EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondents**
Mr N Boundy	AND	Torbay Staff Agency Limited (1) Mr Keith Richardson (2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT EXETER **ON** 7 December 2022
Hybrid Hearing - By Cloud Video Platform

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: **Dr C Hill of Counsel**
For the Respondent: **Mr R Hignett of Counsel**

JUDGMENT

The judgment of the tribunal is that the claimant's claims for harassment related to perceived dyslexia; for indirect sex discrimination; and for detriment arising from paternity leave were presented out of time and are all dismissed.

RESERVED REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not some of the claimant's claims were presented out of time.
2. There was a case management preliminary hearing in this case on 14 July 2022, and in a Case Management Order dated 14 July 2022 ("the Order") Employment Judge Smail set out the Agreed List of Issues to be determined. The claims pursued are for harassment related to race (the claimant's Cornish identity); for harassment related to the perceived disability of dyslexia; for indirect sex discrimination; for detriment arising from paternity leave; for automatic unfair dismissal for a principal reason relating to paternity leave; for constructive unfair dismissal; and for wrongful dismissal in respect of notice pay.
3. The last three claims relating to dismissal were all presented within time. The claim for harassment related to race claims an ongoing course of conduct which, if correct, might suggest that this claim was also brought within time. However, the respondent has made an application that the remaining three claims (for harassment related to the perceived

disability of dyslexia; for indirect sex discrimination; and for detriment arising from paternity leave) should be struck out because they are discrete claims in respect of which these proceedings were presented out of time. This is the judgment which determines that application.

4. This was a hearing held in person save that with the consent of the parties it was a hybrid hearing in that the claimant attended remotely by video (Cloud Video Platform).
5. I have heard from the claimant, and I have heard from his wife Mrs Katie Boundy on his behalf. Their evidence was not challenged by the respondent on the basis that it did not address the statutory tests to be applied today. The matters raised relating to the issues in dispute as regards general liability will be challenged at the liability hearing. I have also heard from Mrs Becky Kodritsch and Ms Natasha Lawlor 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.
6. The Facts:
7. The claimant Mr Nicholas Boundy was born in 1986 and is Cornish. The second named respondent Mr Keith Richardson is a hotelier who has controlling interests in a number of hotels in the West Country known as the Richardson Hotels. The first named respondent Torbay Staff Agency Ltd is a company controlled by Mr Richardson and which employs a number of hotel staff throughout the group, and this company was the claimant's employer. The claimant was employed as a Group Maintenance Manager from 11 February 2019 until he resigned his employment without notice on 25 June 2021.
8. The claimant's place of work was stated to be the Grand Hotel in Torbay, but he carried out maintenance services for other hotels within the group. The claimant took paternity leave between 26 February 2021 and 15 March 2021. The claimant complains of a course of discriminatory and otherwise unlawful conduct throughout his employment leading to his resignation and alleged constructive dismissal on 25 June 2021.
9. The claimant's resignation letter dated 25 June 2021 was addressed the claimant's line manager Mr Bektas Ketenci and complained of Mr Richardson's outrageous, destructive, bullying, and unlawful conduct and concluded by stating: "… I have taken legal advice on more than one occasion and can only apologise for any collateral damage and bad press caused by my legal pursuit of the above." With the claimant's consent his resignation letter was treated as a formal grievance, and the claimant pursued that grievance, including attending a lengthy grievance meeting in person on 7 July 2021
10. Two of the respondent's managers, namely Mrs Becky Kodritsch and Ms Natasha Lawlor, gave evidence at this hearing. They shared a room, and they knew and liked the claimant who would often come in and talk to them. Although there were arguably some minor discrepancies between their evidence, I am satisfied on the balance of probabilities, and I so find, that the following was an accurate summary of some of the interactions which they had with the claimant between March 2021 up to and including the grievance hearing on 7 July 2021.
11. In the first place the claimant carried out his normal role during this time which included liaising with and organising the Maintenance Team which consisted of at least 15 employees across four hotels. He also liaised with independent contractors to decide on necessary works, to obtain quotes, to allocate work, to supervise contractors, and to approve and pay these external contractors on completion of their assignments. In addition, there were a number of specific larger projects which the claimant undertook normally. At that time the claimant was also applying for alternative job opportunities, of which there were at least two. He had been offered a position in an accommodation company but was waiting to be offered an increased salary. He had also applied for a Kitchen Fitting Company and was waiting for an interview. In addition, the claimant personally owned properties which was let to students and he manage those properties.
12. The three specific claims which are the subject of this judgment were set out in the Agreed List of Issues attached to a Case Management Order of Employment Judge Smail which was dated 14 July 2022.

13. The first claim is one for detriment said to have been suffered for family reasons under section 47C of the Employment Rights Act 1996 because the claimant took paternity leave. There are 12 allegations of detriment said to have arisen between 3 March 2021 and 14 March 2021. The period of paternity leave ended on 15 March 2021.
14. The second claim also relates to the period of paternity leave, but it is presented as a claim for indirect sex discrimination under section 19 of the Equality Act 2010. It relies on one provision criterion or practice (PCP), namely the practice of contacting maintenance employees to carry out work whilst they were on leave, which includes (in the claimant's case) paternity leave. This also therefore relates to the period between 26 February 2021 and 15 March 2021.
15. The third claim is one for harassment under section 26 of the Equality Act 2010 which is said to be related to the claimant's perceived disability of dyslexia. These are general allegations which have not been properly particularised. No dates have been provided by the claimant, and no application has been made to amend this aspect of the Agreed List of Issues to provide further information. The claim is mentioned rather vaguely in the claimant's Grounds of Application, and only in the context of other allegations which are said to have arisen between August and October 2020. It was not suggested on behalf of the claimant at this hearing that these allegations relate to any other period.
16. It is accepted by the claimant that these three claims were on the face of it presented out of time, for the following reasons.
17. With regard to the first respondent, the claimant commenced the Early Conciliation process with ACAS on 21 July 2021 (Day A). The Early Conciliation Certificate was issued on 13 August 2021 (Day B). Accordingly, any act or omission which took place before 22 June 2021 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint
18. With regard to the second respondent, the claimant commenced the Early Conciliation process with ACAS on 14 July 2021 (Day A). The Early Conciliation Certificate was issued on 13 August 2021 (Day B). Accordingly, any act or omission which took place before 15 June 2021 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint
19. The claimant then presented these proceedings on 14 October 2021. The proceedings originally named seven respondents, the first six being the associated limited companies within the company structure of which Mr Keith Richardson is the proprietor. By consent five respondents were dismissed from these proceedings leaving Torbay Staff Agency Ltd (the claimant's previous employer) as the first named respondent, and Mr Keith Richardson (personally, as the controlling interest), as the named second respondent.
20. The difficulty which the claimant faces in connection with his objection to the respondent's application before the tribunal today is that his witness evidence, and that of Mrs Boundy in support, does not address either of the two relevant statutory tests to be applied. In a written reply to the respondent's application from his solicitors on 1 September 2022 it was argued in conclusion that it would be just and equitable to extend the claims: "In light of the claimant's severe mental health issues and obvious decline, the ambiguity of the identity of the claimant's employer, and the need to fully consider all of the events to which the disputed claims pertain." Nonetheless the central argument presented on behalf of the claimant today is that he was incapacitated by his mental health issues and was unable or precluded from issuing proceedings within time for this reason.
21. The claimant has adduced a medical report from Dr Sgouros, a Consultant Psychiatrist, dated 3 November 2022 following a consultation on 25 October 2022. The claimant has also adduced other medical evidence including extracts from his medical records, correspondence from his GP, and evidence of support in connection with his mental health difficulties from other medical professionals. Dr Sgouros's report is consistent with this medical history. It is clear that the claimant has been suffering from increasingly worsening mental health issues. Dr Sgouros is of the opinion that the claimant's symptoms are typical of Post Traumatic Stress Disorder (PTSD) and symptoms of disassociation. He reports that the symptoms of PTSD developed gradually from a probable start time of October 2020 which culminated in subsequent severe PTSD symptoms. He confirmed that the claimant

has been treated with antidepressant and anti-anxiety medications. He also noted that the claimant was awaiting psychological therapy.

22. That said, there is no evidence before the tribunal today that during the period in question, (namely from say August 2020 until the claimant issued these proceedings on 14 October 2021) the claimant was prevented, precluded, or in any other way incapacitated or disabled from presenting these proceedings. The claimant has adduced no evidence to suggest that his illness in any way prevented him from presenting these proceedings, and if so during what period of time, and furthermore, why, and if so when, he did become able to issue these proceedings between any period of incapacity and eventually issuing them on 14 October 2021.
23. Having established the above facts, I now apply the law.
24. The Law:
25. One of the relevant statutes is the Employment Rights Act 1996 ("the Act"). Section 47C of the Act provides that an employee has the right not to suffer detriment done for a protected reason, which includes paternity leave. Under section 48(3) an employment tribunal shall not consider a complaint under this section unless it is presented (a) before the end of the period of three months beginning with the effective date of the cat or the failure to act to which the complaint relates, or, where that act or failure is part of a series of acts 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.
26. This is also a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges indirect sex discrimination, and harassment related to perceived disability.
27. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three 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. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.
28. 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.
29. The relevant law relating to Early Conciliation ("EC") and EC certificates, and the jurisdiction of the Employment Tribunal to hear relevant proceedings is as follows. Section 18 of the Employment Tribunals Act 1996 defines "relevant proceedings" for these purposes. This includes in subsection 18(1) the discrimination at work provisions under section 20 of the EqA. Section 140B EqA sets out how the EC process is taken into account. Where the EC process applies, the limitation date should always be extended first by section 140B(3) or its equivalent. However, where this date as extended by section 140B(3) or its equivalent is within one month of the date when the claimant receives (or is deemed to receive) the EC certificate, time to present the claim is further extended under section 140B(4) for a period of one month (applying Luton Borough Council v Haque [2018] ICR 1388 EAT). In other words, it is necessary first to calculate the primary limitation period, and then add the EC period. Having reached that date, it is necessary to ask whether it is before or after one month after Day B (the date of issue of the EC certificate). If it is before then the limitation date is extended to one month after Day B. Otherwise, if it is after one month after Day B, then limitation will be extended to that later date.
30. For discrimination claims, section 140B EqA provides: (1) This section applies where a time limit is set by section 123(1)(a) or section 129(3) or (4). (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 the time limit set by section 123(1)(a) or section 129(3) or (4) 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 section 123(1)(a) or section 129(3) or (4) 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) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exerciseable in relation to that time limit is extended by this section.

31. 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; 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; Cullinane v Balfour Beattie Engineering Services Ltd UKEAT/0537/10; Wolverhampton University v Elbeltagi [2007] All E R (D) 303 EAT; Riley v Tesco Stores [1980] ICR 323; Croydon HA v Jaufurally [1986] ICR 4 EAT; British Coal v Keeble [1997] IRLR 336 EAT; Robertson v Bexley Community Service [2003] IRLR 434 CA; Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640; Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT; Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA; London Borough of Southwark v Afolabi [2003] IRLR 220 CA; Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23; Hutchinson v Westward Television Ltd [1977] IRLR 79; Brittain v Nottingham City Homes Ltd ET/2601808/16; Borg v Liverpool University Hospitals NHS Foundation Trust ET/2415384/20; University Hospitals Bristol NHS Foundation Trust v Williams UKEAT/0291/12; Grabe v United Reform Church ET/2204367/12; Cygnet Behavioural Health Ltd v Britton [2022] EAT 108; Ebay (UK) Ltd v Buzzeo UKEAT/0159/13;
32. In this case, these proceedings were presented on 14 October 2021. With regard to the first respondent, the claimant commenced the Early Conciliation process with ACAS on 21 July 2021 (Day A). The Early Conciliation Certificate was issued on 13 August 2021 (Day B). Accordingly, any act or omission which took place before 22 June 2021 (which allows for any extension under the Early Conciliation provisions) is potentially out of time.
33. With regard to the second respondent, the claimant commenced the Early Conciliation process with ACAS on 14 July 2021 (Day A). The Early Conciliation Certificate was issued on 13 August 2021 (Day B). Accordingly, any act or omission which took place before 15 June 2021 (which allows for any extension under the Early Conciliation provisions) is potentially out of time.
34. S47C Detriment Claim
35. 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: "In light of the claimant's severe mental health issues and obvious decline, the ambiguity of the identity of the claimant's employer, and the need to fully consider all of the events to which the disputed claims pertain."
36. By analogy with claims for unfair dismissal, which adopts the same wording, 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. In addition, the Tribunal must have regard to the entire period of the time limit (Elbeltagi).
37. 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:-

38. 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.
39. 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".
40. 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).
41. 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.
42. 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 reasonably practicable 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, and Schultz v Esso Petroleum Ltd. The mere fact that an individual is suffering from mental health problems during the relevant period does not mean that it was not reasonably practicable to meet the relevant time limit (Cygnet Behavioural Health Ltd v Britton).

43. 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."
44. In this claim the period of the claimant's paternity leave ended on 15 March 2021, and the normal time limit of three months expired on 14 June 2021. The claimant did not commence the early conciliation process until 14 July 2021 and received the Early Conciliation certificate on 13 August 2021. Despite being aware of this process he nonetheless took no steps to present these proceedings until two months later on 14 October 2021. It is clear from the claimant's resignation letter that he had access to legal advice, and he was aware of the necessary procedures required to obtain and Early Conciliation Certificate from ACAS as a precondition of presenting these proceedings.
45. I accept the claimant's medical evidence demonstrates that he suffered from mental illness of increasing severity from late 2020 until the time these proceedings were presented. It is also clear from the respondent's evidence that during the early part of 2021 the claimant was fully able to carry out his normal duties and to apply for alternative employment, and then to write a structured letter of resignation and pursue a subsequent grievance.
46. There is no medical evidence before this tribunal to suggest that it was not reasonably practicable for the claimant to have presented this claim within time because of his mental health, or for any other reason. In addition, there is no evidence before this tribunal to suggest that the claimant presented these proceedings as soon as was reasonably practicable in the time period between the expiry of the time limit on 14 June 2021, and the presentation of these proceedings some four months later on 14 October 2021. The burden of proof is on the claimant in this respect, which he has simply not discharged.
47. Accordingly, in my judgment it was reasonably practicable for the claimant to have presented this claim before the normal time limit expired on 14 June 2021, and even if that were not the case, he has still not presented it within such further period as was reasonable. For these reasons this claim is dismissed as having been presented out of time.
48. Sections 19 and 26 EqA: Discrimination Claims
49. The grounds relied upon by the claimant for suggesting that it would be just and equitable to extend the time limit are that: In light of the claimant's severe mental health issues and obvious decline, the ambiguity of the identity of the claimant's employer, and the need to fully consider all of the events to which the disputed claims pertain."
50. I have considered the factors in section 33 of the Limitation Act 1980 which is referred to in the Keeble decision. For the record, these are the length of and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the parties cooperated with any request for information; the promptness with which the claimant acted once the facts giving rise to the cause of action were known; and the steps taken by the claimant to obtain appropriate professional advice.
51. However, it is clear from the comments of Underhill LJ in Adedeji, that a rigid adherence to such a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion. He observed in paragraph 37: "The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time including in particular … "The length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."

52. This follows the dicta of Leggatt LJ in Abertawe Bro Morgannwg University Local Health Board v Morgan at paragraphs 18 and 19: "[18] … It is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the equality act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in the circumstances to put a gloss on the words of the provision or to interpret it as if it contained such a list … [19] that said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."
53. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.
54. Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan (at the EAT) before the Employment Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was.
55. However, As Sedley LJ stated in Chief Constable of Lincolnshire Police v Caston at paragraphs 31 and 32: "In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it."
56. I apply these principles against the remaining two claims which are the subject of today's application, namely the claim for harassment arising from perceived dyslexia apparently between August and October 2020, and the claim for indirect sex discrimination arising from paternity leave which finished on 15 March 2021. The normal time limit of three months for the first claim would have expired by the end of January 2021 in any event, and the normal time limit of three months for the second claim expired on 14 June 2021.
57. It no longer appears to be the case that the claimant is relying on his suggested confusion as to the correct respondent to these proceedings. In any event this hardly seems to be a justifiable reason to extend time given that he was always able to sue a number of respondents and clarify subsequently which one or more should remain, which is exactly what he did. In addition, it does not appear to be the case that the claimant seeks an extension of time because he did not know his rights, or had been unable to obtain legal advice, because the opposite was the case.
58. The main reason now relied upon by the claimant in seeking an extension of time is his mental health. I have no reason to doubt Dr Sgouros's report, the contents of which are accepted and noted, but as stated above there is no medical evidence before this tribunal to suggest that claimant was in any way prevented from presenting this claim within time

because of his mental health, or for any other reason. It is clear from the evidence that the claimant was fully able to carry out his normal duties and apply for other employment during the relevant period. The burden of proof is on the claimant in this respect, which he has simply not discharged.

59. The delay in issuing proceedings in connection with these two claims is between nine and four months which is not overly extensive, and there has been no suggestion from the respondent that the cogency of the evidence is likely to been affected by this delay. Nonetheless it cannot be said that the claimant acted promptly, particularly given that he had access to legal advice. It has been argued on behalf of the claimant that the claimant will suffer prejudice because these complaints will be raised by the claimant in the course of his constructive unfair dismissal claim, which was presented in time, and the tribunal have to hear evidence in that connection in any event. The respondent takes the opposite view, and so do I. To the extent that the claimant does consider that these matters are still claims which are relevant and should be pursued before the tribunal, he can do so in the context of the constructive unfair dismissal claim, to the extent that they are said to have caused or contributed to the reason for the resignation.
60. Having weighed the balance of prejudice between the parties I am not satisfied that the claimant has convinced the tribunal that it is just and equitable to extend time, and the exercise of discretion is the exception rather than the rule. For these reasons I also dismiss the claimant's harassment and indirect discrimination claims because they were presented out of time.
61. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 6 to 22; a concise identification of the relevant law is at paragraphs 24 to 33; how that law has been applied to those findings in order to decide the issues is at paragraphs 34 to 60.

Employment Judge N J Roper
Dated 7 December 2022

Judgment sent to Parties: 23 December 2022

FOR THE TRIBUNAL OFFICE