EMPLOYMENT TRIBUNALS

Claimant: Mr Y Houti

Respondent: Bills Restaurants Limited

Heard at: **Croydon Employment Tribunal**
(Remote Open Preliminary Hearing via CVP)

On: **18th January 2023**

Before: **Employment Judge McCann**

Representation
Claimant: Mr A. Cromb (friend of Claimant)
Respondent: Mr S. Morley (employment law consultant)

JUDGMENT

(1) The Claimant's claims for unfair dismissal, wrongful dismissal and unlawful deduction from wages were presented outside the prescribed time limits when it was reasonably practicable for them to have been presented in time. Accordingly, those claims are dismissed for want of jurisdiction.

(2) The Claimant's claim for direct race discrimination was presented (via amendment) outside the prescribed time limit and the Tribunal does not consider it is just and equitable to extend time. Accordingly, the race discrimination claim is dismissed for want of jurisdiction.

REASONS

The proceedings

1. On 16 March 2021, the Claimant presented claims for unfair dismissal, wrongful dismissal and unlawful deduction from wages ("the original claims").

2. There was a Preliminary Hearing for case management on 10 February 2022 before Employment Judge Self. He allowed the Claimant's application (dated 25 August 2021) to amend his claim to include complaints of direct race

discrimination (in respect of the decision to take disciplinary action against the Claimant, the conduct of that process, the decision to dismiss the Claimant and the conduct and outcome of the Claimant's appeal against dismissal).

3. A List of Issues is set out in the Record of Preliminary Hearing sent to the parties on 25 February 2022.

4. At the Preliminary Hearing, Employment Judgment Self believed that the original claims had been presented in time and, for that reason, he was prepared to extend time for the race discrimination claim which was based on the same facts (see paragraph 16 of the Record of Preliminary Hearing).

5. However, upon realising (having obtained the ACAS EC Certificate) that the original claims had been presented one day outside the prescribed time limits, he reconsidered and revoked the decision to extend time for the race discrimination claim; and listed all the claims for an Open Preliminary Hearing ("OPH") on 5 May 2022 to consider whether all the claims had been presented within the statutory time limits and, if not, whether time should be extended.

6. The Final Hearing was listed for 5 days between 20 and 24 March 2023.

7. The OPH on 5 May 2022 had to be vacated due to the ill-health of the Claimant and was re-listed on 18 January 2023.

8. In the meantime, the Claimant failed to serve his witness evidence on the Respondent, contrary to a tribunal order to do so by 17 November 2022 and the Respondent applied (via email dated 8 December 2022) to strike out the Claimant's claims under Rule 37(1) of the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013*. The Respondent's application to strike out was added to the issues for determination at the OPH.

Preliminary Issues

9. Accordingly, the OPH initially listed for 3 hours was extended to a one-day hearing which came before me on 18 January 2023 to determine (1) the Respondent's application to strike out the Claimant's claims; and (2) whether any of the claims have been lodged within the statutory time limit and, if not, whether time should be extended to give the Tribunal jurisdiction to determine them.

10. At the OPH, I gave Judgment with oral reasons rejecting the Respondent's strike out application, In respect of the jurisdiction issues, I gave directions for the parties to exchange written submissions (if any) and provide those to the Tribunal. The Judgment and case management orders were sent to the parties on 19 January 2023.

Documents & Evidence

11. I have had regard to the following documents and evidence:

i. Witness Statements for Mr Cromb and for the Claimant, provided to the Respondent and the Tribunal at 01:14 on 18 January 2023; as well as oral evidence, at the OPH, from both individuals.

ii. A Bundle of documents running to 235 pages (including its Index).

iii. A "mini-bundle" consisting of a Chronology and email correspondence (running to 34 pages), produced on behalf of the Respondent in respect of its strike out application relating to the late provision of witness statements by the Claimant.

iv. Some additional correspondence from the parties which had not been included in either of the bundles but which were emailed to the Tribunal by the parties before and during the course of the Hearing – namely:

(a) The Respondent's email/application to strike out the claims dated 8 December 2022;

(b) Mr Cromb's email and letter (dated 13 December 2022) in response to the Respondent's strike out application, and attaching a letter from Mr Cromb to Mr Morley dated 6 April 2022;

(c) Emails between Mr Cromb and Mr Morley from 13 to 17 January 2023;

(d) A letter from Mr Cromb to Mr Morley dated 13 January 2023.

v. The Respondent's Written Submissions (13 pages) as well as a 27-page document, extracting the commentary from *Harvey on Industrial Relations and Employment* Law (with highlights and commentary on behalf of the Respondent), provided during the course of the OPH on 18 January 2023.

vi. Written Submissions sent on behalf of each of the parties to the Tribunal on 23 January 2023 and the Respondent's Submissions in Reply (sent on 26 January 2023).

12. I note that Mr Cromb's witness statement was originally served on the Respondent on 19 December 2022. He then updated and revised it, serving the updated version at 01:14am on 18 January 2023, along with the Claimant's statement. I have not seen the original version of Mr Cromb's statement.

13. During the OPH, Mr Cromb was requested to re-send the updated version of his statement to the Tribunal and to Mr Morley but showing the differences between the two versions in track changes. Mr Morley confirmed during the OPH, that the 'track change' version of Mr Cromb's statement had been emailed to him. Mr Cromb confirmed he had also emailed it to the Tribunal but, for whatever reason, it appears not to have been received.

14. However, whilst Mr Morley told me at the outset of the OPH that there were some differences, I was not informed of any changes which were said to be significant or material and, therefore, I decided that it was not proportionate to

spend further time on the question of the differences between the two versions.

15. At the OPH on 18 January 2023, the Claimant and Mr Cromb both gave evidence and were cross-examined by Mr Morley on behalf of the Respondent. Ms Mahmoud Mohamed provided Arabic interpretation of the proceedings (including the Claimant's evidence) and the Tribunal is very grateful for her assistance.

16. The process of interpreting meant that the OPH took longer than would otherwise be the case and, therefore, Mr Morley did not have as long to cross-examine Mr Cromb and the Claimant as he may have wished. He had also only seen the Claimant's witness statement for the first time on the morning of the OPH.

17. Accordingly, I indicated to Mr Morley that, if this meant that he was not able to challenge every aspect of the witness evidence that he may have wanted to, this would not prevent him from challenging those aspects in closing submissions on behalf of the Respondent.

18. Given that the Claimant's dismissal was on 14 October 2020, the proceedings had been issued on 16 March 2021 and that the final hearing has been listed for 5 days in March 2023, it was important to ensure that the Tribunal could determine the jurisdiction issue(s) without any further delay. Consequently, I directed the parties to exchange and file any closing submissions in writing. They both took the opportunity to do so.

19. I have read and taken into account all of the documentation and evidence set out above in reaching my decision on the jurisdiction issues.

The Facts

20. The Respondent is a restaurant chain operating restaurants across the UK.

21. The Claimant was employed by the Respondent as a Chef at its Clink Street restaurant. His employment commenced on 16 August 2018 and terminated on 14 October 2020, by reason of alleged gross misconduct, as confirmed in a letter of the same date.

22. The Claimant is of Algerian origin. He speaks Arabic, Berber, French and some English. He came to the United Kingdom in 2016, as a refugee; and claimed asylum. He was granted leave to remain in 2018.

23. The Claimant has found it difficult to communicate in English. He needed the assistance of an Arabic interpreter for the OPH. However, from August 2018, he was able to work in an English-speaking kitchen, with the assistance of the head chefs to whom he reported and his English language skills slowly improved over time. He accepted, in his oral evidence, that he was able to undertake workplace training and qualifications in English.

24. There as an incident at the Respondent's Clink Street restaurant on 24 August

2020 when a customer had an allergic reaction after eating a dish that the Claimant had prepared. The Claimant was suspended and was informed that an investigation would take place. He attended a disciplinary hearing on 9 October 2020 and was summarily dismissed on 14 October 2020.

25. The week following his dismissal, on 20 October 2020, the Claimant had dinner with Mr Cromb.

26. The Claimant and Mr Cromb had been friends with each other, at that time, for nearly 3 years, having met in late 2017.

27. In evidence, the Claimant accepted that, by October 2020, he and Mr Cromb were able to communicate pretty effectively with each other and that this process had become easier over time. Mr Cromb's evidence, which I accept, was that communication with the Claimant took longer because of his poor English. The Claimant had a French-speaking friend who spoke good English and, until around March 2021, he was sometimes able to help with translation.

28. The Claimant was aware that Mr Cromb was a lawyer (although not an employment lawyer). In fact, Mr Cromb's evidence, which was not challenged and which I accept, is that he qualified as a barrister and solicitor in Australia, and has specialised in tax law throughout his career, both in Australia and since moving to the UK in 2016.

29. On 20 October 2020, the Claimant and Mr Cromb discussed his dismissal and Mr Cromb did some research about the possibility of making an employment tribunal claim. He and the Claimant discovered that there was a three-month time limit in which to bring a claim and that the Claimant would be required to go through an ACAS conciliation process.

30. Mr Cromb explained to the Claimant that it would probably not be possible for him to represent the Claimant in any tribunal proceedings as he was not an employment lawyer and had professional commitments which left him with very little time to provide assistance.

31. At this early stage, as they confirmed in their evidence, both Mr Cromb and the Claimant were aware how important it was to file employment tribunal proceedings in time to avoid any limitation problems.

32. On 21 and 28 October 2020, the Claimant confirmed his wish to appeal against his dismissal and provided the grounds for his appeal on 30 October 2020. The correspondence was drafted on the Claimant's behalf by Mr Cromb.

33. The grounds of appeal are very detailed and I accept the Respondent's characterisation of them as largely including the content that would be included in an ET1/Details of Claim. In the letter, the Claimant also asked for details of how his suspension and holiday pay had been calculated; and stated that he would not be seeking re-employment as part of his appeal.

34. On 11 November 2020, Mr Cromb drafted correspondence from the Claimant

to the Respondent referring to the possibility of having to file a protective claim.

35. The Claimant's appeal hearing took place on 27 November 2020 and he was informed by the Respondent that he should get the outcome within two weeks. In fact, no outcome was ever provided to the Claimant.

36. On 22 December 2020, Mr Cromb drafted an email from the Claimant to the Respondent chasing for the appeal outcome and for payment of wages which he said were underpaid. He stated that, if he did not hear back from the Respondent in the next few days, he would need to file a claim for unfair dismissal to ensure that he did not miss the applicable deadline.

37. On 2 January 2021, the Claimant emailed the Respondent attaching a letter drafted for him by Mr Cromb. In this letter, the Claimant expressly referred to the three month deadline for bringing his unfair dismissal claim. He stated that the delay in communicating the appeal outcome had been unreasonable and that he would need to issue his unfair dismissal claim to "protect" his position. The email also referred to the ACAS early conciliation process as well as alleging breaches by the Respondent of the ACAS Code of Practice, with the Claimant stating that he would be seeking a 25% uplift in any compensation awarded by the tribunal.

38. In the period from November 2020 to February 2021, Mr Cromb assisted the Claimant with correspondence to the Respondent and with notifying ACAS of a potential dispute on 4 January 2021. Mr Cromb gave ACAS his details as the Claimant's representative.

39. Mr Cromb and the Claimant both gave evidence that they looked for assistance from legal centres and other organisations. In his witness statement, the Claimant says that (on 20 October 2020) he emailed a few organisations suggested by Mr Cromb. He also says that, after receiving the ACAS Certificate on 15 February 2021, Mr Cromb contacted a few legal centres (although Mr Cromb does not give this evidence in his own statement). I was not provided with any documentary evidence of these attempts. The Claimant stated in his evidence that he lost access to his emails for a period of time in 2021/22 when he was homeless but that does not explain the lack of documentary evidence from Mr Cromb.

40. On balance, I accept that there was some attempt to get legal assistance but I find that it was apparent to both the Claimant and Mr Cromb, by January 2021 and certainly by mid-February 2021, that the Claimant was not going to be able to rely on assistance elsewhere.

41. Mr Cromb and the Claimant acknowledge that, after receipt of the ACAS Certificate on 15 February 2021, they knew that the deadline for submitting the ET1 would be 15 March 2021.

42. Mr Cromb's evidence is that he had become very busy with his own work and the Claimant's evidence is that he was aware that it would be hard for Mr Cromb to find the time to help. However, he decided to rely on what help he could get

from Mr Cromb; and that he would do what he could to prepare the documentation to issue his tribunal claim. In a letter from Mr Cromb to Mr Morley dated 6 April 2022, he states (paragraph 14(k)) that he was especially busy with his own work from December 2020 to February 2021.

43. The Claimant and Mr Cromb both accepted in their evidence that, by late January 2021, the Respondent had provided the information they had requested about the Claimant's pay. The Claimant worked on the pay information to calculate how much he thought was owing to him. Mr Cromb researched issues relating to furlough and pay, including going through the various Coronavirus Job Retention Scheme Treasury Directions.

44. By the beginning of March 2021, Mr Cromb had started to draft the ET1 Claim Form. On 7 March 2021, Mr Cromb drafted a data subject access request ("DSAR") on behalf of the Claimant which was sent to the Respondent.

45. Mr Cromb shared various drafts with the Claimant by email and discussed the claims by phone and in person (albeit outdoors, due to the lockdown imposed in England at that time). A few days before the deadline of 15 March 2021, the Claimant saw a nearly final draft of the ET1 Claim Form. It needed some further details but the Claimant confirmed that he would then be happy for it to be filed on his behalf by Mr Cromb.

46. In evidence, when asked what he did to prompt or remind Mr Cromb to get the claim filed in time, the Claimant said that he respected Mr Cromb a lot and felt too shy to ask for more. He said that he sent Mr Cromb WhatsApp messages but that he was not one of those people that would send the same thing repeatedly.

47. Mr Cromb only finalised the ET1 Claim Form on Monday 15 March 2021 in the evening. During cross-examination, Mr Cromb stated that he opened up the website to submit the ET1 "shortly after 11pm". He stated that he had intended to attach a Particulars of Claim document as a separate file but encountered difficulties so decided to submit the ET1 Claim Form, appending the appeal letter. He hit the button to submit just before 11:59pm and it took a couple of minutes to upload so was presented at 00:01 on 16 March 2021 (see page 5 of the OPH Bundle). He subsequently emailed the Particulars of Claim document to the Tribunal a couple of days later.

48. In his letter to Mr Morley dated 6 April 2022, Mr Cromb states (at paragraph 16) that he "began the process of transmitting the ET1 on the Claimant's behalf through the Tribunal's website shortly before 11:59pm on 15 March" and that the process was still underway when the time limit expired. There is no mention of any formatting or other difficulties.

49. On balance, I find that Mr Cromb started the process of submitting the ET1 closer to 11:59pm than to 11pm. Had he spent nearly an hour trying to submit the ET1 (i.e. from 11pm onwards), I consider that he would have said so in his detailed letter to Mr Morley of 6 April 2022.

50. As it is relevant to the timing of the Claimant's amendment application (to include complaints of direct race discrimination), I make findings about the period after 16 March 2021.

51. On 9 April 2021, the Claimant received 250 pages of documents in response to his DSAR. This prompted Mr Cromb to draft a further request for missing information to which the Respondent replied on 17 May 2021 and then handed the DSAR matter to solicitors. Thereafter, Mr Cromb corresponded with the Respondent's solicitors until 4 June 2021 when that correspondence concluded.

52. In their evidence, Mr Cromb and the Claimant explained that they considered that the documentation which they obtained via the DSAR suggested that the Respondent had lied to the Claimant at various points during the disciplinary process.

53. The Claimant's evidence was that he believed that the decision to dismiss was predetermined and that, when he asked himself why the Respondent would do this, he concluded that it needed someone to blame for the allergen incident and picked on him because his poor language skills and migrant status made him an easy target. The Claimant concluded that this amounted to direct race discrimination.

54. The Claimant's evidence was that he and Mr Cromb talked about the possibility of amending his claim for a few weeks and that it then took Mr Cromb a few more weeks to prepare the application due to his professional commitments.

55. On 25 August 2021, Mr Cromb made a written application to amend the Claimant's claim to include complaints of race discrimination.

Relevant Law

56. I have had full regard to the parties' written submissions and the case law referred to therein.

Time limits – unfair dismissal, wrongful dismissal and unlawful deductions from wages claims:

57. By section 111 of the Employment Rights Act 1996,

(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(2) Subject to the following provisions of this section, 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;

(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.

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

58. There are materially similar provisions as to time limits (subject to the same "reasonably practicable" formulation as is found in s111(2)(b) of the 1996 Act) for a claim for unlawful deduction from wages (by virtue of section 23(4) of the Employment Rights Act 1996) and for a claim for wrongful dismissal (that is, breach of contract, by virtue of Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994). The time limit for unlawful deductions claims begins with the date of the deduction or, if there is a series of deductions, the last of them (s23(3)(a) of the 1996 Act). The time limit for presenting a wrongful dismissal claim begins with the effective date of termination (Article 7(a) of the 1994 Order).

59. There are two limbs to be considered:

    i. Firstly, the claimant must show that it was not reasonably practicable to present his claim in time – he has the burden of persuasion: ***Porter v Bandridge Ltd*** [1978] ICR 943 (at 948D, per Waller LJ); and

    ii. Secondly, if – and only if – the claimant succeeds in doing so, the tribunal must be satisfied that the further time period, beyond the expiry of the primary limit within which the ET1 was presented, was itself reasonable.

60. The two limbs must be separated out with clear findings made in respect of each (if necessary); and the tribunal should take care to avoid conflating factors relevant to the reasonable practicability aspect with those relevant to the determination of whether the claim was presented within a further reasonable period after the time limit had expired.

61. Parliament has set down a strict primary time limit which, in the ordinary course of events, it is reasonably practicable for would-be litigants to meet (***London Underground Ltd v Noel*** [2000] ICR 109 (at 117F-G, per Judge LJ).

62. "Reasonably practicable" is not the same as asking what was objectively reasonable – the test is whether it was or was not reasonably feasible, having regard to all the relevant circumstances, for the claimant to present his or her claim within the statutory time limit (***Palmer and Saunders v Southend-on-Sea Borough Council*** [1984] ICR 372 (at 385k per May LJ). The question of what is "reasonably practicable" should be given a 'liberal interpretation in favour of the employee' (***Marks and Spencer plc v Williams-Ryan*** [2005] ICR 1293, at [20]).

63. The starting point is for the tribunal to make clear findings about why the claimant failed to present the claim within the statutory time limit and then assess whether he has demonstrated that it was not reasonably practicable to present the claim in time, by reference to these reasons (***London International College v Sen*** [1993] IRLR 333 (at [35], per Sir Thomas Bingham MR).

64. Where a claimant seeks to rely on ignorance of their right to bring a claim and/or the time limit and/or the process to follow, the overarching question is whether the claimant's state of mind (eg, ignorance or mistake) was itself reasonable (***Wall's Meat Co Ltd v Khan*** [1979] ICR 52); and any ignorance or mistake will not be reasonable if it arises from the fault of the claimant in not making such enquiries as he should reasonably in all the circumstances have made (per Brandon LJ, at 61B).

65. When deciding whether it was reasonably practicable or not to lodge a claim in time, the overall limitation period must be examined but with a particular focus on the closing rather than early stages. Accordingly, the fact there is no impediment to lodging a claim within the first part of the limitation period may not lead to a finding that it was not reasonably practicable to lodge the claim in time if it later became not reasonably practicable to present the claim in the latter stages (***Schultz v Esso Petroleum Ltd*** [1999] ICR 1202).

66. Where a claimant awaits the outcome of an internal appeal before issuing a claim and so misses the statutory deadline, they would normally face an uphill struggle to persuade a tribunal that it was not reasonably practicable to have presented the claim in time. There must be some factor, beyond the institution of an internal appeal, to justify a claimant's failure to comply with the statutory time limit – ***Bodha (Vishnudt) v Hampshire Area Health Authority*** [1982] ICR 200.

67. There have been a number of cases where the employee has been entitled to the benefit of the "not reasonably practicable" escape clause where a claim was sent by post and either got lost or was delayed and arrived late.

68. Mr Morley, on behalf of the Respondent, referred me to the Court of Appeal's Judgment in ***Consignia plc v Sealy*** [2002] IRLR 624, where it was held that, (1) the escape clause is available where a claimant posts his claim on a date which, in the ordinary course of events, would allow it to arrive in time but which arrives late (or not at all) due to some "unforeseen circumstance"; and (2) if this condition is satisfied, then it is irrelevant that a claimant waited until the last moment to post his claim form, as long as it was posted at a time when, in the ordinary course of events, it would be expected to arrive in time (namely, the second day after it was posted, by reference to the deemed date in civil proceedings, CPR 6.26).

69. If, however (as in the ***Consignia*** case), the claim form is posted and would not have arrived in time according to the deemed date (because it had been left too late), the Court of Appeal concluded that the whole of the three-month limitation period would come under scrutiny and the claimant would have to explain why he had left it so late to present his claim form, per Brooke LJ (at [31(7)]):

> "The normal and expected result of posting a letter must be objectively, not subjectively assessed and it is that the letter will arrive at its destination in the *ordinary* course of post. As the present case shows, a complainant knows that he/she is taking a risk if the complaint is posted by first class post on the day before the guillotine falls, and it would be absurd to hold that it was not reasonably practicable for it to be presented in time if it arrives in the ordinary course of post on the second day after it was posted. Nothing unexpected will have occurred. The post will have taken its usual course".

70. The guidance and principles enunciated in ***Consignia*** were applied by the EAT to the situation where a claim was filed by email (which is no longer permitted), in ***Initial Electronic Security Systems Ltd v Avdic*** [2005] ICR 1598.

71. The claimant attempted to email her claim at 16:05 on the last day of the limitation period. She received no error message and the email appeared in her 'Sent' folder so she assumed it had been transmitted. However, it was not received by the tribunal, having apparently disappeared into the ether.

72. The EAT upheld the tribunal's decision that it had not been reasonably practicable for the claimant to present the claim in time since she had reasonably assumed that the claim would have been received the same day, by the midnight deadline. Burton J concluded that the tribunal was entitled to find that the reasonable expectation of someone sending an email is that it would arrive within a very short time thereafter; within 30 to 60 minutes being the normal maximum by way of reasonable expectation. Since the claimant had sent the claim form by email some eight hours before the midnight deadline, that was a sufficient period for her to have a reasonable expectation that it would arrive in time. When she realised five days later that the email had not arrived, she presented a further claim (by hand) within two days and that was held to be a reasonable further period.

73. Where the tribunal concludes that it was not reasonably practicable for the claimant to present her claim within the statutory time limit, it must then be satisfied that the claim was presented within a further "reasonable" period.

74. Here, the tribunal must exercise its discretion reasonably, having regard to the circumstances of the further delay and noting that claimants are expected to present their claims as quickly as possible once the obstacle which prevented them from lodging their claim in time has been removed (***James W Cook & Co (Wivenhoe) Ltd v Tipper*** [1990] IRLR 378 (at [31] and [32]).

Time limit – race discrimination claim

75. By section 123(1) of the Equality Act 2010,

(1) ….proceedings…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.

(2) […..]

(3) For the purposes of this section –

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

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

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on a 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.

76. Section 123(1)(b) of the 2010 Act entitles the Tribunal to take into account all relevant factors – it is, therefore, a wide discretion (***Hutchison v Westward Television Ltd*** [1977] ICR 279 (EAT)).

77. However, the statutory time limit is to be applied strictly; and, notwithstanding the breadth of the Tribunal's discretion, there is no presumption that it would be just and equitable to extend time, the burden of persuading the Tribunal to exercise its discretion being firmly on the claimant (***Robertson v Bexley Community Centre t/a Leisure Link*** [2003] IRLR 434 (CA), at [25], per Auld LJ).

78. As with the exercise of any judicial discretion, all relevant factors should be taken into account and the ET should not have regard to irrelevant matters. The sorts of factors found in s33 of the Limitation Act 1980 are useful pointers as to what may be relevant (per ***British Coal Corporation v Keeble*** [1997] IRLR 336, at [8]) but should not be treated as an exhaustive checklist or mechanistically applied (***Adedeji v University Hospitals Birmingham NHS Foundation*** [2021] EWCA Civ 23, per Underhill LJ, at [37]).

79. Significant factors are likely to include:

(1) The length and reasons for the delay in presenting the claim (this is a pre-eminent factor, albeit not a decisive one) (***Edomobi v La Retraite RC Girls School*** UKEAT/0180/16, 15th November 2016). This question may require the ET to consider:

(a) The extent to which a respondent has cooperated with any requests (by the claimant) for information;

(b) The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action;

(c) The steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

(2) The prejudice to each party as a result of granting or refusing to grant an extension of time (***Miller v Ministry of Justice*** UKEAT/0003/15, unreported, 15th March 2016). This issue *may* require consideration of the following:

(a) The extent to which the cogency of the evidence is likely to be affected;

(b) Whether it is possible to have a fair trial.

In ***Miller***, Laing J (at [12]) made clear that there is "the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence", also noting that such prejudice is a "customarily" relevant factor for a tribunal to have regard to, at [10(iv)].

(3) The potential merits of the claim: ***Edomobi***, at [25] and [28]. Where it is reasonably apparent that a claimant will face an uphill struggle at a final hearing of a complaint, it is less likely to be appropriate for a tribunal to exercise its discretion to extend time. However, an enquiry into the merits will necessarily be conducted at a high level (eg, by reference to the pleadings) and should not involve a trial within a trial.

80. When considering the question of time limits in relation to a claim that has been permitted via an amendment application, the doctrine of "relation back" (whereby a new claim, introduced by amendment, would be deemed to take effect from the time the original proceedings were commenced) is not applicable in employment tribunal proceedings, as found by the EAT in ***Galilee v Commissioner of Police of the Metropolis*** [2018] ICR 634 (at [67]). The EAT concluded that, as a consequence, amendments to pleadings in the tribunal which introduced new claims took effect for the purposes of limitation at the time permission is given to amend (at [109(a)]).

Discussion and conclusion

The original claims

81. The Claimant's effective date of termination was 14 October 2020. The alleged series of deductions from wages ended on 30 October 2020. Given that ACAS was notified of a dispute on 4 January 2021 and issued the early conciliation

certificate on 15 February 2021, the statutory time limit for the original claims was 15 March 2021, as is accepted by the Claimant. Those claims were, therefore, presented one day out of time on 16 March 2021.

82. The question then is whether the Claimant has established that it was "not reasonably practicable" to present his claims on or before 15 March 2021 (and, if so, whether he presented them within a further reasonable period).

83. I have had full regard to the Claimant's difficulties, including: his comparatively poor English (written and spoken); his inability to secure legal advice and assistance from law centres or other agencies; the national lockdown; and, from March 2021 onwards, his lack of access to his French and English speaking friend who had been able to help him with the process of translation. I accept that these factors made it more difficult for him to navigate the process of presenting his tribunal claim.

84. However, the Claimant's English – whilst poor – was good enough to enable him to work in an English-speaking kitchen, undertaking associated training and qualifications in English. I accept that navigating the process of litigating tribunal claims is tough for any litigant in person and, even more so for someone with poor English, but he did have the help of Mr Cromb, a lawyer (although not an employment lawyer) with the ability to research points of law and process. As a consequence, the Claimant knew by the last week in October 2020 that he had a right to bring tribunal claims in relation to his dismissal and unpaid wages and that there was a strict 3 month time limit for such claims. This is not a case where the Claimant was ignorant of his rights, nor was he someone whose language skills were so poor that he could not reasonably find out about the tribunal process (especially with the assistance of Mr Cromb). The issue for the Claimant was that he found it more difficult than some to go about the process of drafting and submitting his claims.

85. Nevertheless, I do not consider that those difficulties were impediments rendering it "not reasonably practicable" for the Claimant to present his claims in time, for the following key reasons:

(1) The evidence shows that the Claimant and Mr Cromb were able successfully to communicate about (1) the facts of his dismissal and appeal (including the drafting and submission of lengthy grounds of appeal which contain most, if not all, of the details required in respect of the unfair dismissal claim); (2) the process of notifying the Claimant's dispute to ACAS and the issue of time limits; (3) the basis of the Claimant's unpaid wages claim; and (4) the Claimant's data subject access request.

(2) Whilst the Respondent could reasonably be criticised for not confirming the appeal outcome to the Claimant (despite his chasing emails), it did provide the necessary details regarding the Claimant's pay in late January 2021.

(3) Whilst the Claimant says that awaiting the outcome of the appeal held things up for him, I find that he and Mr Cromb were clearly aware of the need to submit the tribunal claim (to "protect" his position) in late December 2020

and early January 2021, notwithstanding the fact that there had been no appeal outcome communicated. By 2 January 2021, they had concluded that they would need to embark on the formal processes (including via ACAS) to submit a tribunal claim. I conclude that the lack of an appeal outcome was not the cause of any delay on the part of the Claimant and Mr Cromb after 2 January 2021.

(4) By 15 February 2021, the Claimant had the necessary information to draft his ET1 Claim Form, having completed the ACAS early conciliation procedure. That left a month for him to submit his claims to the tribunal.

(5) By this time, the Claimant and Mr Cromb knew that the Claimant was not going to be able to rely on assistance elsewhere so it would fall to them to do what was necessary to issue the tribunal proceedings.

(6) Whilst Mr Cromb's work commitments were especially heavy from December 2020 to February 2021, they lessened thereafter (so before the expiry of the statutory time limit). He found time to draft the Claimant's DSAR, which was sent to the Respondent on 7 March 2021.

(7) The ET1 Claim Form / Particulars of Claim had been largely drafted a few days ahead of 15 March 2021 and the Claimant was happy with them, albeit they needed a few final details.

(8) Mr Cromb, even assuming that he did need to work at the weekend, could and should have been able to find, in the last week of the limitation period (in particular over the weekend of 13/14 March 2021), the hour or so he then used on 15 March 2021 to get the ET1 Claim Form submitted. There was no evidence before me that this weekend had posed any particular difficulties. I also note that, on or leading up to 7 March 2021, Mr Cromb had found the time to draft the Claimant's DSAR, which could not be reasonably viewed as a greater priority than the finalising of the ET1 Claim Form.

86. In the final analysis, Mr Cromb left it to the last day of the limitation period to finalise the ET1 Claim Form and submit it. Had he sought to submit it on the morning of 15 March 2021, all is likely to have been well. However, I have found that Mr Cromb left it to a few minutes before midnight before seeking to transmit it online. It was not reasonable to expect that there would not be some problem with the process of online transmission (such as a formatting issue, as was experienced by him). The Claimant and Mr Cromb took a significant and unnecessary risk by leaving it so close to the cut-off. I accept as apt the Respondent's suggested analogy to the postal/email line of cases (i.e. ***Consignia*** and ***Avdic***); had the Claimant (via Mr Cromb) started the process of transmitting the ET1 several hours before midnight on 15 March 2021, it would be reasonable to have expected that the process would be completed by the midnight cut-off. However, it was not reasonable to expect that the process could be completed within a few minutes. That means, in accordance with ***Schultz***, that I should scrutinise the entire limitation period and especially the latter stages (as I have done), to determine whether the Claimant has shown that it was "not reasonably practicable" to present his claims in time.

87. In addition to the factors set out above, I have considered whether the Claimant's decision to delegate to Mr Cromb the task of submitting his tribunal claim and to defer to his friend was such that it was then "not reasonably practicable" for the Claimant to present his claims in time, when Mr Cromb then left it so late in the day on 15 March 2021 to submit the ET1 Claim Form. I have concluded that the actions of Mr Cromb should be equally attributed to the Claimant (in particular, leaving it too late to reasonably expect that the ET1 Claim Form would be submitted without any difficulty). Whilst I accept that, given the Claimant's difficulties, it was understandable and reasonable for him to seek all the assistance he could get from Mr Cromb, the statutory test is not one of reasonableness but of reasonable practicability. Moreover, the Claimant knew that his friend had competing commitments on his time and he was fully aware of the 15 March 2021 deadline; and yet he did little if anything to prompt, remind and/or chase up Mr Cromb in the days leading up to, and/or on, 15 March 2021.

88. In those circumstances, notwithstanding the various difficulties experienced by the Claimant and the fact he reasonably relied on Mr Cromb's assistance, I conclude that the impediments were not such as to render it "not reasonably practicable" for him to present his claims in time. He took the risk of delegating the task of submitting the ET1 Claim Form to Mr Cromb, knowing his time constraints, and yet did not take any adequate steps to remind Mr Cromb of the urgency (and, of course, he could have undertaken the process of submitting the claim online himself).

89. Accordingly, the claims for unfair and wrongful dismissal and unlawful deduction from wages were presented out of time and the Claimant has not shown that it was not reasonably practicable for them to be presented in time. The second limb of the formula therefore does not arise for determination.

90. The Tribunal has no jurisdiction to determine these claims and they fall to be dismissed.

The race discrimination claim

91. As for the complaints of direct race discrimination, the decision to investigate the Claimant was communicated to him on or around 27 August 2020, he attended a disciplinary hearing on 9 October 2020, he was dismissed on 14 October 2020 and he appealed by letters dated 21, 28 and 30 October 2020, attending an appeal hearing on 27 November 2020. The Respondent failed to send an appeal outcome letter. He complains about the "conduct" and "outcome" of the investigation, disciplinary and appeal process as direct race discrimination.

92. For the purposes of the jurisdiction issue, I assume in the Claimant's favour (but reach no concluded decision on this issue) that, at a final hearing, he would be able to establish that the acts of alleged race discrimination form "conduct extending over a period", such that time would begin to run from the end of that

period. But when is the end of that period, given that no appeal outcome was ever sent to him?

93. By s123(4) of the 2010 Act, as regards the failure to provide the appeal outcome, I need to consider when this "failure to do something" should be treated as having occurred.

94. The Claimant and Mr Cromb had clearly concluded by 4 January 2021 (when Mr Cromb notified ACAS of the dispute) that the appeal outcome was not going to be sent by the Respondent or, at least, not within a reasonable time period. This was in circumstances where the Claimant had been told at the appeal hearing on 27 November 2020 that the appeal outcome would be sent in two weeks.

95. There is no evidence – at this preliminary stage – of the Respondent having made a specific decision not to inform the Claimant of the appeal outcome. I conclude that the Respondent might reasonably have been expected to communicate the appeal outcome by the end of January 2021 (a few weeks after the Claimant's last letter chasing up his appeal on 2 January 2021 and after the dispute had been notified to ACAS).

96. Accordingly, and on the preliminary assumption that the Claimant would succeed in showing that the complaints of race discrimination are "conduct extending over a period" (s123(3)(a) of the 2010 Act), I find that the time limit for the direct race discrimination complaints started to run from 31 January 2021 (by virtue of s123(4)(b) of the 2010 Act). This means that the three-month time limit for presenting the race discrimination claim (as extended for early conciliation) expired on 10 June 2021.

97. The Claimant's application to amend was made on 25 August 2021 and was granted by Employment Judge Self at the Preliminary Hearing on 10 February 2022.

98. On a strict application of the Judgment of the EAT in ***Galilee***, the race discrimination claim is to be treated as taking effect when permission to amend was granted on 10 February 2022.

99. However, that seems to me to do an injustice to claimants who may then be subject to the vagaries of and delays in the listing and determination of amendment applications (where they are made in writing). Consequently, having regard to justice and equity, I conclude that the date of the Claimant's written amendment application (25 August 2021) should be treated as the date for considering the issue of jurisdiction. This means that the Claimant's race discrimination claim was two months and two weeks out of time.

100. Accordingly, the Tribunal would only have jurisdiction to determine the claim if the Claimant establishes that it is just and equitable to extend time under s123(1)(b) of the 2010 Act, recalling that the Tribunal has a broad discretion and must take into account all relevant factors.

101. I have had regard to all relevant matters set out above and, in addition:

(1) The Claimant received the majority of the response to his DSAR on 9 April 2021 with the correspondence concluding on 4 June 2021. The deadline for the race discrimination claim (even assuming in the Claimant's favour that he would be able to show that all the race discrimination complaints are "conduct extending over a period) was 10 June 2021. The Claimant and Mr Cromb delayed a further two and half months before applying to amend. That is a long delay in the context of the strict statutory time limit of three months (plus the extension for ACAS early conciliation).

(2) The Claimant sets out the reasons for the timing of his amendment application in the letter from Mr Cromb to the Tribunal dated 25 August 2021.

(3) The Claimant states that he considered it preferable to wait until the conclusion of the DSAR process to formulate the amendment application so that any and all amendments could be dealt with in one application. That may well sufficiently explain why no amendment application was made before 4 June 2021 (which was still within the limitation period), but not the period thereafter.

(4) The reasons for the delay after 4 June 2021 are that Mr Cromb continued to have time constraints given his own workload. I have already noted that, in his letter of 6 April 2022, Mr Cromb refers to his workload being particularly bad between December 2020 and February 2021. There is no real explanation of any specific difficulties between 10 June 2021 and 25 August 2021 and, as such, the Claimant's explanation for the delay is not fully satisfactory.

(5) By 4 June 2021, the Respondent had cooperated with the Claimant's requests for information and the Claimant did not, thereafter, act promptly even though, by then, he knew of the facts which he relies upon as giving rise to a claim for direct race discrimination.

102. I then turn to the question of the prejudice to each party in my consideration of whether it would be just and equitable to extend time.

103. I accept that there is likely to be some forensic prejudice to the Respondent. It had no idea that there might be any complaint of race discrimination until 25 August 2021, nearly a year after the events leading to the Claimant's dismissal. The Claimant had not complained about race discrimination during the disciplinary or appeal process (nor, of course, in his ET1 Claim Form). Moreover, the Respondent points out that none of the decision-makers in respect of the Claimant's dismissal and appeal remain employed by the Respondent which is likely to make it more difficult for the Respondent to secure all relevant evidence in its defence of the race discrimination complaints.

104. However, there is another key point on prejudice. As a consequence of my decision on the original claims, they have all been dismissed for want of

jurisdiction. Therefore, the Respondent will not be required to defend those claims at a final hearing. However, if I extend time, it would be required to meet a claim which would otherwise be defeated by the limitation defence. This will cause the Respondent to incur both time and cost. I consider that this constitutes a significant prejudice to the Respondent.

105. On the other hand, I note that if I do not extend time, the Claimant is prejudiced by not being able to pursue his race discrimination claim, albeit that is always the case when considering whether or not it is just and equitable to extend time.

106. I have asked myself whether, if prevented from pursuing his race discrimination claim, the Claimant is being denied the opportunity of an obviously meritorious claim for race discrimination. I can, of course, only conduct a high level enquiry into the merits, having regard to the pleaded cases and any other information (per ***Edomobi***).

107. The Claimant points to various unsatisfactory and unreasonable aspects of the investigation, disciplinary and appeal process. However, unreasonableness – without more – does not create a case of race discrimination (see ***Madarassy v Nomura International plc*** [2007] ICR 867; as applied by the EAT in ***Chief Constable of Kent Constabulary v Bowler*** UKEAT/0214/16, per Simler J, at [97]). The Claimant has not, in his amended pleading, pointed to any clearly arguable facts from which a tribunal could well conclude that the disciplinary action taken against the Claimant was because of race. He points to detrimental treatment and to his protected characteristic. On the other hand, I note the Respondent's case that the Head Chef at the Clink Street restaurant was also subject to a disciplinary process in respect of the same allergen incident (but he resigned before the process concluded). I understand that he was not of Algerian origin and this may tend to undermine the Claimant's case about race discrimination. There is little more to be said, at this preliminary stage, about the potential merits; but this is not a case which has obviously good prospects of success.

108. Putting all of this into the balance and, in particular, the length of the delay, the lack of satisfactory explanation for it and the overriding and greater prejudice to the Respondent should I exercise my discretion in favour of the Claimant, I conclude that it would not be just and equitable to extend time.

109. Accordingly, the Tribunal has no jurisdiction to determine the race discrimination claim which falls to be dismissed.

110. As there are no claims which survive my decisions, there is no need for any case management orders and the dates for the final hearing will be removed from the list.

Employment Judge **McCann**

Date _31st January 2023____