EMPLOYMENT TRIBUNALS

Claimant: **Vicky Jones**

Respondent: **The College of St Barnabas**

Heard at: London South Employment Tribunal (at Croydon)
Remote Hearing (CVP)

On: 7 November 2022

Before: EJ McCann

Representation
Claimant: Ms Aujla (Counsel)
Respondent: Mr McCabe (Sherrards Employment Law Solicitors)

JUDGMENT

The Tribunal has jurisdiction to determine the Claimant's claim for unfair dismissal under section 111 of the Employment Rights Act 1996 as it was presented within the prescribed time limit, having regard to the effective date of termination on 23 December 2021.

REASONS

The Claims

1. By an ET1 Claim Form presented on 18 March 2022, the Claimant brings a claim for unfair dismissal and also refers to "discrimination on medical grounds" in respect of her employment by the Respondent and its termination.

2. The question of whether the Claimant has properly asserted a claim for discrimination in her ET1 (and, if so, what precisely that claim is) has yet to be addressed and, accordingly, case management directions are set out below.

Preliminary Issue

3. The effective date of termination ("EDT") is in dispute. The Respondent maintains that the EDT was 3 December 2021, with the Claimant asserting that it was 23 December 2021 (when she says she read the dismissal letter).

Accordingly, there is jurisdictional issue as to whether the unfair dismissal claim is time-barred under section 111 of the Employment Rights Act.

4. The final hearing (listed for 7 November 2022) was, therefore, converted to an open Preliminary Hearing ("PH"), by way of correspondence sent to the parties by the Tribunal on 31 October 2022, to deal with the jurisdictional issue of whether the Claimant's unfair dismissal claim was presented outside the statutory time limit, having regard to the EDT.

Documents & Evidence

5. The Claimant (via her T.U. representative at the Workers of England Union) was directed by the Tribunal to ensure that any evidence to which she wished to refer at this PH was copied to the Respondent by no later than Thursday 3 November 2022 and brought to the PH.

6. The Workers of England Union and the Respondent had liaised to agree and prepare a Bundle for use at the Final Hearing. The Respondent took the view that it would be cost-effective to use this Bundle for the PH, given that the parties had only been told on 31 October 2022 that the final hearing had been converted.

7. At the outset of this PH, Ms Aujla (Counsel for the Claimant) indicated that:

    7.1. The relevant individual at the Workers of England was not at work on 31 October 2022 and so the Tribunal's correspondence of 31 October 2022 was only seen on 1 November 2022, with Ms Aujla only having been instructed on Friday 4 November 2022.

    7.2. Accordingly, Ms Aujla had only recently managed to take instructions from the Claimant.

    7.3. Ms Aujla considered that a Witness Statement from the Claimant and, possibly, some further documents (not in the PH Bundle) may assist the Tribunal and, as such, she may wish to apply for an adjournment of the PH. The Claimant had not yet had a chance to review the Respondent's Skeleton Argument (provided by Mr McCabe by email of 9:37am on the morning of the PH).

    7.4. The Respondent indicated that any application for an adjournment would be resisted.

    7.5. I adjourned the PH for 20 minutes to allow Ms Aujla to take further instructions (including on the Skeleton Argument); and I indicated that it would be possible for the Claimant to give oral evidence on the narrow issue of jurisdiction even without a witness statement (no order for witness statements having been made by the Tribunal).

    7.6. On the PH resuming, Ms Aujla confirmed that the Claimant was not seeking an adjournment and was content to give her evidence orally.

8. The Claimant was sworn in and gave evidence. There was no witness evidence on behalf of the Respondent. I was taken to various (but not all)

documents in the PH Bundle (running to 151 pages); and the Skeleton Argument on behalf of the Respondent.

9. During the Claimant's cross-examination, she referred to emails between her and the Respondent on 23 December 2021. This led to a short adjournment and an application made on behalf of the Claimant for permission to adduce those emails into evidence (which was resisted by the Respondent). Having considered the emails and heard submissions, I gave permission to the Claimant to rely on the emails, given that they were highly relevant and necessary to a fair determination of the jurisdictional issue. My reasons for doing so are set out below.

The Facts

10. The Respondent is a residential care home for retired members of the clergy.

11. The Claimant's employment with the Respondent commenced on 15 September 2013. She was employed as a part-time Fundraising Assistant.

12. The Claimant was dismissed in December 2021 (the effective date of termination is in dispute).

13. It is not disputed that the Claimant's dismissal came about due to the approval by Parliament, on 22 July 2021, of the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021. The 2021 Regulations, in broad terms, required care homes regulated by the Care Quality Commission to make covid vaccination a condition of deployment for staff, unless the member of staff had a valid medical exemption. The Regulations provided that unvaccinated staff without a valid medical exemption were not permitted to enter a relevant care home with effect from 11 November 2021.

14. The Claimant had not been vaccinated and an issue arose as to whether she had sufficient proof of a valid medical exemption.

15. The documents placed before the Tribunal may or may not constitute the entirety of the evidence to be considered down the line at the full merits hearing. However, those documents evidence the following key chronology of events:

    15.1. The Claimant raised concerns with the Respondent about the requirement to be vaccinated by email dated 18 August 2021.

    15.2. On 3 September 2021, the Claimant was invited to an informal meeting to discuss her concerns, on 15 September 2021.

    15.3. On 21 September 2021, the Respondent emailed the Claimant referring to the meeting on 15 September 2021 and referring to her confirmation that she was in the process of obtaining a GP certificate to validate her medical exemption from vaccination; and referring to her suffering from stress and anxiety.

15.4. On 22 September 2021, the Respondent emailed the Claimant referring to the 2021 Regulations and the requirement for vaccination and referencing the fact that the Claimant would be permitted to "self-certify" her exemption status for a period of 12 weeks starting with the date of launch of the NHS Covid Pass system.

15.5. On 27 October 2021, the Respondent wrote to the Claimant noting that the 2021 Regulations required her to be vaccinated or to provide proof of a valid medical exemption; and invited her to a meeting to discuss the situation, noting that, if she continued not to be vaccinated in the absence of a valid medical exemption, "*a process will be commenced which <u>may</u> lead your employment being terminated*" [emphasis added].

15.6. On 29 October 2021, the Claimant submitted a formal grievance in which she referred to "*discrimination on grounds of disability / health condition*".

15.7. A meeting took place on 5 November 2021 to address the situation in respect of the Claimant's vaccination and/or medical exemption status and her linked grievance. She was accompanied by a trade union representative (from the Workers of England Union) who referred to the Union's access to advice from "our barristers' chambers".

15.8. On 9 November 2021, the Respondent emailed the Claimant an "outcome letter". Her grievance was not upheld. She was advised of her right to appeal the grievance outcome; and she was invited to a formal meeting on 10 November 2021, "*to discuss bringing your employment to an end*".

15.9. The Claimant replied by email later that day. She referred to her continuing concerns and referenced her understanding that people in her position were permitted to self-certificate until 24 December 2021. She also stated, "*it seems very likely that, as my employer, you will continue to proceed along the lines of <u>potential</u> dismissal*" [emphasis added].

15.10. The formal meeting was postponed to 17 November 2021. The Claimant was accompanied by a trade union representative who stated that "*should this result in Vicky's dismissal because you are adamant to follow guidelines and not the legislation….it results in this being built into a case, and taken to a tribunal*".

15.11. At the meeting on 17 November 2021, there was also discussion about the possibility of retaining the Claimant in employment until 24 December 2021 (on the basis that she was permitted to self-certify until then); and the Claimant suggested that she could work from home rather than be dismissed. The Respondent confirmed that they would clarify some issues with the Care Quality Commission regarding the ability to self-certify until 24 December 2021.

15.12. The Claimant's T.U. representative asked "*<u>if</u> you move for dismissal, will it be under the title of some other substantial reason*", to which the Respondent responded "*probably*" and it "*will be in touch and put it in writing*" and confirmed that, having contacted the Care Quality Commission, "*if there's a new angle, we'll explore it*".

15.13. At the meeting, the Respondent did not give a date or timeframe within which it would confirm the position to the Claimant.

Accordingly, I find that the Claimant left that meeting understanding that further enquiries would be undertaken by the Respondent with the Care Quality Commission which might save her employment (at least until 24 December 2021).

15.14. On 23 November 2021, the Respondent sent a letter to the Claimant (via email), stating that if she completed a self-declaration via the Department for Health and Social Care website by 26 November 2021, the Respondent would be "*happy for you [to] stay employed at the College up until 24 December 2021 and to remain employed by the College thereafter, if you can provide evidence of either a valid medical exemption, or evidence that you have been double vaccinated*". The Respondent also stated, "*If you fail to provide a valid self-certification form, as set out above, by 26 November 2021, you shall be served with a notice of termination for your employment*". The Claimant was notified of her right to appeal "this decision" within 5 days.

I, therefore, find that the Claimant ought reasonably to have understood that, if she did not provide a valid self-certification form by 26 November 2021, the Respondent would serve her with notice of termination of her employment. However, I also find that the Respondent did not tell her (1) what date the notice of termination would be served; nor (2) what date the termination of employment would take effect (i.e. whether it would be with notice or whether it would take immediate effect, but with a payment in lieu of notice).

15.15. On 26 November 2021, the Claimant emailed the Respondent stating that she wished to exercise her right of appeal. She also stated, that "*I am continuing to be pressured to complete the DHSC temporary form by 4pm today, and if I don't, <u>you will begin a process of unfairly dismissing me</u>*" [emphasis added] and "*…as you have even acknowledged <u>if</u> you dismiss me from my employment with The College of St Barnabas, I [sic] would be perfectly acceptable to come into the home as a visitor*". She asked the Respondent to contact her about the next steps for her appeal.

Accordingly, I find that the Claimant was expecting the Respondent to embark on a "process" of dismissal and her use of the word, "if", indicates that she did not yet think her dismissal was inevitable (albeit it was expected).

15.16. The Respondent sent the Claimant an email at 11:15 on 2 December 2021 with a letter attached. The letter dated 2 December 2021

stated, "*I now serve you with notice of termination of your employment. Your last day of employment is Friday 3 December 2021. You will be paid in lieu of your notice and will be paid for any accrued but untaken leave*". There was no evidence from the parties as to whether or when the payments in lieu of notice and accrued holiday were actually paid.

15.17. The documents in the bundle demonstrate that there was communication between the Respondent and the Claimant from 7 to 16 December 2021 (inclusive) relating to the Claimant's appeal. None of the emails make reference to the Claimant having been dismissed (the Claimant's right of appeal having been communicated to her in the letter of 23 November 2021, before the notification of dismissal).

15.18. On Friday 17 December 2021, the Respondent emailed the Claimant attaching 19 documents. The subject line of the email was "Documents submitted for appeal – 5 January 2022". The content of the email indicated that the Respondent had put together several documents in preparation for the appeal meeting on 5 January 2022. One of the attachments was the letter of dismissal dated 2 December 2021.

The Claimant asserts that the email of 17 December 2022 was the first time that she received the dismissal letter and that she only read the email and 19 attachments (including the dismissal letter) on 23 December 2021. I make findings on this below.

15.19. The Claimant's appeal was considered at a meeting on 5 January 2022. The appeal decision was provided in writing (undated); and the Claimant asserts that she received this on 13 January 2022, which was not disputed on behalf of the Respondent.

15.20. The Claimant contacted ACAS on 11 March 2022, in accordance with the requirements for early conciliation notification; and a Certificate was issued on 18 March 2022.

15.21. The Claimant presented her ET1/Claim Form to the Tribunal on 18 March 2022.

Emails between Ms Jones and Mr Erskine (23 to 28 December 2021)

16. I need to make findings about emails between the Claimant and Respondent on 23 and 28 December 2021 and how they came to be adduced into evidence.

Application for reliance on chain of emails (of 23 to 28 December 2021)

17. During her cross-examination, the Claimant stated that she had only received the letter of dismissal (dated, on its face, 2 December 2021) on 23 December 2021, when she read an email from the Respondent which had been sent to her on 17 December 2021 and which attached the dismissal letter (amongst 19 attachments).

18. The Claimant stated that she never saw the original email with the dismissal letter in her inbox; and that, upon realising (on 23 December 2021) that she had been dismissed, she emailed the Respondent. The Claimant stated that the Respondent's C.E.O. (Mr Monty Erskine) replied by email to state that the email with the letter notifying the Claimant of the termination of her employment had been sent to her.

19. Those emails were not in the agreed Bundle and Mr McCabe (for the Respondent) put to the Claimant that she had never provided copies of the emails. The Claimant said that she had provided them to the Workers of England Union for inclusion in the bundle.

20. Mr McCabe also put to the Claimant that she had "*only <u>now</u> raised the point that the email with the dismissal letter was not in her inbox*" [emphasis added]. The Claimant disputed this, stating that she had told Mr Erskine this in an email to him at around that time.

21. At this point of the Claimant's cross-examination, I observed to the parties that the emails between the Claimant and Mr Erskine on or around 23 December 2021 had been referenced in the Claimant's ET1 and ought probably also to have been disclosed by the Respondent.

22. I suggested that, at the end of the Claimant's evidence, we would take some time to see if the Claimant wished to locate and rely on the emails to which she had referred in her evidence. If so, I would give her the opportunity to forward them to Ms Aujla; who could then consider them and, if disclosable, provide copies to Mr McCabe and then let the Tribunal know whether the Claimant wished to seek permission to rely on this late disclosure.

23. At the end of the Claimant's evidence, she was released from her oath and she was permitted, if she so wished, to email Ms Aujla with the relevant emails and to speak to her about them. The hearing was adjourned to enable this to happen; and, during the adjournment, Ms Aujla disclosed the emails to Mr McCabe.

24. There was a chain of emails as follows: on 23 December 2021, an email from the Claimant to Mr Erskine and his response; on 28 December 2021, an email from the Claimant to Mr Erskine (stating, "*I have searched my inbox but cannot see that email at all. Obviously, it is a very important letter so I am sure you would have sent it to me but I have not received it in the post either*"); and an email of 11 July 2022, whereby the Claimant forwards those three emails to the Workers of England Union. Ms Aujla provided this chain of emails to the Tribunal.

25. When the hearing resumed, Ms Aujla made an application on behalf of the Claimant to rely on the chain of emails as being relevant and necessary to the determination of the jurisdiction issue.

26. Mr McCabe objected to their inclusion on the basis that the emails had been disclosed very late, when there had been ample opportunity for the Claimant to provide these emails sooner. He stated that it was not in accordance with the overriding objective to allow the Claimant to rely on the emails at this

late stage when the Respondent may have instructions to give on the emails which he could not now obtain. When asked by me what instructions would be necessary, Mr McCabe explained that the Respondent may wish to check with IT whether the email of 2 December 2022 had been sent from the Respondent's system to the Claimant.

27. Ms Aujla, in response, pointed out that the emails of 23 December 2021 were referred to in the Claimant's ET1 form and had been forwarded by the Claimant to her Union representative in July 2022 but, for some reason, had not then been provided onwards to the Respondent's solicitors but this should not be held against the Claimant.

28. I decided to permit the Claimant to rely on the chain of emails (of 23 and 28 December 2021) because:

    28.1. They were potentially of substantial relevance to the issue of when the Claimant was actually notified of her dismissal and would, therefore, be necessary for a fair determination of the jurisdiction issue.

    28.2. Mr Erskine, the Respondent's C.E.O., knew, as of 23 December 2021, that the Claimant was stating that she had not received the letter of dismissal of 2 December 2021 until the email of 17 December 2021, which she said she only read on 23 December 2021.

    28.3. The Respondent was also on notice, via the ET1, that the Claimant considered that she was only aware of her dismissal on 23 December 2021 and had emailed the Respondent on that date (receiving a response that same day).

    28.4. Accordingly, the Respondent ought itself to have searched for and disclosed these emails (or asked the Claimant for copies).

    28.5. The Respondent had had ample opportunity (since 23 December 2021) to seek information from its IT providers about whether its email of 2 December 2021 had been sent from its server to the Claimant's email account. However, that would not, in my view, assist with whether the email was actually received into the Claimant's email account. The Claimant did not dispute that the Respondent had sent the email of 2 December 2021. Her case is that the email did not arrive into her inbox and that the dismissal letter only arrived as an attachment to the email of 17 December 2021 (which she read on 23 December 2021).

    28.6. Accordingly, I did not consider that the Respondent was being ambushed; nor that further instructions from the Respondent would take matters very much further. I also did not consider that it would be proportionate to adjourn to enable further instructions to be sought, given that it was unlikely that the Respondent could shed much, if any, light on what had happened with the email of 2 December 2021 after it had been transmitted from the Respondent's IT system.

28.7. From the chain of emails, it was evident that the Claimant had forwarded the emails of 23 December 2021 to her T.U. representative on 11 July 2022. It was regrettable that the emails were then not forwarded on to Mr McCabe (if, indeed, they were not, which was not clear).

28.8. However, the Claimant's Union representative was not acting in the capacity of a legal representative and any failure to provide the emails of 23 December 2021 to the Respondent in July 2022 (or thereafter) should not be laid at the door of the Claimant.

28.9. In the final analysis, the overriding objective required the Tribunal to do justice to all parties and to conduct the hearing in the manner it considers fair, bearing in mind the relative lack of formality in the Tribunal's procedures (see Rule 41 of the ET Rules of Procedure 2013).

28.10. Given the potential importance of the emails of 23 December 2021 (if the Claimant's evidence was accepted, it might tend to demonstrate that she was not made aware of her dismissal until that date), I decided that they were relevant and necessary for a fair determination of the jurisdictional issue and that the Claimant would be permitted to adduce them into evidence.

28.11. However, I also considered that it was only fair to allow Mr McCabe to cross-examine the Claimant on those emails, if he wished. He took that opportunity and Ms Aujla was permitted to re-examine.

28.12. The Claimant was, therefore, recalled to give evidence under oath on this chain of emails and was cross-examined and re-examined on these emails.

Findings as regards chain of emails of 23 & 28 December 2022

29. On 23 December 2021, the Claimant emailed Mr Erskine. This was in response to the email of 17 December 2021 regarding her appeal. In her email of 23 December 2021, the Claimant stated that she had been going through her emails and there was a "*serious discrepancy*" – namely, "*among the letters attached is one dated 2nd December from yourself actually terminating my employment from 3rd December. I have never received this formal letter! This is the first time I have seen it, simply attached within an email from Friday 17th December providing copies of previous correspondence being submitted by yourselves for the appeal meeting in January. This I believe is not right for it to have been sent to me in this way, in amongst other documents*."

30. Mr Erskine replied (on 23 December 2021) to state that he had checked his email and the dismissal letter was sent on 2 December 2021 at 11:15am.

31. On 28 December 2021, the Claimant emailed Mr Erskine to say, "*I have searched my inbox but can not see that email at all. Obviously, it is a very important letter so I am sure you would have sent it to me but I have not*

received it in the post either. I have now seen it within the other documents emailed but was shocked and saddened to see your choice of outcome and the official termination of my employment given the reasoning which still makes no sense at all."

32. When cross-examined about this chain of emails, the Claimant accepted that the Respondent's email of 2 December 2021 (attaching the dismissal letter) may have been sent but said that she did not see it. She stated that she did not check her emails daily, that it was a busy time of year and that she had a very full email inbox (with 6 children). It was put to her by Mr McCabe that the email of 2 December 2021 may have been lost in the volume of other emails. The Claimant replied to say that, if that were the case, she would have found it when she looked for it, having been alerted to it. When she did look, it was not in her inbox.

33. Mr McCabe asked the Claimant whether, having then seen the letter of dismissal, she had a follow up call with her Union representative, she replied that she had her children at home; was trying to sort out Christmas and was trying to deal with her appeal as well.

34. In re-examination, the Claimant pointed out that 17 December 2021 was a Friday and that she read and responded to that email on Thursday 23 December 2021.

35. I find that the Respondent did send the email of 2 December 2021 to the Claimant attaching the letter of dismissal. However, I find that this was not received into the Claimant's email inbox. Whilst there is no explanation for this, I am able to take judicial notice of the fact that emails sometimes do not arrive into the recipient's email inbox and get lost "in the ether". Most people will have had experience of this.

36. There is no good reason to doubt the Claimant's evidence that the email of 2 December 2021 was never received into her inbox. Even before her appeal was heard (on 5 January 2022) and before she had notified ACAS of a dispute (on 11 March 2022), the Claimant was telling the Respondent that the email was not received into her inbox (see her email of 28 December 2021 to Mr Erskine). This is consistent with her oral evidence during the PH.

37. I accept the Claimant's evidence that the letter of dismissal (dated 2 December 2021) was only received into the Claimant's email inbox as an attachment to the Respondent's email of 17 December 2021 (sent at 16:00). That email had 19 attachments. I find that there was nothing in the subject line of that email or the wording of the email itself to alert the Claimant to the important attachment (at attachment #17); and I accept the Claimant's evidence that, with the Christmas holidays by then in full swing, with 6 children at home, she did not get the chance to read the email and attachments until 23 December 2021. This is consistent with her email of 23 December 2021 to Mr Erskine in which she states that she has been going through her emails and, for the first time, has seen the letter of dismissal, attached to the email from the Respondent sent on 17 December 2021.

Other relevant evidence

38. I also heard evidence about the circumstances in which the Claimant came to present her ET1 to the tribunal on 18 March 2022 and I make the following findings.

39. The Claimant started to get assistance from the Workers of England Union in around June 2021, when she made contact with them due to feeling pressure at work in relation to the requirement to be vaccinated against Covid.

40. The Claimant, in her evidence in chief, stated that she had no real contact with the Union between June and September 2021. She described their role as being more of a "safety net".

41. However, in cross-examination by Mr McCabe, it was put to the Claimant that her letter to the Respondent dated 18 August 2021 clearly referenced her legal rights, with references to the Equality Act and whistleblowing and other rights and that this indicated she must have had some legal advice and input.

42. The Claimant conceded that she did obtain assistance from the Union, but they are not lawyers. She accepted, looking at the membership details on the Workers of England Union's website, that membership entitled her to access free legal advice (p147 of the PH Bundle).

43. In her evidence, the Claimant stated that whilst she understood that dismissal was coming, she did not know when and she still believed her job would be saved. She accepted she was provided with support from the Union for her formal meetings and her appeal.

44. I note that, from the notes of the meeting on 5 November 2021, there was reference to the Union having access to legal advice (from "our barristers chambers"); and the Claimant herself stated that she had sought advice from her Union about the vaccination requirement; and, in the formal meeting on 17 November 2021, the Claimant's Union representative referred to the likelihood of taking the case to a tribunal should she be dismissed.

45. I find that the Claimant obtained considerable support and assistance from her Union and that she received advice on her potential dismissal. Given the language used in the Claimant's letter of 18 August 2021, I find that there was some legal advice being sought in the background in connection with the Claimant's situation.

46. The Claimant stated that, by the time of the appeal, England was back into lockdown and she had her children at home whilst also trying to work at a friend's café. She accepted that she knew of the right to bring a claim to an employment tribunal, that she was required to contact ACAS first to enable her to go to tribunal but she stated that she did not know there was a specific timeline or date by which she had to do something; and she stated that whenever she wanted to contact ACAS, that filled her with dread and she eventually did it at the beginning of March.

47. In cross-examination, the Claimant accepted that she could have undertaken research to find out more about the time limit and, with hindsight, she could and should have asked about this.

48. Finally, the Claimant stated that, in February 2022, her father-in-law in Egypt became gravely ill and she, her husband and children visited for a week. She then had to support her husband, in the lead up to her father-in-law's death, on 25 March 2022. She contacted ACAS on 11 March 2022, the EC Certificate was issued on 18 March 2022 and she presented her claim that same day.

49. Whilst the Claimant referred to ill-health and to feeling under pressure and to anxiety and stress, there is no medical evidence before the tribunal as to her state of health.

50. I find that the Claimant was feeling distressed and under pressure but this did not prevent her from fully engaging with the dismissal and appeal process (both attending meetings and corresponding with the Respondent), nor did this prevent her from contacting ACAS.

51. Consequently, I find that the Claimant knew of her right to bring a claim for unfair dismissal to an employment tribunal in November 2021, even before she was dismissed; and that she had the opportunity to access advice and assistance from and/or via the Union, including advice from a barristers' chambers to which the Union had access. I also find that she had the ability to undertake research and showed herself well able to do so.

52. I find that, in the period December 2021 to 11 March 2022, the Claimant was fully aware of the requirement to contact ACAS to get the ball rolling but, whenever she thought about doing so, put this to one side with a feeling of dread. This was exacerbated by the lockdown, having her children at home, and the deteriorating health of her father-in-law.

53. I find that the Claimant eventually bit the bullet and contacted ACAS on 11 March 2022. I find that, whilst the Claimant was feeling anxious and stressed throughout the period (indeed, from August 2021 onwards), there is no medical evidence to suggest that this substantially impeded her ability to engage with the dismissal or appeal processes, nor the steps she would need to take in the litigation.

54. What this means for the jurisdictional issue, under the applicable law, is dealt with below in the Concluding section.

Relevant Law

55. I have had full regard to the closing submissions, made orally, by Mr McCabe and Ms Aujla and the Respondent's Skeleton Argument and the cases referred to therein.

56. 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) ….

57. By section 97 of the Employment Rights Act 1996,

(1) Subject to the following provisions of this section, in this Part, "effective date of termination" –

(a) In relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,
(b) In relation to an employee whose contract of employment without notice, means the date on which the termination takes effect
(2) ….

58. When considering when a summary dismissal actually takes effect for the purposes of section 97(1)(b) of the 1996 Act, it is necessary to identify when the employee was made aware of the termination.

59. Where an employee is informed that she has been summarily dismissed by letter, then the EDT will be the date on which the letter is received and read.

60. In *Brown v Southall and Knight* [1980] ICR 617, the EAT held that a summary dismissal communicated to the employee for the first time in a letter addressed to his or her home will not take effect until the letter reaches the employee or until he or she has had a reasonable opportunity to read it.

61. *Brown* was applied by the EAT in *McMaster v Manchester Airport plc* [1998] IRLR 112. The EAT held that, when examining whether a dismissal has been communicated to an employee, a tribunal would be likely to assume that letters usually arrive in accordance with the normal course of post; and that people are to be taken, normally, as opening their letters promptly after they have arrived at their place.

62. However, it is clear that the key question is when the employee is actually notified of his or her dismissal.

63. In *Gisda Cyf v Barrett* [2010] ICR 1475, the Supreme Court considered and approved *Brown* and noted that the tribunal at first instance had not erred in law in taking the claimant's specific circumstances into account when considering whether she had had a reasonable opportunity to discover the contents of the letter of dismissal; and the fact that she could have discovered the letter's contents over the weekend (when she was away visiting her sister, who had just had a baby) was just one of the factors to be looked at. The Supreme Court observed that an employer who wants to be certain that an employee is aware of a dismissal always has the option of dismissing him or her face-to-face.

64. Although not directly addressed by the Court of Appeal or Supreme Court in *Gisda Cyf v Barrett*, in the EAT, Bean J held that, "where a decision to dismiss is communicated by letter sent to the employee at home and the employee has neither gone away deliberately to avoid receiving the letter nor avoided opening and reading it, the effective date of termination is when the letter is read by the employee, not when it arrives in the post".

65. As regards the law on section 111 of the 1996 Act:

(1) There are two limbs to the section 111 formula to be considered:

i. Firstly, the claimant must show that it was not reasonably practicable to present her claim in time – she 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 dong 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.

(2) The two limbs must be separated out with clear findings made in respect of each; 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.

(3) "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).

(4) 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)/

(5) 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 she 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).

(6) Ill-health or disability can constitute a sufficiently serious impediment as to render it "not reasonably practicable" to comply with the primary time limit (*Wall's Meat Company Limited v Khan* [1978] IRLR 499, per Brandon LJ). However, whether this justifies a conclusion that it was "not reasonably practicable" will depend on all the circumstances. Accordingly, the tribunal must reach clear factual findings as to:

i. The nature of the illness or disability;
ii. The extent of its impact on the claimant's ability to embark on litigation.

These findings must be made in respect of the entire period, but with particular focus on the later stages of the limitation period, reflecting the reality that, in most cases, that is when litigants focus their minds on lodging a claim (*Schultz v Esso Petroleum Ltd* [1999] IRLR 488 (at 1210A-D, per Potter LJ).

(7) Where a claimant seeks to rely on their 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*); and any ignorance or mistake will not be reasonable if it arises from the fault of the claimant in not making such enquiries as she should reasonably in all the circumstances have made (per Brandon LJ, at 61B).

(8) 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.

(9) 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]).

Discussion and conclusion

When was the effective date of termination?

66. I have concluded that the Claimant was notified of her dismissal on 23 December 2021 when she read the email from the Respondent of 17 December 2021 to which the letter of dismissal (dated 2 December 2021) was attached. Consequently, I conclude that the EDT was 23 December 2021.

67. I have reached this conclusion because:

(1) At the last meeting (prior to dismissal) with the Claimant (on 17 November 2021), there was some discussion about the possibility of her employment continuing on until 24 December 2021 (by reason of guidance from the CQC about the possibility of self-certifying a medical exemption from vaccination up to that date).

(2) At the end of that meeting, the Respondent undertook to make enquiries on that specific point.

(3) Therefore, in the Claimant's mind, I find that she had the date of 24 December 2021 in mind as the most likely date for any dismissal.

(4) In the Respondent's letter of 23 November 2021, the Claimant was given a chance to provide a valid self-certification form (by 26 November 2021). She was told that, if she did not, notice of termination would then be served. The Respondent did not tell the Claimant what date the notice of dismissal would be served nor what date any dismissal would take effect.

(5) On 23 November 2021, the Claimant referred to a "process" of dismissal.

(6) I find, therefore, that the Claimant did not have a specific date in mind by which she would expect to hear from the Respondent and that she thought, if she was going to be dismissed, it was quite likely that this would take effect on 24 December 2021.

(7) Whilst I have found that the Respondent did send the Claimant a letter of dismissal dated 2 December 2021 via an email on that date, I have also found that the Claimant did not receive that email; and that the letter of dismissal was only received into her email inbox attached to an email of 17 December 2021. I have found that the Claimant did not read the email of 17 December 2021 or its attachments (including the letter of dismissal) until 23 December 2021.

(8) There was nothing in the emails between the Claimant and Respondent between 7 and 17 December 2021 to alert her to the fact that she had already been formally notified of her dismissal; and the Respondent had not told her to expect any notice of dismissal by any specific date (other than that it would be after 26 November 2021 if she did not serve a valid self-certification of her medical exemption). On 23 November 2021, she had been notified of her right of appeal against the decision to require her to provide a valid "self-certification". This was before any notice of dismissal was given and so the Claimant was focussed on the appeal.

(9) I conclude that the Claimant did not deliberately nor unreasonably avoid reading the email of 17 December 2021. She, entirely reasonably, thought that email was about her appeal which was not due to be heard until 5 January 2022. Moreover, this was the beginning of the Christmas holidays and her six children were at home.

(10) In those specific circumstances, I conclude that the letter of dismissal only reached the Claimant on 17 December 2021 and that she only had a reasonable opportunity to read that letter by 23 December 2021, when she did read it.

68. It follows that, having regard to the EDT of 23 December 2021, the fact she notified ACAS of a dispute on 11 March 2022, an EC Certificate was issued on 18 March 2022, and she presented her claim on 18 March 2022, that her claim was presented within the statutory time limit and the Tribunal has jurisdiction to determine her claim for unfair dismissal.

69. I note that, even if the EDT is taken to have been on 17 December 2021 (when, on my findings of fact, the Claimant first received the dismissal letter dated 2 December 2021), her claim was still presented in time (having regard to the extension of time for ACAS early conciliation); and so the tribunal would still have jurisdiction to determine her unfair dismissal claim.

Alternative finding on section 111 (if EDT was 3 December 2021)

70. If am wrong about the EDT and it was 3 December 2021, as maintained by the Respondent, then the notification to ACAS on 11 March 2022 was already beyond the three month time limit for presenting the Claimant's claim. The deadline for her claim would, therefore, have been 2 March 2022. Consequently, on that basis, the Claimant's ET1 was presented 16 days' late.

71. Since I have heard all of the evidence relevant to the question of jurisdiction under section 111 of the 1996 Act, I have also reached alternative conclusions on the basis of an effective date of termination of 3 December 2021.

72. I would have found that the Claimant's ET1 was *prima facie* out of time (by 16 days) and that she has not shown that it was not reasonably practicable to present her claim in time. This is because:

(1) The Claimant had access throughout to advice and assistance from the Workers of England Union which, in turn, had access to legal advice from barristers' chambers;

(2) The Claimant knew of her right to bring a claim to a tribunal; the need to contact ACAS in order to do so and that there was time frame in which to do so but did not know what that was.

(3) I accept that there was a lot going on for the Claimant during the relevant period (including, as for many people, the lockdown due to Covid and the fact that this meant the Claimant's children were not at school). However, I conclude that the Claimant's lack of precise knowledge about the time limits was not itself reasonable because she did not make the enquiries she ought to have made and which she could easily enough have made, either via online research or via her Union (which had access to expert free legal advice, to which she was entitled as a member).

(4) The evidence clearly shows that the Claimant was able fully to participate in the dismissal and appeal processes (via meetings and in writing) and that she was capable of doing the necessary research in order to get all her ducks in a row. I do not consider that the Claimant has adduced sufficient evidence that her mental state or her father-in-law's deteriorating health demonstrate that it was not reasonably feasible for her to contact ACAS sooner, obtain the EC Certificate sooner and then present her ET1.

73. Accordingly, if the Claimant's EDT was 3 December 2021 (rather than 23 December 2021, as I have found), I would have dismissed her claim for want of jurisdiction since her claim was presented to the tribunal outside the statutory time limit and she was not able to demonstrate that it was not reasonably practicable for her to present her claim in time. I, therefore, would not have needed to consider the second limb of the test (under section 111(2)(b) of the Employment Rights Act 1996).

Disposal

74. Having found that the Claimant's EDT was 23 December 2021, her claim for unfair dismissal is in time and can, therefore, proceed to a final hearing.

75. Case management orders are set out below.

CASE MANAGEMENT ORDERS

Employment Tribunals Rules of Procedure Rule 29

76. Having discussed possible next steps in the litigation with the parties at the PH, the following directions are made (to be complied with ahead of a Preliminary Hearing for Case Management which the Tribunal will list in due course).

77. The Claimant may have presented a claim for discrimination. Ms Aujla confirmed at the PH that the Claimant believed that she had included a claim for disability discrimination in her ET1. It has yet to be determined whether the Claimant has properly presented a claim for discrimination within her ET1 (and, if so, what precisely that claim is).

78. The following case management orders are made:

Further Information

The Equality Act 2010 says that a person has a disability if they have a physical or mental impairment that has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

There is more information about this here:
Disability: Equality Act 2010 - Guidance on matters to be taken into account in determining questions relating to the definition of disability (HTML) - GOV.UK (www.gov.uk)

(1) **<u>Within 21 days</u>** of this Decision and Reasons being sent[1] to the parties, the Claimant is to confirm whether she is bringing a claim for disability discrimination.

If she is, then (**<u>at the same time</u>)** (that is, within 21 days of this Decision and Reasons being sent to the parties):

(2) the Claimant must state what physical or mental impairment(s) she relies on.

Physical or mental impairments include, for example, sensory impairments, physical or mental health conditions, developmental or learning disabilities and impairments produced by injuries.

(3) the Claimant must provide **brief details** of the following information about the impairment(s) relied on:

(a) How long has the Claimant had this impairment?

(b) At the material date (that is, the date of the alleged act(s) of discrimination), what were the effects of the impairment on the Claimant's ability to carry out normal day-to-day activities?

The Claimant should give clear examples. If possible, the examples should be from the time of the events the claim is about.

> *In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interview, preparing written documents, and keeping to a timetable or a shift pattern.*

(c) Give the dates when the <u>effects</u> of the impairment(s) started and stopped.

(d) If the effects had lasted less than 12 months at the time of the alleged act(s) of discrimination, why does the Claimant say they were long-term (viewed at that time)? For example, were the effects the result of a progressive, recurring or fluctuating condition, or were the effects likely to last for 12 months?

(e) Has the Claimant had medical treatment, including medication? If so, what and when?

(f) Has the Claimant taken other measures to treat or correct the impairment? If so, what and when?

[1] That date is to be found at the bottom of this document.

(g) What would the effects of the impairment have been without any treatment or other measures? The Claimant should give clear day-to-day examples, if possible.

(h) Any other information the Claimant relies on to show that she had a disability at the relevant date(s).

(4) the Claimant must provide **brief details** of the following matters (by reference to the contents of her ET1):

(a) What type of disability discrimination complaint she has asserted (for example, direct disability discrimination or failure to make reasonable adjustments, or disability-related harassment etc).

(b) For each type of disability discrimination complaint that the Claimant says she has asserted in her ET1, she must give brief details in writing of what she says happened, to include:

i. The date of the act of discrimination;

ii. The name of the person doing it;

iii. What that person did and where (if relevant);

iv. Why this is said to constitute disability discrimination;

v. The identity of any appropriate comparator.

(c) if the Claimant makes a complaint of failure to make reasonable adjustments, she must state in writing (by reference to the contents of her ET1):

i. What it is about the Respondent's way of doing things (referred to as a provision, criterion or practice or "PCP") that has put the Claimant at a substantial disadvantage compared to a non-disabled person;

ii. How the Claimant is or was disadvantaged, in what way and to what extent;

iii. What the Claimant says the Respondent should have done to prevent the disadvantage (that is, what reasonable adjustments should have been made);

iv. Whether the Claimant says the Respondent knew that she was disabled and, if so, when and how the Respondent knew; or

v. Whether the Claimant says the Respondent should have known that she was disabled and, if so, why it should have known this.

(5) The case is to be listed for a Preliminary Hearing for Case Management, as soon as possible after the Claimant has provided the **Further Information** (as ordered in (1) to (4) above).

A Final Hearing for the unfair dismissal claim and any other claim that is allowed to proceed can be listed at the Preliminary Hearing for Case Management at which further case management orders can be made.

(6) The parties must seek to agree an Agenda for Case Management, at least 7 days before the date listed for the Preliminary Hearing for Case Management.

If any of these orders is not complied with, the Tribunal may (a) waive or vary the requirement; (b) strike out the claim or response or part of it; (c) bar or restrict participation in the proceedings; and/or (d) award costs in accordance with the Employment Tribunals Rules of Procedure 2013. Anyone affected by any of these orders may apply for it to be varied, suspended or set aside.

Employment Judge McCann

Date: 25th November 2022