bennett, Trainee Solicitor

JUDGMENT

1. The claim was not brought within the time limitation periods contained in article 7 of the Extension of Jurisdiction Order 1994, sections 23 and 111 of the Employment Rights Act 1996, and section 123 of the Equality Act 2010 or in circumstances where an extension of time is permitted by those provisions.

2. The claim is therefore dismissed.

3. All further hearings concerning this claim are vacated.

WRITTEN REASONS

Introduction

1. These are the written reasons for the above judgment delivered with oral reasons on 10 August 2022. The formal judgment was signed by the judge on 10 August 2022. It was sent to the parties on 19 August 2022. The claimant made a timely application for written reasons under rule 62 on 1 September 2022.

2. This was a preliminary hearing to determine whether the complaints within the claim had been presented within the relevant limitation period and, if not,

whether time might be extended.

The evidence

3. The Tribunal had before it a documents bundle comprising 592 pages (inclusive of index). References to that bundle appear in square brackets below. The claimant also submitted a witness statement of 6 pages, on which he was cross-examined by the respondent's counsel and questioned by the Tribunal. The Tribunal also heard oral submissions from the claimant and from the respondent's counsel.

The claim

4. Acas early conciliation first commenced on 28 August 2021 and ended on 7 October 2021 [6]. Further Acas early conciliation commenced on 6 September 2021 and ended on 18 October 2021 [7]. The claimant's ET1 claim form and statement of claim were presented on 10 October 2021 [8-49]. The respondent's ET3 response form and grounds of resistance were presented on 4 March 2022 [50-67].

5. The claim broadly contains complaints of (1) unfair dismissal; (2) disability discrimination; (3) wrongful dismissal; and (4) unlawful deductions from pay.

Case management

6. A preliminary hearing for case management purposes was conducted by Employment Judge Sharkett on 9 March 2022 [68-82]. Judge Sharkett listed the present preliminary hearing (originally to be heard on 22 June 2022). She also listed a second preliminary hearing (to deal with the claimant's status as a disabled person) and the final hearing. The judge summarised the claim, complaints and issues at [70-71] and she identified the time limitation points.

7. The claimant responded to Judge Sharkett's case management summary and orders on 6 April 2022 [83-90].

Key documents and chronology

8. The Tribunal identified the key documents before it as being the Acas early conciliation certificates [6 and 7]; the claimant's statement of claim, especially at [20, 29, 31 and 32]; the respondent's grounds of resistance, especially at [58-60]; and the claimant's response to Judge Sharkett's case management summary and orders, especially at [85 and 89].

9. The key events in the chronology of this matter are as follows.

10. The claimant is a man now aged 52. Following a career in the armed forces, he was employed by the respondent as an Area Manager/Quality Manager from 5 October 2020. He was employed because of the respondent's need arising from the operation and management of Covid-19 Test Centres.

11. On 16 March 2021 the claimant experienced a heart attack. He was then absent from work, although with an expectation of a timely return to work on a phased

basis from 14 June 2021 [100-104, 156]. Then on 21 April 2021 the respondent dismissed the claimant by email/letter with an effective date of termination of employment stated to be 20 May 2021 [105-106]. The stated reason was a need to end his temporary contract because of changed requirements and an anticipated resource reduction.

12. The claimant's initial reaction to his dismissal is dated 21 April 2021 [107]. There then followed further correspondence from him regarding the consequences of his dismissal on 26 April 2021 regarding his pension [108]; on 14 May 2021 regarding the return of company property [107]; on 28 May 2021 chasing that last communication and raising questions about his final pay, holiday pay and P45 [110]; and a further chaser on 12 July 2021 [111].

13. On 9 July 2021 the respondent prepared a P45 in respect of the claimant. It recorded his leaving date as 11 June 2021 [115], although this was not issued to the claimant until later (see below).

14. The claimant raised a grievance about these matters on 11 August 2021 [113]. The claimant referred to the respondent's legal obligations and his intention to escalate matters legally. This led to a reply by the respondent on 11 August 2021 with an explanation for the delay [114]. The respondent addressed itself to the claimant's concerns about his final pay slip, P45 and holiday pay. On 13 August 2021 the respondent provided an explanation for its final payments to the claimant [118]. On 13 August 2021 the claimant acknowledged receipt of his P45 and sought a breakdown of his final payments [119]. He followed this up with a further email on 16 August 2021 [120].

15. On 24 August 2021 the claimant referred the respondent to its legal obligations in respect of the above matters [121]. On 25 August 2021 he challenged the respondent's calculations of his final payments [123]. This communication contains the first reference to the claimant's awareness that time limitation periods applied; to the leaving date of 9 June 2021 contained in the P45; and to avoiding submitting a claim. In reply on 25 August 2021, the respondent confirmed that the effective date of termination was 20 May 2021 [124]. It explained the reference to a different leaving date in the P45. It further explained the calculation of the final payments.

16. At that point, by 25 August 2021 the claimant was in obvious dispute with the respondent regarding the payments made to him and the P45 [125]. The respondent replied to that on 26 August 2021 [126]. It is clear that by 29 August 2021 the claimant was only prepared to recognise the leaving date of 11 June 2021 in the P45 as the effective date of termination [128]. This is also the first reference to the claimant having contacted Acas.

17. The claimant contacted the Acas Helpline on 28 August 2021. He recalled that the adviser mentioned early conciliation. He cannot remember whether time limits were also raised. He also approached a solicitor on 1 September 2021 for general advice, but he was unable to afford the legal fees to take the matter further. He had been advised by Acas to check his insurance policies for legal expenses insurance, but he had no cover. Acas also provided him with links to voluntary advice services. He looked at the relevant web pages, but he took the matter no further. It was only in mid/late August 2021 that he searched the

internet for relevant information.

18. On 6 September 2021 the claimant made reference to raising a further grievance [129]. He referred to the Acas Code of Practice. There is also a further reference by him to time limits. There is a first reference to challenging his dismissal and to an appeal, as well as to disability. The respondent replied on 8 September 2021 [130-131]. The claimant responded again on 10 September 2021 in which he made reference to Acas and early conciliation [132]. He submitted an appeal on 14 September 2021 [133-134]. He chased the matter of the appeal on 28 September 2021 [135].

19. As noted above, Acas early conciliation first commenced on 28 August 2021 and ended on 7 October 2021 [6]. Further Acas early conciliation commenced on 6 September 2021 and ended on 18 October 2021 [7]. The claimant's ET1 claim form and statement of claim were presented on 10 October 2021 [8-49].

20. The claimant's evidence is that he was unaware that there was a time limit that would apply to any claim in the Employment Tribunal. He suggests or implies that the respondent was at fault because it actively avoided informing him of the time limits. He sets out the history of his heart attack and his communications with the respondent between 16 March 2021 and 12 April 2021. He was due to return to work on a phased basis on 14 June 2021 [156]. He then gave evidence as to events following his dismissal on 21 April 2021. What is relevant here is what the claimant knew and did after he had been given notice on 21 April 2021. See paragraph 7 onwards from page 2 of his witness statement.

21. From paragraph 19 (page 5) of his witness statement onwards the claimant gives evidence as to why he did not present his claim to the Tribunal within the primary time limitation (and, as the case might be, why it was not reasonably practicable to do so). He addresses the question of whether he presented the claim within a reasonable period at paragraphs 24-25 (page 6). He explains why it would be just and equitable to extend time at paragraphs 26-29 (page 6).

22. There is no medical evidence before the Tribunal that is specific to the claimant (other than the claimant's own account) and to the questions on time limitation that the Tribunal is required to answer or which supports his position in relation to those questions. Instead, the claimant has submitted generic evidence in the form of NHS Guidance following a heart attack [230].

The claimant's position and evidence on the preliminary issue

23. In his ET1, the claimant relies upon 9 extenuating circumstances, as follows.

24. First, his sudden medical sickness and subsequent impairment, including the rehabilitation and recuperation requirements had a huge bearing on his priorities, judgements and actions. He was medically directed and, therefore, understandably and justifiably focused more on his ailment, physical recovery, mental health and close family etc, rather than on his employment and its subsequent termination.

25. Second, his significant physical condition and immediate mental anxiety and depression, along with the time-frame within which he had to recover, caused an unforeseen delay in his reaction to deal with the dismissal, grievances and claim. He completed NHS rehabilitation on 30 June 2021, but remained under the care and treatment of the NHS consultant, and he is required to take life-long medication due to his impairment. However, he informed the Department of Work and Pensions (DWP) that he considered himself fit for work from 14 June 2021 onwards.

26. Third, the respondent informed him of his dismissal without warning 5 weeks into the statutory sick leave period and 11 weeks prior to the NHS rehabilitation course completing. The respondent knew of his condition and that he was not fit to consider or contest their decision.

27. Fourth, the last date he was paid by the respondent was on 10 June 2021. Therefore, a 3 months less 1 day period would feasibly give a "limitation date" of 9 September 2021. A time-frame within which he acted accordingly.

28. Fifth, the respondent failed to respond, communicate or correspond with him from 21 April 2021, until he raised a formal grievance on 11 August 2021 (16 weeks in total). The respondent, therefore, "blatantly reduced the time" for him to react, respond or submit this claim.

29. Sixth, the respondent provided two belated P45s. Although requested several times, the first P45 was unreasonably delayed, being received on 11 August 2021 (3 months and 3 weeks after his dismissal notification) and only after a formal grievance was raised. This not only had a detrimental financial and employment effect on him, but it also raised additional questions, discrepancies and grievances. Subsequently, he had a significant, limited time in which to liaise with the respondent and take steps to attempt to resolve their differences. The second, modified P45 was received on 8 September 2021.

30. Seventh, the respondent stated two separate "effective dates of termination" (EDT). These were 20 May 2021, followed by 11 June 2021. However, the latter date was stipulated in the "legal" P45 document and recognised by HMRC, who acted upon it, causing him financial detriment. With no communication from the respondent to the different, later date, this was deemed as "extant" by him. He reacted to his dismissal at the earliest opportunity due to the slow recovery of his physical and mental health, and ability to function normally *per se*. He raised multiple grievances with the respondent (including end-of-employment date, daily rate-of-pay amount, loss of salary and loss of entitled holiday pay) and questioned the initial reason(s) stated for his dismissal, including the lack of procedures followed.

31. Eighth, the respondent decided to stop the eventual "Grievance and Appeals" process (including any future communication with him) on 8 September 2021. Up to this point, the respondent had already acknowledged and dealt with the grievances raised in August 2021 and September 2021. By doing so, he perceived the respondent had recognised that they were still within the "limitation date" time-frame, and that he could potentially make an ET claim.

32. Nineth, the mandatory ACAS Early Conciliation scheme was initiated and

involved by him on 20 August 2021 *[the Tribunal notes that that date does not appear to be correct]*. The respondent engaged with this process and thus, as he understood it, effectively "stopped the clock" on the usual Tribunal time limit. However, the overall conciliation process was unsuccessful. The ACAS Early Conciliation certificate was issued on 7 October 2021, allowing him to submit this claim application.

33. The claimant's evidence-in-chief is that he suffered two heart attacks on 16 March 2021. He was treated in hospital and underwent double angioplasty surgery. He describes this, understandably, as a life changing event which led to impairment resulting from his subsequent cardiovascular condition. Within 5 weeks his employment was terminated.

34. He was unaware that there was a time limit within which to submit a claim to the Employment Tribunal. He suggests that the respondent actively did not inform him of any time limit. He was dismissed on 21 April 2021, while still on sick leave and on several cardiac medications and getting use to recovery, although he had not yet started a rehabilitation program. His last day of employment was 20 May 2021. He was not informed (in the termination letter or otherwise) that he could raise a grievance or appeal the decision.

35. On 29 April 2021 he commenced his cardiac rehabilitation programme. Between 21 April 2021 and 12 July 2021 he attempted to contact Mr Lubura (the respondent's General Manager) on separate occasions. He understood that his concerns would be investigated, and that Mr Lubura would get back to him. He did not do so. As a result, on 11 August 2021, the claimant submitted his first grievance to the respondent. Mr Lubura responded to him. There remained concerns about his final payment and his P45. The P45 showed his leaving date as 11 June 2021. This was later explained as being as a result of a payroll generation delay. The date was later amended on the P45 to 20 May 2021, after a further grievance was raised by the claimant.

36. The claimant asserts that by 11 August 2021 the respondent had not interacted with him in accordance with the ACAS Code of Practice. He suggests that the respondent knowingly only afforded him just 7 days to submit a claim, but not informing him of such. His position is that at no point was he told by the respondent or was he aware that he could raise a grievance or appeal. He was (and still is) suffering from the heart attacks, which he describes as "the subsequent, long-term physical or mental impairments (depression and anxiety etc.)." He was unaware of the time limit requirement.

37. On 13 August 2021, the claimant raised further questions with Mr Lubura. Mr Lubura responded with an explanation. Mr Lubura was about to go on holiday. The claimant then had communications with Mrs Shirley Eaves regarding pay and Ms Hannah Wilkins regarding the return of company property. This interaction continued until 29 August 2021.

38. On 28 August 2021, the claimant notified the ACAS Early Conciliation Support Team of his dispute with the respondent. He now knows (that is, in 2022) that there is a time limit of 3 months less 1 day from the Effective Date of Termination (EDT). On 29 August 2021, the dispute had not been resolved and he informed the respondent as such. The claimant's position at this point

is that, unbeknownst to him, the respondent had continued to "keep him occupied", so that he would run out of time in which to claim. He refers to the effect that a different EDT would have depending upon whether it was 20 May 2021 or 11 June 2021.

39. He understood that ACAS could only accept a case if it was submitted within the correct time limit. He informed ACAS of the disputed EDT on his application. ACAS accepted his claim and provided a conciliator. On 29 August 2021 he notified Mr Lubura that he wanted to find a solution to their disagreements using the ACAS Early Conciliation process. He received no response. It was only now that he began to consider and look into an Employment Tribunal claim against the respondent. He started slowly to realise and to understand his situation.

40. On 6 September 2021 the claimant submitted a further grievance to Mr Lubura by email. No response was received until 8 September 2021. Mr Lubura replied to the grievance by email and attached a second P45 stating a revised last date of employment of 20 May 2021. The respondent stated that it now considered the matter closed and that he had no further right of appeal of the decision.

41. On 7 October 2021 the claimant received the first ACAS certificate. The respondent chose not to engage in conciliation. On 10 October 2021 the claimant made a claim to the Employment Tribunal. On 18 October 2021 the claimant received the second ACAS certificate.

42. The claimant states that he was physically and mentally fit before and during his employment with the respondent, but that he was not so when he was dismissed by them. He believed that the respondent would show loyalty to him as he had to them. He expected a degree of empathy as a former member of the armed forces (as is the now CEO of the respondent).

43. In submitting his ET1 claim the claimant stated it to be an exceptional case. He set out the 9 extenuating circumstances and mitigating factors (rehearsed above). As well as slowly beginning the long, physical healing process after his life-threatening heart attack, subsequent emergency double angioplasty and extensive medical rehabilitation and his own recuperation, he was also trying to deal with the reality of the situation mentally and was not doing so. The claim is a double-edged sword. On the one hand, it focusses his good days and gives him a purpose. On the other hand, he did not want the heart attacks or the ongoing impairments nor should he have been dismissed or find himself in this position and the additional stress it causes.

44. The claimant asks the Tribunal to acknowledge the 9 extenuating circumstances in the ET1. In addition, he queries the discrepancy of him submitting the ET1 10 days late versus the respondent submitting the ET3 just over 3 months late. He asks the Tribunal to exercise its discretion and rule that this case is exceptional.

45. Finally, the claimant directly addressed why it was not reasonably practicable to submit his claims in time.

46. The claimant says that after the STEMI he suffered (and still does) from both physical and mental impairments. He compares his condition with Post Traumatic Stress Disorder (PTSD). He currently has good and bad days with depression and anxiety. On good and positive days he is able to communicate as normal; but on others he cannot, hiding away from everyone. He does not know to what day he will awake. He feels that he is healing slowly, albeit the ET claims requirements cause him problems.

47. The STEMI was 15-months ago. He is still under a Cardiac Consultant. He did attend the NHS Cardiac Rehabilitation course, which could have been time spent appreciating the situation better, realising the time frame requirement earlier, and acting accordingly. However, he was also distracted by the respondent's dismissal action without warning or reason; his health; and his family's reaction. If he had been aware of the time frame requirement, he would have submitted his claim earlier. However, had he not had the heart attack in the first place, he would have been working until April 2022, when his Covid-19 Test Centres closed. Thus, he would not have even been involved in an Employment Tribunal in the first place. If he had not been discriminated against by the respondent, he would not be required to submit a claim or to know the time frame. Had the respondent any evidence to underpin its ET3, they would not be discussing the time frame, but dealing with the actual facts of the case.

48. How does he say that he submitted his claims within such further period as was reasonable?

49. If the EDT is ruled as 20 May 2021, then he says that he submitted the claim 10 days late. However, if it is ruled as 11 June 2021, then he says that he submitted it 12 days early.

50. The claimant says that not knowing the timeframe, communicating with a non-proactive, non-compliant employer, experiencing what he has, both health-wise and ET-wise, dealing with what he had (near death, followed by both physical and mental impairment), and in the time period he has, he believes the small, further period of only 10 days is reasonable. Acknowledging also that the same timeframe requirement is for the able-bodied and able-minded individuals. He also thinks it is a reasonable time when compared to the respondent's delay in its ET3 when replying to his ET1. He says that this is the basis upon which it would be just and equitable to allow his discrimination claims to proceed.

Cross-examination and Tribunal questions

51. It is also helpful to consider the claimant's position as it emerged under cross-examination and in response to the Tribunal's questions, as follows.

52. The claimant agrees that he was unaware of the relevant time limits. At first, this was not the main reason for his delay in commencing proceedings. That was his heart attack and his coming to terms with it. His lack of knowledge was only relevant after the first two months once he was able to start to deal with his dismissal coherently.

53. He agrees that by 14 June 2021 he was capable of work. It was intended that he would return to work on a phased basis. He agrees that he could make phone calls, enter into correspondence and that he could have contacted Acas. Some days were good and other days were not so good. He agreed that he was able to raise various points concerning his employment and his dismissal regarding pay, pension and so on. His wife helped him – he dictated what he wanted to say and his wife typed the emails or correspondence.

54. He accepted that there was no ambiguity in his letter of dismissal. His last day of employment would be 21 May 2021. However, he says that the issue of the P45 with a different leaving date changed that position.

55. He agreed that at some point he began to refer to the respondent's legal obligations; that he would escalate matters legally; and that he required action or reply within 7 days. He said that this was to egg on the respondent. He was not sure to where he would escalate matters or how. He preferred not to have to go down a legal route. He agreed that his wife and others made him aware of the legal route, but that he did not investigate it further.

56. He agreed that in paragraph 21 of his witness statement he said that had he been aware of the time limit he would have instigated legal proceedings sooner. At that point he was asking the respondent to engage with him. He had started to look at the legal route. He became aware of the Employment Tribunal, but not of time limits. He did not become aware of time limits until he had spoken to Acas.

57. He agreed that he did not seek legal advice at any time. He agreed that he had access to the Internet and that he could "Google" or search for information. He said that he could have searched for time limits if he had known that there were time limits. He agreed that when identifying the 9 extenuating circumstances in the ET1 he did not make reference to being unaware of the time limits. By the time he submitted the ET1 he was aware of the time limits.

58. He agreed that in the armed forces he had been an Equality and Diversity Adviser. He was thereby aware of discrimination law and that there was a legal route to enforcement of rights. He also had general knowledge of disciplinary and dismissal procedures. He disclaimed knowing much about the process. He agreed that as at June 2021 he was aware of the law concerning unfair dismissal, but at that point he was not in a frame of mind to think about taking ET action. That was not until the end of August 2021, when it was clear that the respondent would not engage further.

59. He approached a solicitor in September 2021, but he was unable to help him. He agreed that he could have looked up the relevant time limits, but not before August 2021, implying that he needed to be aware of time limits in order to be able to look up what they were. The claimant's position is that if you have not had a heart attack you cannot know what effect it will have upon you and what you are able or not able to think or do.

60. He agreed that he was aware of the time limits, if not by 11 August 2021 [113], then at least by 25 August 2021 [123]. He was trying to recover additional money from the respondent as a result of his dismissal. That was based upon

the P45 recording a later leaving date. It had been his choice not to use the legal route up to that point, but now he was getting nowhere with the respondent. He regarded the respondent's response about the leaving date in the P45 as being a legal line in the sand.

61. He agreed that he had not raised any question of discrimination with the respondent. That possibility only arose once he had spoken with Acas. That led to the need for a second Early Conciliation certificate.

62. In answer to the Tribunal's questions, the claimant confirmed that his first contact with Acas was through the Acas Helpline on 28 August 2021. The Helpline referred him to the Early Conciliation service. He cannot remember whether time limits were mentioned at that point. He approached a solicitor for general advice on 1 September 2021. He was unable to pay solicitors fees and the case could not be taken on under a no-win no-fee basis. Acas advised him to check his domestic insurance policies for legal expenses cover. He had no such cover. Acas also gave him a link to Citizens Advice. He looked at their web pages, but he did nothing more. He did not think of approaching his veterans' association for help or advice. He agreed that he did not think of using a search engine with various search terms until the end of August 2021.

63. The claimant agreed that he had produced no medical evidence specific to his personal circumstances.

Respondent's submissions

64. The respondent noted that the effective date of termination had been placed in dispute. The EDT is 20 May 2021. See [106] and section 97 Employment Rights Act 1996. The claim is out of time. The primary time limit expired on 19 August 2021. Acas early conciliation first commenced on 28 August 2021 and ended on 7 October 2021. The time limit had already expired. The ET1 was presented on 10 October 2021 and it was thus 51 days out of time.

65. So far as the majority of the complaints is concerned the test is one of reasonable practicability. For the disability discrimination complaint the test is one of justice and equity. The reasonably practicable test is well-trodden. See the most recent discussion in *Cygnet*. See paragraphs 18-2 of the judgment. The facts of that case are similar to some extent to the present case. See paragraphs 53-64 of the judgment discussing the things that the claimant in that case was able to do notwithstanding ill health.

66. The claimant in the present case had a heart attack on 16 March 2021. The respondent accepted that the claimant did not recover from his heart attack immediately. His recovery was staged over a period of time. See the claimant's claim form. He was expected to return to work on a phased basis on 14 June 2021. See [156]. The respondent accepted that this did not mean that the claimant could "climb the Himalayas", but he was able to work and to communicate, as was evident from 14 June 2021 onwards. See also the evidence of the considerable number of emails from the claimant from April 2021 onwards. The claimant accepted under cross-examination that he was capable and he was able to communicate during this period.

67. Relying upon *Cygnet*, it would only have taken a moment to look up time limits or to have researched unfair dismissal and/or disability discrimination. Ignorance of itself has to be reasonable: *Wall's Meat*. It is an objective test: *Porter*. The claimant ought to have known about the time limits. This is also equally applicable to the just and equitable test: *Adedeji*. The application of the just and equitable extension is the exception rather than the rule: *Robertson*.

68. The respondent invited the Tribunal to make findings of fact as to why the claimant acted as he did. His reasons for not acting sooner should not satisfy the Tribunal that he had good reasons for missing the time limit. Had the claimant known of the time limit he would have submitted his claim sooner. He was capable of doing so. His background is significant. He is intelligent and articulate. He has training in equality issues and experience in disciplinary processes. He has knowledge of discrimination and unfair dismissal. He was physically capable and cognitively able to deal with this matter.

69. The respondent submitted that it was irrational to conclude that the claimant could not be aware of the time limit. He had assistance from his wife. He ought to have been aware of the time limit. The evidence of his initial ill health falls short of an explanation for why he did not contact Acas or submit a claim to the Tribunal. He says that the respondent was culpable in causing the delay; but there is no correlation between the respondent's actions and the timing of the ET claim. Any delay was simply about pay slips and the P45. The claimant knew what the effective date of termination was. He did not raise any question of disability or of discrimination until September 2021.

70. In the respondent's submission, the real reasons for the claimant's inaction were: (1) he did not want to commence ET proceedings until he had explored obtaining additional money from the respondent; and (2) in doing so the claimant made his own decision to recognise a different termination date in order to increase the money claimed. It is disingenuous of him to then use that to justify the late submission of the claim. There is no good reason why the claim was not submitted in time. The claimant left it till the last minute because he wanted to avoid ET proceedings.

71. The respondent agreed that the just and equitable test is a broader test. However, it is the exception rather than the rule. The claimant tried to redefine the effective date of termination. It would not be just and equitable to extend time. There is a cost to the respondent in defending an out of time claim. Although the merits are not in issue at this hearing, it is clear that the claim has no prospect of success. The respondent no longer had a need for the claimant's services. Two other employees in his team also lost their employment. He faces a high hurdle to show that his disability was the cause of his dismissal. The respondent had paid him full pay rather than statutory sick pay; and it paid the claimant additional notice pay (2 weeks over and above his statutory notice).

72. As to "reasonable time", the claim was 51 days out of time. This is not reasonable. As at 1 September 2021 the claimant had been given links to various legal resources. He could and should have put his claim in sooner. His failure to do so was because he was working to a different effective date of termination. He had been told several times that the date on the P45 was an error. The respondent should not bear the cost of an out of time claim.

Claimant's submissions

73. The claimant accepted that he was not as legally aware as the respondent's counsel and that he could not argue with her submissions.

74. He stated that he had not been aware that two other employees had been dismissed. He believed that he was the Quality Manager for several sites and that he had been replaced. He also submitted that there were several instances where the respondent was in error or incorrect. He should be protected. He was sick. This was continuing. He had a disability. It is not right to say that he was 100 per cent fit to return to work. He was able to work from home and could do so more easily.

75. The claimant does not agree that he was employed under a temporary contract or that he was dismissed because his employment was temporary. That was never said. He does not agree.

76. He argued for the date on the P45 to be treated as the date of his dismissal. He took that to be a legal document. That is why he argued for additional payment. There was also a history of the respondent delaying in replying to him, just as it delayed in submitting his ET3. He was dismissed without any process being followed. He expected the Acas Code to be followed. That is why he raised a grievance/appeal. He agreed that his wife assisted him. To be dismissed was "a kick in the teeth".

77. The respondent made no reasonable adjustments for him. It then decided not to let him return. The question of redundancy was never raised. He agrees that his claim is late. He has not contested this. However, he was dismissed for bogus reasons. The respondent does not have an arguable case. The claim was 10 days late and the Tribunal accepted the claim. He wants to highlight that he was dismissed.

The relevant statutory provisions and case law

78. So far as any deductions from wages is concerned, section 23 of the Employment Rights Act 1996 applies to the jurisdiction of this Tribunal. 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 the date of payment of the wages from which the deduction was made (section 23(2)(a)). In respect of a series of deductions, the relevant date is the last of those deductions in the series (section 23(3)). Section 23(3A) refers to the extension of time caused by the early conciliation provisions. Then section 23(4) provides that 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.

79. In respect of unfair dismissal, section 111 of the Employment Rights Act 1996 applies. Section 111(2) provides that an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal

(a) before the end of the period of three months beginning with the effective date of termination, or (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months. Section 23(2A) refers to the extension of time caused by the early conciliation provisions.

80. In respect of wrongful dismissal, the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 applies. Article 7 provides that an employment 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. Time is also extended in respect of the early conciliation provisions (article 8B).

81. So far as the "not reasonably practicable" tests in sections 23 and 111 of the 1996 Act and article 7 of the 1994 Order are concerned, the legal principles have been most recently reviewed and summarised in *Cygnet Behavioural Health Ltd v Britton* [2022] EAT 108. See paragraphs 18-28 of the judgment, to which the Tribunal has had particular regard. See also paragraphs 53-64 (on the application of the legal principles to the particular facts of that case).

82. Drawing from *Cygnet*, the strictness of the reasonable practicability test was emphasised in *London Underground Ltd v Noel* [1999] IRLR 621. It is not available to be exercised, for example, "in all the circumstances" nor when it is "just and reasonable" nor where the tribunal "considers that there is good reason for doing so." The statutory test is one of practicability. It is not satisfied just because it was reasonable not to do what could be done: *Bodha (Wishnudut) v Hampshire AHA* [1982] ICR 200.

83. The onus of proving that presentation of the claim in time was not reasonably practicable rests with the claimant. It is an empirical factual test based on practical common sense (*Wall's Meat Co Ltd v Khan* [1979] ICR 52 CA). The relevant factors include: (1) what was the substantial cause of the claimant's failure to comply with the statutory time limit; (2) whether the claimant knew of his rights and if so what did he know; (3) whether the claimant had been advised by anyone; (4) the nature of any advice given; (5) whether there was any substantial fault on the part of the claimant which led to the failure to present a claim in time; and (6) whether the respondent had misled the claimant in any way that led him to missing the time limit.

84. A relevant factor will often be ignorance on the part of the claimant of his rights or of the time limits. The Tribunal must assess the truth of any such assertion of ignorance and that the ignorance was reasonable on an objective inquiry. Ill health may mean that it was not reasonably practicable to claim in time. Mere stress as opposed to illness or incapacity is not sufficient. Mental health problems may mean that it was not reasonably practicable to claim in time –

even if the claimant was able to undertake some day-to-day tasks. However, it may be necessary for the claimant to produce medical evidence to back up his contention that he was suffering from ill-health (and what the effect of that was on his ability to make a timely claim).

85. The Tribunal must also separately consider whether, even if was not reasonably practicable to claim in time, the claim was also presented within a reasonable further period. That requires an objective consideration having regard to all of the circumstances of the case, including what the claimant did, what he knew or reasonably ought to have known about time limits, and why it was that the further delay occurred.

86. See generally: *Wall's Meat Co Ltd v Khan* (above); *Palmer v Southend-on-Sea Borough Council* [1984] ICR 372 CA; *Porter v Bainbridge* [1978] ICR 943 CA; *Midland Bank plc v Samuels* (EAT 672/92); and *Nolan v Balfour Beatty Engineering Services* (EAT 0109/11).

87. So far as disability discrimination is concerned, the jurisdiction of the Tribunal falls within section 120 of the Equality Act 2010 applies. Section 123(1) provides that 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. 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 (section 123(3)). (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 (section 123(4)). Time is also extended in respect of the early conciliation provisions (section 140B).

88. Amongst a copious case law on the application of section 123 of the 2010 Act, perhaps the most helpful authorities are *Robertson v Bexley Community Centre* [2003] IRLR 434 CA and *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 27 CA. The principles to be derived from section 123 and the associated case law are well-known and frequently rehearsed. The Tribunal has had careful regard to the case authorities, which may be summarised as immediately below.

89. The discretion afforded by the just and equitable test is broader than the discretion to allow late claims where it was not reasonably practicable to present the claim in time. However, it does not necessarily follow that exercise of the discretion is a foregone conclusion: *Robertson v Bexley Community Centre* [2003] IRLR 434 CA. There is no presumption in favour of exercising the discretion. It is for the claimant to show that it is just and equitable to extend time. Exercise of the discretion is the exception rather than the rule. This does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law simply requires that an extension of time should be just and equitable.

90. There are no specific factors to which a Tribunal must have regard. The

factors listed in section 33(3) of the Limitation Act 1980 might be of assistance. The Tribunal might consider the prejudice to each party in the exercise of the discretion. It might have regard to all the circumstances of the case, and in particular, the length of the delay; the reasons for the delay; the effect upon the cogency of the evidence; the extent to which the respondent has co-operated with any requests for information; the promptness with which the claimant acted once he knew of the facts giving rise to the claim; and the steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

91. However, this is no more than a useful guide, which should not be followed slavishly. Two factors which are almost always relevant are the length of and reasons for the delay; and whether the delay has prejudiced the respondent. See *Southwark London Borough Council v Afolabi* 2003 ICR 800 CA; *Department of Constitutional Affairs v Jones* [2008] IRLR 128 CA; *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194 CA; *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] ICR D5 CA.

92. The best approach for a tribunal in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, including in particular, the length of, and the reasons for, the delay. The strength of the claim may also be a relevant factor when deciding whether to extend time. Tribunals can take a wide range of matters into account when determining whether it is just and equitable on the facts to allow a claim to proceed out of time.

93. One such matter is the balance of prejudice between the parties. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent and the relative prejudice that not extending time would cause to the claimant. Some prejudice will always be caused to the employer if an extension of time is granted given that the case would otherwise be dismissed. However, the prejudice caused needs to amount to more than simply that.

94. It will be important for the party seeking an extension of time to provide an explanation for the delay, keeping in mind that no single factor is determinative. However, as *Morgan* illustrates, the discretion under section 123 is intended to be broad and unfettered. There is no requirement that the tribunal must be satisfied that there was a good reason for the delay; or that time cannot be extended in the absence of an explanation for the delay from the claimant. Whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard.

95. The discretion to extend time in discrimination cases is wider than the discretion available in unfair dismissal cases. Incorrect legal advice or an understandable misconception of the law is unlikely to save a late unfair dismissal claim. The same is not necessarily true when the claim is one of discrimination. The fact that a claimant is unaware of his right to make a tribunal complaint is also much more likely to save an out-of-time discrimination claim than an out-of-time unfair dismissal claim, provided the claimant's ignorance is reasonable.

96. The fact that a claimant has awaited the outcome of an internal grievance procedure before making a claim is just one matter to be taken into account by a tribunal considering the late presentation of a discrimination claim: *Apelogun-Gabriels v Lambeth LBC* [2002] ICR 713 CA. There is no general principle that it will be just and equitable to extend the time limit where the claimant was seeking redress through the employer's grievance procedure before embarking on legal proceedings. The general principle is that a delay caused by a claimant awaiting completion of an internal procedure may justify the extension of the time limit, but it is only one factor to be considered in any particular case.

97. In disability discrimination cases, as *Jones* exemplifies, the disability itself is an additional factor to be taken into account when considering an application to extend the time limit. It does not follow, however, that there is a general principle that a person with disability is entitled to delay as a matter of course in bringing a claim.

Discussion

98. The Tribunal is satisfied that the relevant date for all purposes is the effective date of termination of employment. That date was 20 May 2021. That date was clear from the outset when the respondent gave the claimant notice of termination of employment on 21 April 2021 [105-106]. That position was not altered by the mistaken issue of a P45 on 9 July 2021 recording a leaving date of 11 June 2021 [2021]. That was an obvious error and the respondent sought to explain it [124]. While the P45 date was a distraction, by 25 August 2021 the claimant had no reasonable expectation that he could rely upon that date. The leaving date recorded on a P45 cannot usually displace the better evidence of a termination date expressly stated on the face of a letter recording a dismissal with notice.

99. That means that the claimant should have commenced Acas early conciliation no later than 19 August 2021. He did not do so until 28 August 2021 at the earliest. That did not have the effect of extending the time limitation period because it could only do so if early conciliation had been commenced by 19 August 2021. He then presented his ET1 claim on 10 October 2021. That is 52 days (7 weeks and 3 days) out of time.

100. The Tribunal agrees with the respondent's submissions as to whether time should be extended in relation to any part of the claim. However, the Tribunal's own reasoning is as follows.

101. In the Tribunal's judgment, it was reasonably practicable for the claimant to have presented a claim in time, with or without the benefit of an extension of time afforded by the early conciliation provisions. There is no medical evidence specific to the claimant (other than his non-specific references to his health in his witness statement) to suggest that there were continuing medical reasons following his earlier heart attack that might explain any delay in presenting a claim to the Tribunal within the primary time limit or why there was a further delay after the primary time limit had expired and early conciliation had been concluded. The claimant had expected to commence a

phased return to work on 14 June 2021 [156]. There is also copious evidence from 26 April 2021 onwards pointing to the claimant being able to communicate with the respondent in some detail about his rights and its obligations. By 11 August 2021 he was intimating an intention to escalate matters legally.

102. It is correct that the claimant had some assistance from his wife at this time. It is also correct that a person can be capable of writing emails during a period of ill health. However, in the absence of medical evidence specific to the claimant, the Tribunal is unable to accept that from at least the middle of June 2021 onwards the claimant could not have taken some basic steps to inform himself of how he might pursue his dispute with the respondent through legal action. Some simple inquiries and/or some basic Internet searches would have quickly advised him of his possible recourse to the Employment Tribunal, and in turn about Acas early conciliation and the relevant time limits. That he did not do so is surprising in an obviously intelligent and articulate man, especially one with his background.

103. In summary, the substantial cause of the claimant's failure to comply with the statutory time limit was his unwillingness to recognise the EDT, his wish to obtain further payment from his employer and his reticence to commence tribunal proceedings (and not his heart condition). He knew of his rights in broad terms and he knew enough to put him on enquiry on matters such as early conciliation, time limits and presentation of an ET1. The claimant had not been legally or professionally advised, but he failed to take any advice at all in circumstances where it would have been reasonable to do so and easily undertaken. By the time he was in contact with Acas, he had no reason to be unaware of what was required of him in commencing ET proceedings. The claimant was substantially at fault in failing to present a claim in time. It cannot be said that the respondent had misled the claimant in any way that led him to missing the time limit. The matter of the incorrect leaving date on the P45 was obvious, was corrected, and amounted to a “red herring”.

104. The Tribunal has considered with care whether the position is any different in applying the “just and equitable” test to the disability discrimination complaint. Here the Tribunal is afforded a greater degree of discretion.

105. However, the Tribunal notes (without deciding) that the disability discrimination claim is not an obviously strong one. The untested evidence points towards the respondent wanting the claimant to return to work after his heart attack; being willing to assist him in doing so; and being prepared to wait [100-104]. What changed matters, however, was the respondent’s assessment of its position arising from an anticipated resource reduction following actual or proposed closures of Covid-19 Test Centres [106]. Although the claimant was not expressly employed under a fixed term or temporary contract of employment, the respondent may well be able to show that the requirements of his employment were task-specific in the particular circumstances of a pandemic and that his dismissal was necessitated by those circumstances rather than because of his medical condition.

106. The length of the delay is not short nor insignificant. It amounts to 52 days (and not 10 days, as the claimant suggests). He had allowed the primary time

limitation period to expire before he commenced early conciliation. Thus he obtained no benefit of any extension of time or stopping of the clock that early conciliation usually affords a claimant.

107. The reasons for the delay are also unconvincing. The claimant stubbornly refused to acknowledge the real date of the termination of his employment. He took no timely advice in relation to it. He undertook no basic searches for information. He persisted unrealistically in attempting to regard the obviously incorrect date in his P45 as the true date of dismissal, but he did so as part of an attempt to achieve extra payment from his employer. He may have wanted to pursue the matter by internal means and/or to avoid legal proceedings, but judged in the round, his reasons for delay are not compelling or persuasive.

108. The effect of the delay upon the cogency of the evidence is perhaps unremarkable at this stage, although we are still quite some way from being in a position to proceed to a final hearing. This factor is a neutral one. The claimant also seeks to make the respondent somehow liable for his time default by suggesting that the respondent deliberately delayed matters in order to thwart a timely claim or that it failed to advise him of his rights and of the enforcement of them. There is nothing in this suggestion, which is misguided and misconceived, as is the misplaced comparison of the *jurisdictional* delay in presenting an ET1 with the *procedural* delay in presenting an ET3. The two matters are not comparable. The claimant was less than prompt in acting once he knew of the facts giving rise to the possible claim. The steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action were few and ineffectual.

109. So far as the balance of prejudice between the parties is concerned, there is some relative prejudice that extending time would cause to the respondent. This goes beyond the simple prejudice that defending unwanted litigation is always prejudicial and unwelcome. There is bound to be some prejudice to a respondent in having to defend a late claim and particularly where the Tribunal is unlikely to be able to list a final hearing for some time in present circumstances. The respondent has not over-stated its case here.

110. On the other hand, there is also some relative prejudice that not extending time would cause to the claimant. He is denied the opportunity to challenge his dismissal before the Tribunal. The unfair dismissal and wrongful dismissal complaints were likely to go no further in any event, as the claimant does not have 2 years' service (for an ordinary unfair dismissal complaint, at least) and he appears to have been given proper notice. The claim for additional pay is also one that has little merit once the effective date of termination is correctly identified. Thus the disability discrimination complaint is likely to have been his relatively stronger claim. Yet, the respondent's pleaded case contains more than a mere suggestion that it will have a reasonable prospect of defending the dismissal on the basis of a redundancy or some other substantial reason rather than it being a dismissal informed in some way by reference to the protected characteristic of disability (the claimant's heart attack and its aftermath).

111. It appears to the Tribunal that the balance of prejudice is finely balanced, and it is not determinative of the question whether it would be just and

equitable to extend time for the disability discrimination complaint.

112. The Tribunal is not satisfied that the claimant was unaware of his right to make a tribunal complaint. In the circumstances described above, the claimant's professed ignorance was also unreasonable. In the circumstances of this case, moreover, the fact that the claimant was pursuing his concerns internally has little or no weight, especially when he raised no issue as to his disability status or as to the real reason for his dismissal until the possibility of a disability discrimination complaint suggested itself to him quite late in the day, necessitating a second round of early conciliation. There is, furthermore, no proper basis here upon which the Tribunal could conclude that any disability itself is an additional factor to be taken into account when considering an application to extend the time limit.

Conclusion

113. In conclusion, the claim was not brought within the time limitation periods contained in article 7 of the Extension of Jurisdiction Order 1994, sections 23 and 111 of the Employment Rights Act 1996, and section 123 of the Equality Act 2010, or in circumstances where an extension of time is permitted by those provisions. The claim is therefore dismissed. All further hearings concerning this claim are vacated.

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Judge Brian Doyle
DATE: 12 September 2022

JUDGMENT & WRITTEN REASONS
SENT TO THE PARTIES ON

30 September 2022

FOR THE TRIBUNAL OFFICE

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