EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Petrina Newell	**v**	**London Borough of Brent**

Heard at: Watford **On**: 5 October and 8 December 2022

Appearances
For the Claimant: Ms. McCarthy, Consultant (by CVP)
For the Respondent: Mr. Lester, Counsel (by CVP)

RESERVED JUDGMENT

1. The Tribunal does not have jurisdiction to hear the Claimant's claim for unfair dismissal, unlawful deductions and breach of contract as they were presented outside the time limits prescribed by statute and it was reasonably practicable for the Claimant to present the claims in time. As such, the Claimant's claims are dismissed.

2. The amendment application to include a claim/s of disability discrimination under the EqA 2010 is dismissed.

REASONS

3. The Respondent in their grounds of resistance ("GOR") applied for the Tribunal to dismiss all the claims brought by the Claimant due to lack of jurisdiction (time limits breached). The Respondent applied in the alternative for a deposit order [**HB/30-31 §14-§20**]. In directions made on 22 March 2022, this application to dismiss was listed for a one day Preliminary Hearing on 5 October 2022 but no time was allocated to deal with a claim of disability discrimination under the Equality Act 2010 ("EqA 2010"). It would seem that it was not evident on the papers when directions were made on 22 March 2022 that there might be a disability discrimination claim.

4. Before the hearing on 5 October 2022, a hearing bundle [**HB**] was provided totalling 368 pages. In addition, in line with directions made on 6 October 2022, the Claimant provided a written application to amend her ET1 to

include a disability discrimination claim/s under the EqA 2010 (drafted by her representative) and a document intending to give further and better particulars about this/these disability discrimination claim/s under the EqA 2010 called "My report for Case 2nd" (drafted by the Claimant). The Respondent filed a response to the Claimant's application to amend and an updated skeleton argument.

The issues

5. The issues had been identified in the directions made on 22 March 2022. There were, however, other issues, raised by Ms. McCarthy during the hearing on 5 October 2022. I heard oral evidence from the Claimant at the hearing on 5 October 2022 and submissions from both representatives at the hearings on 5 October and 8 December 2022. The summary of all issues is listed below:

    5.1 Whether in the ET1, the Claimant had made a disability discrimination claim under the EqA 2010 or not?

    5.2 Whether the application to amend to include a disability discrimination claim/s under the EqA 2010 should succeed?

    5.3 Which date amongst those proposed by the Claimant and the Respondent was the correct Effective Date of Termination ("EDT")?

    5.4 Had the time limits for each of the claims in the ET1 been breached?

    5.5 If so, should time be extended under the reasonably practicable or further reasonable period tests?

Finding of fact on credibility and the issues

6. I make my findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral which was admitted at the hearing. I do not set out in this judgment all of the evidence which I heard from the Claimant (who was the only witness). Rather I set out only my principal findings of fact, those necessary to enable me to reach conclusions on the issues. Where it was necessary to resolve conflicting accounts (between the Claimant's oral evidence and Ms. McCarthy's submissions on the facts), I have done so by making a judgment about the credibility of the Claimant versus the plausibility of Ms. McCarthy's version of events.

Background

7. The Claimant was on sick leave from a date in 2018 for a period of over two years (see medical evidence) **[HB/310] [HB/340]**. It was stated by the

Respondent to have been from mid-2018 (skeleton argument) or 3 September 2018 (GOR). Under the relevant sickness absence policy and procedures, a number of Occupational Health ("OH") referrals and assessments were undertaken in 2020 and several meetings were scheduled in 2020 (some of which did take place) with the Respondent **[HB/171] [HB/176]**. The Claimant attended a meeting on 18 January 2021 at the school after which she returned to work briefly on a phased return from 26 January 2021, but was on sick leave due to COVID-19 from 23 February to 26 March 2021.

8. A phased staff restructure procedure was carried out by the school from January 2021 (see the staff restructure documents **[HB/264] [HB/272]**). Phase 1 of the redundancy consultation took place from 18 January to 5 February 2021. The Claimant was sent a letter dated 26 January 2021 setting out calculations to represent 19 weeks of gross pay for a redundancy payment of £8,451, and a total sum of £12,676.52 for an enhanced amount in the case of voluntary redundancy, with a last day of service of 31 March 2021 **[HB/259]**. The Claimant had 16 years of service.

9. On 5 February, 2021, the Claimant applied for voluntary redundancy, which she accepted in oral evidence. A further letter dated 12 February 2021 was sent to the Claimant to confirm acceptance of her application for voluntary redundancy and an enhanced settlement offer by the Governors. The letter repeated that her last day of service would be 31 March 2021 **[HB/260]**.

Was a disability discrimination claim under the EqA 2010 made?

10. Ms. McCarthy indicated at the outset on 5 October 2022 that there was a disability discrimination claim. I had to therefore consider first whether a disability discrimination claim under EqA 2010 was made or could be made out in the ET1. Prior to this, I established with Ms. McCarthy what the alleged disability discrimination claim/s consisted of as a necessary first step.

11. I describe the elements of the claim as identified by Ms. McCarthy with the assistance of my questioning but I have put it into the language of a disability discrimination claim under the EqA 2010:

    11.1.1 Failure to make the reasonable adjustments (recommended by Occupational Health) of mediation between the Claimant and the Headteacher and risk assessments before the Claimant's return from long term sickness.

    11.1.2 Requiring the Claimant to attend a consultation meeting on 18 January 2021 a number of days prior to her return to work on 26 January 2021 and whilst she was on long term sickness absence.

11.1.3 Holding a consultation with the Claimant on 18 January 2021 which was run by the Headteacher, with whom the Claimant alleges to have had a difficult conflictual relationship.
11.1.4 Failure to deal adequately or at all with her grievance of 2019.

12. In directions dated 6 October 2022, the Claimant was to provide further and better particulars of the disability discriminations claim to describe each allegation of less favourable treatment with dates and why she alleged that she had been treated unfavourably on each occasion because of a disability. The Claimant and Ms. McCarthy were both made aware of the need to establish a number of elements, including comparators and causation.

13. By the date of the hearing on 8 December 2022, the Claimant had filed a document entitled "My Report for Case 2nd". This is a five page document without page or paragraph numbering or headings. It reads as a witness statement, describing events. This does not fulfil the purpose of fine-tuning the list of apparent allegations above, identifying less favourable treatment with dates, causation and comparators. I also discuss the content of this document in the section on "Application to Amend".

14. Returning to the hearing on 5 October 2022, I heard from Ms. McCarthy for the Claimant and from Mr. Lester for the Respondent.

15. Ms. McCarthy's submissions were:

15.1.1 Accepted that the Claimant did not say that she was directly discriminated against in ET 1:
15.1.2 Accepted that the Claimant "may not state there is a claim for disability discrimination".
15.1.3 Accepted that the box for discrimination was not ticked. Accepted that other boxes were ticked (UD, arrears, holiday pay etc).
15.1.4 Page 13 Box 8.1 Despite not having returned to work, informed would not have the assessments (mediation or risk assessment).
15.1.5 Page 14 Box 8.2 redundancy not genuine.
15.1.6 Summary: she was on long term sick. Redundancy was not genuine.
15.1.7 the Respondent is aware of this claim because of a reference to Disability Discrimination in the Grounds of Resistance ("GOR").
15.1.8 the Claimant had no help. She is a lay person.

16. Mr. Lester's submissions were:

16.1.1 The Claimant has ticked almost all of the other boxes. Reason for not ticking that box is because no discrimination claim intended

16.1.2 Page 13, 14 very unclear what the words mean. They do not make sense. Difficult to derive a disability discrimination claim from this.
16.1.3 No reference to no union presence at meeting which is now said to be unfavourable treatment.
16.1.4 Reference to a grievance is not enough.
16.1.5 Failure to follow OH recommendations and behaviour of the Headteacher – there is nothing which relates to some kind of discrimination.
16.1.6 Lack of clarity. That will be good reason for any Respondent to be cautious in responding to a claim such as this. That may well be why the Respondent chose to mention proactively what might be a disability discrimination or attempted disability discrimination claim. But the fact that the Respondent did so does not mean that there is a disability discrimination claim here. It means the representatives acted protectively on behalf of their client.
16.1.7 The only thing which really matters is the content of the ET1.

Conclusion: No disability discrimination claim under the EqA 2010 made in ET1

17. No disability discrimination claim under the EqA 2010 is made out in the ET1 because:

17.1.1 The box for discrimination is not ticked. This is a word used often in everyday language and used in the context of schools frequently where the Claimant worked for many years. It is not plausible that she would not understand what it meant.
17.1.2 The Claimant ticked most of the other boxes.
17.1.3 The Claimant does not mention the word discrimination.
17.1.4 The Claimant does not tick the box that she is disabled.
17.1.5 The Claimant does not mention the word disability anywhere.
17.1.6 The Claimant does not mention unfavourable treatment or anything which could be said to be that.
17.1.7 The Claimant does not mention anything about comparators.
17.1.8 In other words, none of the elements of a disability discrimination claim under the EqA 2010 are in the ET1. Nothing in the wording could be read to mean that.
17.1.9 the Claimant said at the hearing on 5 October 2022 that she was offered redundancy and made redundant because she was on long term sickness absence.
17.1.10 The Claimant does not, however, say that a disability caused her to be on long term sickness absence. In other words, she does not assert anywhere that she was off sick because of a disability.

17.1.11 The reference in the GOR is standard practice amongst respondents who receive a claim form which is not clear. It is a device used to protect them from anything conceivably which a Claimant may say is a claim but has not clearly said in her ET1. I do not read anything into that.

17.1.12 Although Ms. McCarthy said that the Claimant had no help with her ET1, Ms. McCarthy had said earlier in the hearing that she had helped the Claimant.

17.1.13 I conclude from the boxes which were not ticked and the points I have made above that the Claimant did not tick these boxes because she did not intend at the time of the claim to make a disability discrimination claim under the EqA 2010.

Relevant applicable law on amendment

18. The amendment application was listed to be heard at the adjourned hearing on 8 December 2022. Under directions I made on 6 October 2022, by 2 November 2022, the Claimant was to file and serve on the Respondent and the Tribunal her amendment application, giving reasons why this should be allowed. This date was amended by the Tribunal on application by the Claimant in light of Ms. McCarthy's mother's illness. She was also to file and serve particulars of her disability discrimination claim or claims under the EqA 2010. The Respondent was by 30 November 2022, to file and serve on the Claimant and their Tribunal their response to the amendment application.

19. The amendment falls under Rule 29 of the Employment Tribunal Rules of Procedure 2013 (as amended): general case management powers. I also bear in mind the Presidential Guidance of 2018 on this topic.

20. I am aware of a number of cases including *Selkent v Moore [1996] ICR 836 (02 May 1996)* which identifies the following as relevant circumstances for consideration: "the nature of the amendment…...the applicability of the time limits…the timing of the application…the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment".

21. I also bear in mind *Vaughan v Modality Partnership UKEAT 0147 20 BA(V)* (promulgated 9 November 2020) in which HHJ Tayler gave a reminder that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. The exercise starts with the parties making submissions on the specific practical consequence of allowing or refusing the amendment. If they do not do so, it will be much more difficult for them to criticise the Employment Judge for failing to conduct the

balancing exercise properly. The balancing exercise is fundamental. The *Selkent* factors should not be treated as if they are a list to be checked off.

Decision on application to amend to include a disability discrimination claim/s under the EqA 2010

22. I heard submissions from both representatives. Taking account of all the relevant case law, the written and oral submissions and the facts, I refused the amendment application and I explain my reasons below.

23. First, the particulars of the disability discrimination claim/s are difficult to comprehend. What is clear is that they involve the making of entirely new factual allegations and entirely new claims. Thus, the nature of the amendment sought is extensive.

24. Secondly, given the failure to describe the relevant elements of a disability discrimination claim under the EqA 2010 for any of the allegations (e.g. in terms of causation, comparator etc), the Respondent still does not know what case it has to answer.

25. I am aware that in this balancing exercise, I should take account of the merits of these claims. Given the omission of any clear reference to all the elements of a disability discrimination claim under the EqA 2010, I am unable to make an assessment of the merits of these claims.

26. Thirdly, these claims are not in time. One allegation is very old, 2019, whilst the remainder relate to events around a meeting on 18 January 2021, over 22 months ago and events in the first two weeks of February 2021. This would be highly prejudicial to the Respondent to have to deal with.

27. Fourthly, delay in making the application to amend is a discretionary factor for me to consider. The ET1 was issued on 13 October 2021. No plausible or indeed any explanation has been given for a delay of over a year since the ET1.

28. Fifthly and very importantly, the direction asked the Claimant to give reasons why the Tribunal should amend. There seems to be a reference to a reason in the following extract, which purports to explain the basis of the application to amend:

"…This application to amend is made having considered the Discovery of Disclosure and the preliminary hearing disclosure that the Claimant was actually on statutory sick a matter not raised prior to ACAS as advised …"

29. The meaning of this sentence and in particular “the discovery of disclosure” is not clear. There is no explanation of the relevance of the Claimant being on “statutory sick pay” to a failure to include a disability discrimination claim under the EqA 2010 in the ET1. The Claimant had returned to work on 26 January 2021 and her subsequent sickness absence did not relate to the cause of her long term sickness absence but rather to Covid-19.

30. Again scrutinising this document, the following extract seems to indicate some reason:

“At the outset, the Claimant believed the process and the collective redundancy including the package to be genuine” (Section A paragraph 1)

“The Claimant was led to believe the dismissal was lawful by reason of redundancy on 31 March 2021. At all times the Claimant was off work for the reasons set out in the ET1 a grievance, which relates and is a continuing act of discrimination and being background fact of bullying and mental abuse consequently leading to mental health. Return to work phases were put into place to support the Claimant in returning to work as agreed but was treated unfavourably as the voluntary redundancy was offered when the Disability of which she suffered and off work did not allow such determination as she had not returned at the time the Claimant was requested to attend work and as seen in the attached report” (Section A paragraph 3).

31. This paragraph is difficult to understand but what I glean from it is that the Claimant was not aware until later that on her case, the redundancy was not genuine but caused by her disability. This document does not make it clear what showed her what she considers to be the true causation. She has not said that it was the documents provided by the school in or about June/July 2021 but even if it were, that would have been in time for her to mention it in her ET1.

32. The Claimant also refers to “bullying and mental abuse leading to mental health”. It is not clear if this is part of her intended disability discrimination claim under the EqA 2010. If so, this has not been particularised as I directed. Furthermore, no reason has been given why this could not have been put in the ET1.

33. Again there is an attempt at a reason in the extract below:

“The Claimant was not capable of understanding, or consideration is given to the true nature of why she was asked in whilst ill nor if her redundancy payment package offer was accurate and genuine lawful. At that time the Claimant was unaware of the factor that being off under a phase return meant that the Claimant legally should have attended or had to. At all times it was not a matter contested or complained as knowledge was not present rather

the redundancy whilst suffering from mental health and covid-19" (Section B paragraph 4).

34. No reason is provided as to why "the Claimant was not capable of understanding ..the true nature of why she was asked in (on 18 January 2021)". The extract below seeks to explain how and when she became capable of understanding.

    "The relevant discovery of disclosure was in fact after August during the documented communication with the Respondent regarding not only the failure to pay the Claimant the legal redundancy rates but in fact the request for a P45 and notice pay" (Section B paragraph 4).

35. First, there is no reference to exactly which part of the "documented communication with Respondent" alerted the Claimant to the potential existence of a disability discrimination claim under the EqA 2010. Secondly, in any event, no reason is given why "after August" was not in time to include this in the ET1.

36. The Claimant concludes Section B by stating (at paragraph 4)

    "Therefore, It was not apparent or in the forefront of the Claimant's mind or knowledge that the redundancy was genuine until enquiries were made".

37. These enquiries were in the form of the Subject Access Request ("SAR") to the school in April 2021 and received in June or July 2021, although the Claimant refers to August 2021. In other words, the Claimant's case is that including a disability discrimination claim under the EqA 2010 in the ET1 was precluded until the answer to enquiries had been received. Even if, as the Claimant implies, the school's response was not clear until "documented communication with the Respondent" in August 2021, no reason is given why a disability discrimination claim under the EqA 2010 was not included in the ET1.

38. At the hearing on 8 December 2022, in oral submissions, Ms. McCarthy referred more directly to reasons why the amendment application should be allowed. First, the Claimant's mental health. Ms. McCarthy appeared to consider that the Respondent fully accepted her position on the Claimant's mental health. The Respondent, however, had not accepted these mental health issues. Therefore, I cannot treat this as an undisputed fact, as Ms. McCarthy would like. I note that no GP records or specialist letters or reports have been provided to show the severity of the Claimant's mental health at the relevant dates and causation: namely, that the alleged treatment by the Respondent impacted on Ms. Newell's mental health.

39. Secondly, Ms. McCarthy added as a second reason, the failure to obtain legal advice. The Claimant herself said in oral evidence at the hearing on 5 October 2022 that she had sought advice from her union; she could have mentioned her mental health and asked if that could have been the subject matter of a claim in the ET1. Alternatively, it was open to her to seek free legal advice from a law centre, Citizens' Advice Bureau or the Free Representation Unit. In any event, the Claimant's own oral evidence was that she had sought legal advice from Ms. McCarthy in April 2021. Ms. McCarthy said this was restricted to the amount of redundancy pay but that was not the Claimant's evidence. In sum, the Claimant has advanced no reasons as to why she could not bring a disability discrimination claim/s under the EqA 2010 in her ET1.

40. In terms of hardship or injustice, I find that this balancing exercise comes out in favour of the Respondent. If I allow this amendment, there would be a wholesale expansion of the claim to include a large array of factual matters never pleaded in her ET1, and all the relevant claims are significantly out of time. These new claims involve substantially different areas of inquiry to the old. In addition, as the proceedings having been ongoing since 13 October 2021, it would be highly prejudicial to the Respondent for there now to be a large expansion of the claims to include out-of-time discrimination matters that could and should have been brought in the original claim but which the Claimant chose not to include. I also bear in mind the additional costs faced by the Respondent for having to face what will be new matters, including the need to obtain further clarification of a disability discrimination claim/s under the EqA 2010 and to respond, with at least one further PHR before a final hearing.

41. I therefore refused this application and did not grant the amendment.

42. For that reason, it was not necessary for me to consider whether the time limit for any disability discrimination claim under the EqA 2010 should be extended under the just and equitable test.

Other matters arising at the hearing on 5 October 2022 requiring decisions

43. At various points in time, there were disagreements between the representatives about aspects of the proceedings, which meant that I had to take time, before looking at the issues listed for determination, to ask whether the Claimant wished to make an application. This took place with regards to:

    43.1.1 The use of the bundle, compiled by the Respondent and emailed as an attachment on 4 October 2022 at about 1 pm and in the evening in a different format. It was agreed that relatively few pages in the bundle were relevant and those were accepted as uncontroversial by the Claimant.

43.1.2 The inclusion of the Respondent's skeleton argument. Once it was understood that this was not seen as an agreed document, its inclusion was accepted.

Claims on ET1 - particulars

44. Before deciding the issues set down for determination at the Preliminary Hearing on 5 October 2022 (whether each of the claims was time-barred etc), it was necessary to specify exactly what each claim consisted of. Ms. McCarthy clarified the claims as best she could to which Mr. Lester contributed. Some claims remained to a significant extent lacking clarity but I note below what was discernible:

44.1.1 **Unfair dismissal** by way of redundancy: allegations of being pressurised into volunteering for redundancy.

44.1.2 **Notice pay**: failure to pay 12 weeks' notice. It is agreed that this was received on **27 April 2021**. The Respondent considered that the sum of £5,117.16 had been paid and represented 12 weeks' notice (see GOR). Ms. McCarthy stated that only 4 weeks' notice had been paid but did not give any figures of what had actually been paid and what in her view should have been paid. This was made as an unlawful deduction claim.

44.1.3 **Holiday pay**: failure to pay holiday pay. As the Claimant was on sickness absence from mid-2018 to 25 January 2021 and from 23 February 2021 to 26 March 2021, this claim may have related to the Claimant's inability to take her holiday in the relevant holiday year and the potential to carry such holiday from year to year for a reasonable period (2 or 3 years). Ms. McCarthy said nothing informative on the subject save that the claim existed.

44.1.4 **Arrears of pay:** it was alleged that monies had been deducted off pay which had been made during the summer holidays. There is no clarity about exact dates and how much. Ms. McCarthy confirmed that she was referring to **Summer 2020**. This was revised almost immediately to an allegation that over the whole period (of employment), for term time and holiday periods, payments were less than contractually required. Ms. McCarthy seemed to suggest that the last salary payment was made on 6 April 2021. Mr. Lester's position was that in the absence of any objective evidence, this date was unknown.

44.1.5 **Redundancy payment**: it was alleged that the wrong calculation had been made in failing to use the Claimant's correct age such that 1 ½ weeks' pay where appropriate was not given. It was agreed that length of service had been 16 years. The redundancy payment was received on **6 April 2021**.

45. I note that the holiday pay and arrears of pay claims remained unclear, after Ms. McCarthy's closing submission on 8 December 2022.

Dispute about EDT with regard to unfair dismissal claim

46. I had to decide the EDT since a dispute about this became apparent during the 5 October hearing. I heard submissions from the representatives.

Submissions

47. Ms. McCarthy said that EDT was 23 June 2021. Her submissions were:

    47.1 Consultation period should have been allowed to run in full
    47.2 So 12 weeks should have been allowed from 31 March 2021.
    47.3 Incorrect redundancy package and time taken to resolve with HR meant unjust to use 31 March 2021.

48. Mr. Lester said that the EDT was 31 March 2021. His submissions were:

    48.1.1 He referred me to s97 of the ERA 1996. Initially, as he relied upon his skeleton argument, he proposed a date of 20 April 2021, applying s97(2)(2)(b) (12 weeks from 12 February 2021).
    48.1.2 He then applied under the slip rule to correct his submission. S97(1) applied without any qualification. EDT is the date upon which notice expires. S97(2)(2)(b) applied to three situations which did not apply to the Claimant's situation.

Decision and reasons on EDT

49. I must consider the law which is there to explain what is required in a strict fashion. s97(1) ERA 1996 contains the relevant law; Ms. McCarthy was not able to show me any other legal provision which supported her submissions. The Claimant, having been invited to consider voluntary redundancy on 18 January 2021, asked for a calculation of her redundancy entitlement. I accept that she did not agree to voluntary redundancy until 5 February 2021; this was not in dispute. It was therefore not possible for the school's letter dated 31 January 2021 to give the Claimant a date upon which her termination would take effect. The Claimant confirmed that she had received the letter dated 12 February 2021 on 12 February 2021. In the end, the Respondent conceded that a termination date had been given to the Claimant in the letter dated 12 February 2021.

50. Given that the Claimant's employment was terminated by notice and none of the exceptions in s97(2)(2)(b) apply, s97(1) applies. The date on which notice expired was clearly stated in the 12 February 2021 letter (in two places) as 31 March 2021. **Therefore the EDT is 31 March 2021**.

Claims on ET 1 – jurisdiction – applicable law

51. By section 111(2) of the Employment Rights Act 1996, a Tribunal '*shall not consider*' an unfair dismissal claim unless it is presented in time; a claim has to be presented to a Tribunal **before the end of the three month period starting with the effective date of termination** (section 111(2)(a), ERA 1996); **the same applies to unlawful deductions claims** (section 21(1) ERA 1996), and **to breach of contract claims** (article 7(a), Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (SI 1994/1623) (Extension of Jurisdiction Order 1994).

52. A Tribunal may only extend time for presenting a claim where it is satisfied either that (a) it was "not reasonably practicable" for the complaint to be presented in time, and even if that was the case, (b) the claim was nevertheless presented '*within such further period as the Tribunal considers reasonable*' (Section 111(2)(b) ERA 1996; section 23(4) ERA 1996; article 7(b) Extension of Jurisdiction Order 1994). The burden of proof for establishing that it was not reasonably practicable to present the claim in time is on the Claimant.

53. The question is whether the Tribunal considers the claim was submitted **within a reasonable time after the original time limit expired** (*University Hospitals Bristol NHS Foundation Trust v Williams* UKEAT/0291/12).

54. Where an unlawful deductions claim is brought in respect of a series of deductions or payments, the time limits begin to run with the last deduction or payment in the series, or the last of the payments so received (section 23(3), ERA 1996).

55. Per the EAT in *Cygnet Behavioural Health Ltd v Britton* [2022] EAT 108, 'A person who is considering bringing a claim for unfair dismissal is expected to appraise themselves of the time limits that apply; it is their responsibility to do so.' [53].

Claims on ET1 – decision about jurisdiction – presentation in or out of time?

56. As agreed by the representatives and at Ms. McCarthy's request, I asked questions of the Claimant (given that there was no witness statement and the

ET1 had little detail). I based my decision on the Claimant's oral evidence and closing submissions from both representatives.

Was the Unfair Dismissal presented in or out of time - EDT 31 March 2021?

57. Before explaining my decision and reasons about the legal tests I have set out above, due to Ms. McCarthy's approach, it is necessary to set out some facts clearly first. It is still not clear whether Ms. McCarthy accepts that all of the claims set out, however sketchily, in the ET1 were out of time.

58. The chronology of events is as follows. The EDT was **31 March 2021**. The time limit from EDT was 3 months. As decided at the hearing on 5 October 2022, I did not accept Ms. McCarthy's view that the Claimant should been given an opportunity to serve out her notice rather than PILON (pay in lieu of notice), which would have made her EDT 23 June 2021 and that the time limit was 3 months after that: 22 September 2021.

59. The time limit expired therefore on **30 June 2021**.

60. The early conciliation process through ACAS started on **30 July 2021**; the date of receipt by ACAS is not in dispute.

61. The Claimant commenced the early conciliation process through ACAS **after** the expiry of the time limit; her delay was a **month**.

62. The early conciliation process through ACAS concluded on **10 September 2021**, which is not in dispute.

63. For this reason, the 3 month time limit could not be extended. Ms. McCarthy did not seem to recognise this at the hearing on 5 October 2021.

64. The Claimant presented her claim on **13 October 2021.** This was not disputed. She therefore presented her unfair dismissal claim out of time, being late by **over 3 months.** Her claim was filed 6 ½ months after the EDT.

65. As the Claimant said in oral evidence that Ms. McCarthy's advice was the reason for late filing of her claim, it is important to set out Ms. McCarthy's perceptions of the correct timing. Applying her logic, the ACAS early conciliation process would have been in time to extend the time limit and the period of extension would have been about 1 and one third of a month (30 July 2021 to 10 September 2021). Thus 22 September 2021 would have become around 31 October 2021. On Ms. McCarthy's view, 13 October 2021 would have been within the time limit. As stated above and for the reasons above, I do not accept this. I make a clear finding that the unfair dismissal

claim was presented out of time. I note at the hearing today Ms. McCarthy did not make these points.

Was the claim regarding the Redundancy Payment presented in or out of time?

66. I find that the redundancy payment was made by a single payment on 6 April 2021. Given that, the time limit of 3 months expired on **5 July 2021**. Again, this time limit could not be extended because the early conciliation process through ACAS started after its expiry.

67. Thus, the Claimant **was over 3 months late** in filing her claim and did not present this claim in time.

Was the claim regarding Notice Pay presented in or out of time?

68. As this single payment was made on 27 April 2021, the time limit of 3 months expired on **26 July 2021**. Again, this time limit could not be extended because the conciliation process started after its expiry.

69. Thus, the Claimant was **over 2 months late** in filing her claim and did not present this claim in time.

Were the claims regarding arrears of pay and holiday pay presented in or out of time?

70. These claims are said to involve a series of deductions and to be interrelated. As no particulars of these claims or dates have been clearly given or at all, I cannot decide the date of the last alleged deduction. In any event, because Ms. McCarthy has failed to give any or sufficient detail, I have no option but to decide that these were very significantly out of time. Given the length of the Claimant's sickness absence (over 2 ½ years), the last payment would have been likely to have been at the end of her sick pay entitlement, possibly mid-2019.

Claims on ET1 – decision about jurisdiction – was it reasonably practicable to file each claim in time?

71. I begin my consideration with the unfair dismissal claim, which had the earliest date for the expiry of the time limit (**30 June 2021**). My findings however apply equally to the other claims, which had deadlines respectively of 5 and 26 July 2021.

72. In Ms. McCarthy's closing submissions on 8 December 2022, she presented a situation different to that of the Claimant's oral evidence. Ms. McCarthy said that she only gave legal advice in relation to the redundancy package – its amount. The Claimant gave her evidence clearly and without hesitation. I

prefer her account wherever it differs from that presented by Ms. McCarthy in her submissions on 8 December 2022.

73. Ms. McCarthy also said that the Claimant was not aware of an unfair dismissal claim believing the redundancy to be genuine. I am not clear when Ms. McCarthy says the Claimant knew but she seemed to say that it was only after the response (ET3) by Respondent. This is not consistent with the fact that the Claimant contacted ACAS on 30 July 2021 to start the early conciliation process on the basis that there had been an unfair dismissal.

74. The Claimant contacted ACAS in April 2021. She regarded their "advice" as her reason for being late in filing her claim. She maintains that ACAS told her in April 2021 that she should have had a statutory notice period of 12 weeks from the date of notice of redundancy, which she (correctly) took to be **12 February 2021**.

75. The Claimant says that she used this date of 12 February 2021 to calculate the expiry of the time limit as **7 May 2021**. I make two observations. First, ACAS typically do not give advice; that is not their role and they would usually make that clear. In any event, nothing turns on this because, secondly, if the Claimant had made a claim by her own calculated date (**7 May 2021)**, she would have been in time.

76. Piecing together what the Claimant said in oral evidence, the picture emerging is this. After her conversation with ACAS in April 2021, she considered that the correct date for her to present her claim was 7 May 2021. The Claimant could not afford legal advice from a solicitor or any other legally qualified person because in her own words, she had had "three years of unemployment", in other words, no pay due to being on sickness absence and having exhausted her sick pay entitlements.

Conclusions about the reasonably practicable test

77. The Claimant therefore sought legal advice from an alternative and found Ms. McCarthy. The Claimant confirmed that Ms. McCarthy had acted for her from April 2021. She confirmed that she knew that Ms. McCarthy had no legal qualifications. It is not clear whether she paid Ms. McCarthy a fee, although I note that Ms. McCarthy said that she had represented a number of individuals in an Employment Tribunal. Ms. McCarthy also confirmed that she did not work for a charity. The Claimant then relied totally upon Ms. McCarthy's advice.

78. Therefore, on Ms. McCarthy's advice that she should add her statutory notice period of 12 weeks onto 7 May 2021, the Claimant accepted Ms. McCarthy's

view that the expiry of the time limit was **6 August 2021** (although I note that the Claimant had already added this 12 week period onto 12 February 2021 after speaking to ACAS). It is thus solely down to Ms. McCarthy's advice that the Claimant did not file her claim by 30 June 2021.

79. In deciding whether it was reasonably practicable for the Claimant to present her claim in time first, I note that the only reason that the Claimant refrained from doing so was the advice from Ms. McCarthy on the law on when the time limits expired. The Claimant's own firm judgment was to present it on a date which would have meant that her claims were in time. She ignored this to rely on the opinion of someone whom she knew had no legal qualifications.

80. Secondly, arising out of this point, I remind myself that I must look at the case law on advisers being at fault. I am aware that in the majority of cases, an adviser's incorrect advice about time limits will bind the Claimant and a Tribunal will be unlikely to find that it was not reasonably practicable to have presented the claim in time. Under *Dedman v British Building and Engineering Appliances Ltd. 1974 ICR 53, CA*, (affirmed in *Spencer Plc v Williams-Ryan 2005 ICR 1293 CA)* a solicitor's mistake will be binding. Even though a Claimant may not be at fault for their solicitor's mistake of law, a Tribunal is unlikely to exercise its discretion because the Claimant will have a remedy in negligence against the solicitor: *Hill and Anor v Chau EAT 761/86*. Nevertheless, subject to the Dedman principle, the question of reasonable practicability is one of fact for the Tribunal: *Northamptonshire County Council v Entwhistle 2010 IRLR 740 EAT.*

81. I am aware, however, that I must also look specifically at the case law on types of advisor other than a solicitor. In this respect, *Remploy Ltd v Brain EAT 0465/10*, indicates that this is essentially a question of fact for the Tribunal to decide after taking into account the circumstances of the particular case.

82. Ms. McCarthy held herself out as an advisor, who had acted for a number of clients in the Employment Tribunal. Trade Union representatives count as advisors in this context and they are generally assumed to know the relevant time limits and to appreciate the necessity of presenting claims in time. Factually, there is no difference between Ms. McCarthy as an advisor and a Trade Union representative and she too should have known the relevant time limits and the necessity of presenting the Claimant's claims in time. The situation is similar to that in *Times Newspapers Ltd. v O'Regan 1977 IRLR 101, EAT* where Ms. O'Regan revised her knowledge of the time limit in light of her union official's wrong advice; the union official's fault was attributable to her. The Claimant revised her opinion about the expiry date of the time limit in

light of Ms. McCarthy's wrong advice. In the same way, Ms. McCarthy's fault is attributable to the Claimant.

83. Even if I am wrong to make an analogy between Trade Union representatives and Ms. McCarthy in her role, incorrect advice from an advisor employed by CAB and the Free Representation Unit has also been treated as the fault of the Claimant herself. Applying *Riley v Tesco Stores Ltd. and Anor 1980 ICR 323, CA* (which involved the CAB), it was not really material whether or not Ms. McCarthy was "skilled" or whether or not, the Claimant had "formally engaged" with Ms. McCarthy. The key factor is that the Claimant had taken advice and this was relevant as part of the overall circumstances (that the claims were presented over 2 to 3 months out of time).

84. Even if I am wrong to make an analogy between Ms. McCarthy and the CAB etc, the case law on employment law advisors shows that the Dedman principle applies. The delay of an employment law advisor is to be attributed to the Claimant, even though they are not qualified solicitors: *Ashcroft v Haberdasher's Aske's Boys' School 2008 ICR 613 EAT.*

85. Ms. McCarthy says today that the Claimant was prevented by her mental health and/or being ill with Covid from meeting the time limits. It was incumbent on Ms. McCarthy to provide evidence to that effect if that was the Claimant's case. These points were not mentioned on 5 October 2022 and no medical evidence has been provided to support Ms. McCarthy's assertion. Ms. McCarthy continued to say on 8 December 2022 that medical evidence was not relevant.

ERA 1996 Claims – decision about jurisdiction – were the claims presented within such further period of time as could be considered reasonable?

86. Even if I am wrong and it was not reasonably practicable for the claims to be presented in time, which I do not accept, the Claimant would have to establish that the each of the claims were presented *"within such further period of time as the Tribunal considers reasonable".* The question then arises as to why the Claimant was over 3 months late for the ERA claims (save for the claim concerning notice pay which was over 2 months late).

87. Again, this was due solely to Ms. McCarthy's legal advice. On Ms. McCarthy's advice, in April 2021, they submitted a Freedom of Information Subject Access Request "(SAR") to the Claimant's former school to obtain accurate dates to complete the ET1. The Claimant could not remember whether the responses were sent to them in June or July 2021.

88. According to the Claimant, they were late in presenting her claim because they waited for all the documents "to look at the case in its entirety". I note that Ms. McCarthy's first opinion on the expiry date was 6 August 2021, which she communicated to the Claimant in or about April 2021. She revised her opinion during the Tribunal hearing to 22 September 2021 when asked to make submissions about the EDT.

89. I find that the Claimant did not present her claim within such further period of time as I consider reasonable. First, a legal advisor should be expected to know that it is not necessary to "look at a case in its entirety" or have all the documents or details in order to complete and present an ET1. It is always possible to provide further and better particulars at a later stage. Secondly, any legal advisor should be expected to know that filing the ET1 in time takes priority over perfecting the ET1. Thirdly, there is nothing in the ET1 which relied on something only obtainable from a document. This was all information within the Claimant's own knowledge. Putting those mistakes aside, for the moment, Ms. McCarthy made a further mistake. I accept that an ET1 would have been rejected without the ACAS early conciliation certificate but once that was issued, Ms. McCarthy should have advised the Claimant to issue immediately, that is on or about 10 September 2021 not the 13 October 2021, over a month later. No reason for that delay has been given.

90. In conclusion, all of the claims on the ET1 (unfair dismissal, unlawful deductions and breach of contract) are out of time and I dismiss these claims due to lack of jurisdiction.

I confirm that this is my Reserved Judgment with reasons in Case No: 3321259/2021 and that I have approved the Judgment for promulgation.

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Employment Judge Coll

Date: 9 January 2023

Sent to the parties on: 13 January 2023

For the Tribunal Office