EMPLOYMENT TRIBUNALS

Claimant: **Mr Augustine Lebbie**

Respondent: Saint-Gobain Building Distribution Limited, t/a Jewson

Heard at: **ET London South via CVP** **On: 14 February 2023**

Before: **EJ Swaffer**

Representation
Claimant: In person
Respondent: Ms A Beech, Counsel

RESERVED JUDGMENT ON A PRELIMINARY ISSUE

1. The claim for unfair dismissal pursuant to the Employment Rights Act 1996 (ERA) is dismissed for want of jurisdiction.
2. The claim for unlawful deductions from wages pursuant to the ERA is dismissed for want of jurisdiction.
3. The claims for direct disability discrimination, harassment related to disability, direct race discrimination, harassment related to race, direct sex discrimination, harassment related to sex, and victimization were made in time pursuant to Section 123(1)(b) Equality Act 2010 (EqA) and those claims therefore proceed.

REASONS

Introduction

1. The respondent designs, manufactures and distributes building materials to the building trade via a nationwide network of branches. The claimant was employed by the respondent as a senior customer service adviser in its Maidstone branch from 20 September 2019 until 18 December 2020, when he was dismissed. On 18 December 2020 the claimant raised a grievance, which the respondent also treated as an appeal against dismissal; these were heard on 21 January 2021. On 15 February 2021, the outcome of the grievance was determined. Early conciliation started on 20 February 2021

and ended on 3 April 2021. The claim form was presented on 20 September 2021.

2. The claim is about what the claimant says were multiple incidents of discrimination, bullying and harassment, a discriminatory selection for redundancy, and a claim for an unpaid sum. The respondent denies that the claimant was unfairly dismissed, and states that the claimant was dismissed for a fair reason (redundancy) or some other substantial reason. It contends that the redundancy process was fair. It denies any money is owed to the claimant. It denies any discrimination, bullying or harassment.

3. The purpose of today's preliminary hearing was:
    a. to decide whether the Tribunal has jurisdiction with regard to the claim for unfair dismissal. It is accepted that the claimant does not have the two years' service required by Section 108(1) ERA.
    b. To decide whether the Tribunal had jurisdiction to hear any of the claims pursued by the claimant or whether they were out of time.

4. I explained that the purpose of the preliminary hearing was not to consider the full merits of the claims. I identified the issues to be decided today as follows:

    1.1 Does the Tribunal have jurisdiction to hear the unfair dismissal claim pursuant to the ERA as the claimant does not have two years' service? Does the claim fall within one of the exceptions in Section 108(2)-(5) ERA?

    1.2 Were the discrimination and victimisation complaints made within the time limit in Section 123 EqA? The Tribunal will decide:

        1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
        1.2.2 If not, was there conduct extending over a period?
        1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
        1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
            1.2.4.1 Why were the complaints not made to the Tribunal in time?
            1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

    1.3 Were the unfair dismissal (if the Tribunal has jurisdiction) and unauthorised deductions complaints made within the time limit under Sections 23 and 111 ERA? The Tribunal will decide:

        1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination or date of payment of the wages from which the deduction was made?

1.3.2 If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

1.3.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.3.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

5. I heard sworn evidence from the claimant. The respondent did not call any witnesses. I considered a bundle of 56 pages. The claimant mentioned another, larger, bundle of approximately 156 pages; Ms Beech explained that this was being prepared in relation to the final hearing. I was not provided with that larger bundle. I was also provided with the claimant's witness statement dated 6 February 2023, and copies of two WhatsApp exchanges between the claimant and colleagues A and M, one of which (with M) was provided during the hearing. I was provided with a coronavirus timeline produced by IFG, Case Management Orders by Employment Judge Barker made on 7 October 2022, and a record of a preliminary hearing by Employment Judge Harvard on 3 February 2023.

6. Due to the shortness of time, at the end of the hearing I asked the parties whether they wished to make written submissions. Ms Beech was keen to make oral submissions, whilst the claimant preferred to make his submissions in writing. Ms Beech began her oral submissions, but due to technical difficulties (which had also occurred during the main part of the hearing) she was unable to complete them orally. I agreed that she could complete her submissions in writing. I ordered that Ms Beech should provide her submissions by close of business on 14 February 2023, and due to the claimant's objections to my original proposal, I ordered that he should provide his submissions by 9am on 17 February 2023. Both parties agreed to this proposal.

Preliminary matters

7. Ms Beech provided her written submissions on 14 February 2023 as ordered, and the claimant provided his written submissions before 9am on 17 February 2023 as ordered. In his submissions, the claimant made a number of allegations about Ms Beech's professional conduct during the preliminary hearing. Ms Beech responded by email dated 17 February 2023, refuting his allegations.

8. I do not accept the allegations made by the claimant about Ms Beech's conduct being unprofessional. Ms Beech conducted herself appropriately during the preliminary hearing and in the contents of her written submissions. I find that the claimant's allegations are most likely linked to his lack of experience in litigation. I find that Ms Beech was seeking merely to act on instructions and to present her client's case during the hearing and in her submissions.

9. In his written submissions, the claimant referred to documents which were not provided to me during the hearing. I did not therefore take account of his references to those documents in reaching my decision.

10. In his written submissions, the claimant also appeared to seek to have the respondent's response struck out. Given that this matter was not raised during the preliminary hearing itself, and that the respondent therefore has not had an opportunity to respond to any such application, and that I did not hear any related evidence, I have not dealt with the possibility of an application for strike out in this decision. It will be a matter for the claimant whether he wishes to seek to make an application for strike out pursuant to Rule 37.

11. As a point of clarification, it is incorrect when the claimant submits that Employment Judge Barker "unconditionally agreed" that his claims of sex and disability discrimination "are within reasonable time". Employment Judge Barker's Orders are clear at paragraphs 2, 5, and 47 that there would be a preliminary hearing to decide whether his claims were out of time and whether the time limits for presenting them could be extended to allow the claims to go ahead.

Findings of fact

Unfair dismissal Section 98 ERA - jurisdiction

12. The claimant spoke to his trade union representative in November 2020 prior to his dismissal, and at that point he understood it was possible to claim unfair dismissal on the basis of race. He believed that he had been dismissed due to his claimed protected characteristics of race and disability.

13. I explained the differences between a claim for unfair dismissal under the ERA which ordinarily requires two years' service, and a claim for race discrimination on the basis of dismissal under the EqA. The claimant does not have two years' service. I find that the claimant, as a litigant in person, may not appreciate that it is possible to claim direct race discrimination on the basis of his dismissal, and that such a claim is brought under the EqA which does not have a minimum service requirement, rather than the ERA which does. This finding is supported by his witness statement, where the claimant states "the reason for my claim is racism and discrimination on a number of grounds". In written submissions he stated that "wherever race is an issue in relation to dismissal I believe an exemption can be made". He also submitted that dismissal on the basis of discrimination is automatically unfair; dismissal on the basis of discrimination is not one of the automatically unfair reasons for dismissal under the ERA. Again, I find that in making these submissions the claimant is likely to be unclear as to the distinction between the ERA and the EqA in the context of dismissal.

Time limits – ERA and EqA

14. I find that the claim form was presented out of time. The claimant has not been able to provide the dates for the majority of his allegations against the respondent. He gave inconsistent evidence about when the prejudicial treatment by the respondent ended. In his claim form the claimant stated that such treatment stopped three months before his dismissal (page 9). In evidence, he denied that the prejudicial treatment stopped three months before his dismissal, then when pressed stated that the "bulk" of such treatment stopped three months before his dismissal, and that the incidents were less frequent in the last three months of his employment. In his

witness statement he alleges that he was threatened during a phone call with J D-T on 18 December 2020, shortly after he was dismissed. When asked directly whether that phone call with J D-T was the last incident of which he complained, the claimant said "I can't say yes or no". However, when asked he did not raise any allegations of any subsequent incidents.

15. Therefore, in the absence of any evidence to the contrary, I find that the date of the last act or omission complained of by the claimant is 18 December 2020. I therefore find that the last day for presentation of the claim was 3 May 2021, taking into account the early conciliation extension. I do not make any findings at this stage about whether there was conduct by the respondent extending over a period or a succession of unconnected or isolated specific acts as I consider that it will be necessary to hear evidence on each of the alleged acts or omissions to make such a finding. I find that there was a delay of some 4½ months in presenting the claim.

16. The claimant claims that the respondent had promised to pay him £500 "as a goodwill gesture" during his last interview on 18 December 2020, but then retracted that offer by phone the same day (the call with J D-T referred to a paragraph 14 above), sometime after the claimant had been dismissed and was at home. The claimant said he had "exaggerated" the timing of the withdrawal of the offer in his claim form. Insofar as the claim relates to unauthorized deductions, the claimant's last payslip is dated 28 January 2021. Three months from 28 January 2021 is 27 April 2021. With an early conciliation extension, the last day for presenting a claim for unauthorized deductions was 8 June 2021. I find that there was a delay of just over 3 months in presenting the claim insofar as it relates to unauthorized deductions.

17. The claimant explained the reasons for the delay in presenting the claim form. In summary, his reasons are related to his ignorance and lack of familiarity with the Tribunal and its procedures, his fears of retaliation by employees of the respondent should he present a claim, his anxiety and "shattered confidence", and the impact of Covid19. I deal with each of these in turn.

Ignorance

18. In his witness statement, the claimant stated that when the alleged incidents of discrimination were taking place during the course of his employment, he was not knowledgeable about the Tribunal or its procedures, and that this was "coupled with a desire not to lose my job at the branch I turned a blind eye to too many discriminatory acts against me". I find that whilst the claimant may not have been familiar with the Tribunal, he was aware that it was possible to take some form of action in the face of perceived discrimination, given his reference to "turning a blind eye" and his concerns about possibly losing his job if he made a complaint.

19. I find that the position in terms of the claimant's knowledge of the possibility of making a claim had changed by November 2020. The grievance is dated 25 November 2020, and states that it was written "a couple of days before I was informed that I was a candidate to be made redundant" (page 27). The claimant accepted that when he wrote his grievance, he was aware that

he could bring legal proceedings against the respondent if he believed he had been subjected to racism, but stated that he did not know the procedure to do so. The grievance refers to the EqA (page 28). In his covering email to the grievance (page 25) the claimant states "as I've mentioned during my consultation I have external organisations advising me as to what steps I should take so I await your response before I decide [what] my next step will be". I find, and the claimant accepts, that he had taken steps to research discrimination law, he states by phoning a related charity that he found online, and prior to this he discussed his situation with a friend. This happened shortly before he was dismissed. The charity advised the claimant to submit a grievance because what he was alleging was "in breach of the EqA", and explained the EqA to him. I find on the balance of probabilities that it is unlikely that the claimant would have been able to refer specifically to the EqA in the grievance without having some knowledge of that legislation and the related rights, although I also find that he may not necessarily have known about the Tribunal at that stage.

20. The claimant spoke to his trade union representative before he was dismissed, probably in early December 2020. The claimant accepted that his trade union representative mentioned that it would be possible to "take it to the Employment Tribunal", but the claimant said that he "left it". The claimant's evidence was also that whilst he knew about ACAS and had spoken to ACAS prior to his dismissal, he was not aware of the Tribunal. I find that by early December 2020 the claimant was aware that the Tribunal had a role in situations such as the situation he claims he experienced with the respondent.

21. The claimant also spoke to the Citizens Advice Bureau (CAB) (page 9), and said that the CAB "told me I was doing the right thing", and said they were "glad your case is within the time frame. Many people are not able to bring claims". When asked further about his discussions with the CAB about time limits, the claimant said he was told there is "not too much emphasis on time limits when a crime takes place", given the wish to treat people who bring claims "sympathetically". He said that the CAB told him that "most people say [the time limit is] three months, but you have a year if there is trauma".

22. I find these statements to be incongruous. On the one hand the claimant reports that the CAB told him they were glad he was within the time limit, and they also said many people could not bring claims. There is no such period of a year if there is trauma. I find it very difficult to accept that the CAB would have advised the claimant in the way that he suggests; I find that it is likely that the claimant misunderstood the advice he was given by the CAB about time limits. I find that the statements regarding the claim being in time and people not being able to bring claims imply that the CAB told the claimant about the time limits, and also that failure to comply with them could prevent a claim from being brought. This finding is supported by the statement in the claim form (page 10) that employers will "stop all racial and prejudicial treatment three months prior to dismissal with the notion that the unfortunate employee in this case which is myself will not be able to bring them to justice". It is difficult to marry this statement with what the claimant states he was also told about there not being too much emphasis on time limits. Given the significance of the time limits in employment claims and the amount of related case law, on the balance of

probabilities I find it very unlikely that the claimant would have been advised by the CAB that the Tribunal does not place "too much emphasis on time limits". I find that the statement in the claim form quoted above shows a clear understanding of the relationship between the last act or omission complained of and the need to bring a claim within three months.

23. The claimant said that ACAS "probably did mention the time limits, it is all a blur". I find that it is likely, on the balance of probabilities, that ACAS did mention time limits to the claimant when he contacted them about early conciliation. I find, given the claimant's research and contact with a number of organisations (trade union, charity, CAB, ACAS), that he would have been told about the time limits for presenting a claim to the Tribunal. This finding is supported by the claimant's own evidence when he said "I may have been given the necessary information, but I don't know if I processed it".

24. The claimant accepted that by 20 February 2021, when early conciliation was started, he knew that early conciliation was needed to bring a claim before the Tribunal. I find that, as a result of his research and contact with organisations including the charity, the CAB, his trade union, and his subsequent conduct, the claimant knew that it was necessary to engage with ACAS and early conciliation prior to bringing a claim before the Tribunal. He began early conciliation within the time limits, which supports this finding. I find that the claimant was fully aware of the need to contact ACAS, and when such contact should be made. I find that by his awareness of that need, and his own evidence that he "may have been given the necessary information", by 20 February 2021 the claimant was aware of the links between contacting ACAS and the Tribunal process.

25. The claimant said that he sought advice when drafting the claim form, he "called many people" including solicitors, although he had no help or advice in the actual drafting of the claim form.

26. I find that as the claimant was clearly aware of the need for early conciliation with ACAS, presumably as a result of his research and discussions including with the charity, his trade union representative, the CAB, and ACAS itself, he ought reasonably to have known about the time limits for presenting a claim to the Tribunal. He started early conciliation within the relevant time limit. I find that the claimant's evidence about his knowledge of the time limits was at times contradictory. I do not accept that the claimant was reasonably ignorant of the relevant time limits, given his contact with relevant organisations and his commencement of early conciliation in time.

Fear of retaliation

27. The claimant alleges that he was threatened by his then manager CF (threats to shoot him, threats to his life, and to his family) at some point in mid November 2020. He also alleges that CF said he was "thinking of a way of poisoning me and blaming it on Covid19". The claimant alleges that the assistant branch manager H threatened that head office would "flush me down the toilet"; he believes this happened shortly after he returned to work from furlough. The claimant said he interpreted this as a threat on his

life/of physical harm if he made a complaint. He said he believed that this threat was in relation to what might happen after leaving the respondent.

28. The claimant sent his email setting out his grievance less than an hour after he was dismissed; he said he did not send it before he was dismissed due to his fear of retribution. He said that hours after his final redundancy consultation at which he was dismissed, JD-T, a member of the respondent's HR team, called him and threatened him along the lines of "you may sue us, but we know where you keep your car" which he interpreted as a threat of vandalism. The claimant accepted that there was no reference to any threats of violence in his grievance. He accepted that his grievance did not include many of the incidents which he now alleges took place.

29. The claimant said the threat to his safety "carries on to this day". He believed the risk to himself was now higher than it was when he was dismissed, on the basis of the things he was told would happen if he brought a claim. However, he also said in evidence "as time has gone by, as my fear of retribution becomes less, I recall more of what happened". I note the contradictions in the claimant's evidence. The claimant has provided no evidence that he has been threatened by the respondent or any of its employees in the period of almost 16 months since he presented his claim. I find it difficult to ascertain the basis for his belief that any threat to his safety is now greater because he has brought a claim, when there is no evidence of any such harm or threats to the claimant since September 2021 when the claim was presented, or since early conciliation was started in February 2021. I find it very difficult to reconcile this absence of any evidence of threats or harm with his assertion that the risk to his safety has in fact increased since his dismissal. Both cannot be true.

30. I cannot accept the claimant's evidence about his fear of retaliation preventing him from bringing the claim in time. The claimant was able to start early conciliation within the specified time limits. He provided no evidence of any threats after 18 December 2020. He has provided no evidence of any acts or retaliation by the respondent or its employees once he started the early conciliation process in February 2021. He has provided no evidence of any retaliation by the respondent since he presented his claim in September 2021. He has given contradictory evidence about the current level of his fears. However, whilst I find that fear of retaliation was not in itself a reason for the claimant's delay in presenting his claim, I find that the claimant's fears are relevant to the ground of anxiety and shattered confidence, as discussed below.

Anxiety and shattered confidence

31. The claimant submitted that his experiences with the respondent left him with anxiety and shattered confidence, and that these impacted on his ability to bring the claim in time. He "fell into an abyss" when he was dismissed, and felt "suicidal". As he thought about whether to bring a claim, he became stressed and nervous; this was in the context of his reported fears of retaliation, as discussed at paragraphs 27-30 above. The claimant accepted that the threats he reports did not stop him from bringing a claim, but said that they slowed him down and affected his ability to bring the claim.

I find that the claimant's fears of retaliation, regardless of whether they have or had any basis in fact, were such as to contribute to his anxiety.

32. The claimant said that he told Employment Judge Barker about his anxiety but the first time he mentioned it in writing was his witness statement. He did not mention anxiety in his claim form as he was only gradually remembering everything that happened to him at the respondent. The claimant said he had a poor memory. He said that as time passes since his dismissal and he becomes "less anxious I recall more of what happened to me". However, he also said that as time passed after his dismissal "the threats began to sink in". As he regained confidence, he recalled more of what his mind had blocked out. I accept that the claimant mentioned his anxiety during the preliminary hearing with Employment Judge Barker. I find that whilst anxiety and shattered confidence was not specifically raised in writing as a distinct reason for the delay in bringing the claim until his witness statement, there was a discussion of his anxiety during the preliminary hearing. I also find that anxiety and shattered confidence, in the way that the claimant has explained these reasons for the delay, are closely related to the fear of retaliation, which was raised. I also find a link between anxiety and shattered confidence and Covid19, which is discussed in more detail below.

33. The claimant did not have evidence of his mental health issues, but I do not find that this is a bar to my accepting his explanations of the impact of his anxiety and shattered confidence. In this context, I note that the claimant accepted that a lot of people experience anxiety but still manage to get through life. I find his explanation that "anxiety makes things harder and less enjoyable but is not a burden that halts you completely. I was restricted (it slowed me down) but anxiety did not prevent me from doing anything" to be persuasive, as was his evidence that between February 2021 and presenting the claim he was not "in the best condition", and was on the "verge of losing my job but my manager sympathized with me and kept me on". He prioritized finding a new job following his dismissal, as employment was "more important than pursing my case… I fully intended to pursue my case".

34. It is not disputed that the claimant started a new job within a week of his dismissal, and by February 2021 had changed job and was working for a different employer. The respondent's case was that the WhatsApp exchange between M and the claimant was evidence that he had a new job on the day of his dismissal; his evidence was that he told M that he had a new job as he did not want anyone "to gloat over my dismissal". I do not find that the specific timing of when the claimant found his first job following his dismissal to be particularly relevant to the matter of time limits. I find it entirely reasonable that the claimant would initially prioritize finding employment after being dismissed

35. I accept his evidence that he was still carrying out daily tasks, but "with difficulty". In this context, I accept his evidence that he had a new job, and was in poor health. He was "not as attentive then, in a zombie state". I find that whilst the claimant had the relevant information about bringing a claim, in his words "mentally I was not with it". I find that this is due to his poor

emotional well-being at the time, which he describes as anxiety and shattered confidence.

36. Nonetheless, the claimant still started the process with ACAS within the required time limits. He said "I knew that no matter what state I was in it was something which had to be done". He said that starting early conciliation was a "jerk reaction". As time went on, the "threats began to sink in. It slowed me down. I spent many weeks and months considering whether to go ahead with the claim… when I thought about it I got stressed and nervous". I find this evidence persuasive, particularly as the claimant had started his second new job in February 2021, and was struggling to maintain that employment. I accept his evidence that as he thought about whether to bring a claim, he became stressed and nervous. I find that his levels of anxiety and stress may well have fluctuated during the time between starting early conciliation and presenting the claim.

37. I find that the impact of his dismissal including on his emotional well-being, together with his beliefs about the related circumstances of his dismissal including his beliefs that he had been the subject of discrimination, bullying and harassment, and his beliefs that his safety was at risk are evidence for his anxiety and shattered confidence. I find that due to the claimant's anxiety and shattered confidence, he was unable to submit the claim in time.

Covid19

38. In the claim form (page 10) the claimant stated that "the Covid19 pandemic massively contributed to the delay of me bringing this case to the tribunal". In evidence he described the pandemic as a "contributing factor" which "slowed things up", and not the main reason for the delay. He relied on the impact of Covid19 on his mental and physical health as a reason for the delay in bringing the claim. He contracted polio as a child, and during Covid19 was unable to exercise regularly. As a result of long periods without exercise, he would return home after work and "collapse and fall asleep". He said that his "illness affected his ability to think straight – I barely kept myself at work". The claimant said that the "incredible strain" of the pandemic slowed him down.

39. The claimant accepted that Covid19 did not stop him bringing a grievance, or speaking to the charity, the CAB, or his trade union representative. He also accepted that Covid19 did not stop him finding a new job after his dismissal.

40. I find that Covid19 was a reason for the claimant's delay in presenting his claim. Whilst he was able to find two jobs between his dismissal and February 2021, was still working in the second new job, and was able to commence early conciliation within the time limits, I find that the pandemic was a reason for the claimant's delay in bringing the claim. I find that the claimant lost focus on the time limits for bringing the claim, and that this was reasonable given his particular personal circumstances of his physical health and the related impact of the limitations during the pandemic notwithstanding the relaxing of government restrictions, his mental health in particular his anxiety and shattered confidence, the need to find employment, the impact of the dismissal and his allegations of the

circumstances of his dismissal, and his allegations of his experiences at the respondent and the impact on him.

Just and equitable

41. The reasons for the delay of some 4½ months in presenting the claim are discussed in detail above. I find that the claimant's reasons of anxiety and shattered confidence and Covid19 are relevant reasons for the delay in presenting the claim.

42. I must consider the impact of that period of delay on the respondent's ability to present evidence. I note that that the claimant has not provided dates in relation to the allegations he makes. However, he has named specific individuals, and described the circumstances in which he alleges that the relevant acts or omissions occurred. The claimant raised a grievance on the day that he was dismissed. His evidence was that he did not complain during his employment as "making things formal makes things difficult, I chose not to as life would be easier if I didn't". In his grievance (page 27) he states that he told his area manager CT in "early July" that he was facing "a lot of resentment". CT asked the claimant to make a formal complaint, but the claimant refused "because I felt it would create further difficulties between myself and my colleagues". Given the claimant's allegations about his experiences at the respondent and also his beliefs about the possible consequences of making a formal complaint, I find it reasonable that the claimant chose not to raise a grievance prior to his dismissal. I find that he was not under any obligation to raise a grievance.

43. Whilst that grievance does not detail each of the allegations which are set out in the record of the preliminary hearing by Employment Judge Barker, it does contain reference to the claimant's concerns about unfair treatment on the basis of race, and victimization. The claimant describes his selection for redundancy being based on "ethnicity or favouritism", or due to his sex or medical condition. He refers to raising concerns with his manager CT in July 2020 that he had a "target on my head" but not wanting to make a formal complaint. He describes telling CT that staff were "resentful" of him due to his race, refers to his concerns about the treatment of other colleagues linked to their ethnic origins, to what he alleges was unfair delegation of tasks to him, he names CF and JMD and alleges they undermined and discredited him, to a discussion with A which he alleges is evidence of the "culture of racism" at the respondent, to customers not wanting him to serve them due to his race, and to JMD being "sympathetic to people of a racist disposition" which may have led to the decision to make the claimant redundant. He gives examples of what he alleges is sex discrimination and names three female members of staff, of the respondent requiring him to carry out tasks such as serving on the counter which other staff could have done, and he describes two possible scenarios with CF and JMD which he believes might be discrimination due to his medical condition.

44. Given this, I find that the grievance will have given the respondent an indication of the nature of the claimant's allegations, including naming some of the persons against whom allegations were made, although only limited specific details. I find that the respondent was aware of a number of the claimant's allegations by means of the grievance made on 18 December

2020, and the hearing on 21 January 2021. I further find that the respondent would have been aware that there was a possible claim against it by the claimant when ACAS early conciliation was started on 20 February 2021. I find that the claimant has provided details of his specific allegations in a piecemeal fashion.

45. The respondent has also not always complied with relevant time limits in this case. The respondent failed to comply with an order made on 3 March 2022 to send the Grounds of Resistance referred to in the Response Form to the claimant and the Tribunal by 10 March 2022. These had still not been provided by the time of the preliminary hearing on 7 October 2022, and were ordered to be provided by 16 December 2022. The Grounds of Resistance were sent to the Tribunal and the claimant on 15 December 2022.

46. The open preliminary hearing on 3 February 2023 was unable to proceed as the Judge did not receive the bundle of papers, it would appear due to an error by those acting for the respondent. I find no evidence that this omission by those acting for the respondent was deliberate, but it nevertheless caused delay.

47. The claimant has provided inconsistent evidence in a number of regards, in particular about his knowledge of the Tribunal and its processes, and the time period for his fears of retaliation. He has not been able to provide dates for many of his allegations against the respondent. There was much discussion about a WhatsApp exchange with a colleague M on 18 December 2020, and the correct interpretation of that exchange. I do not consider it necessary to make a finding about the correct interpretation of that exchange, which the respondent submitted was evidence of the claimant's unreliability.

Relevant law

48. Section 108(1) ERA provides that to qualify for the right to claim unfair dismissal under Section 94 ERA, employees must generally show that they have been continuously employed for at least two years. There are however a number of exceptions to the usual rule that two years' continuous service must be shown to claim unfair dismissal. Section 108(2)-(5) ERA sets out situations where the period of minimum service does not apply, including "automatically unfair" dismissal where the dismissal is for one of the "impermissible reasons", and dismissal for redundancy where selection for redundancy was for one of the inadmissible reasons (Section 108(3)(h) ERA). Section 105 ERA provides that an employee will be regarded as unfairly dismissed if Section 105(1)(a) the reason or principal reason for the dismissal is that the employee is redundant, and Section 105(1)(b) it is shown that the circumstances constituting the redundancy applied equally to one or more other employees who held similar positions to the employee and who have not been dismissed by the employer and it is shown that any of subsections 105(2A) to (7N) applies. Sections 105(2A) to (7N), and in particular Section 105(7) to (7C) do not include claims brought under the Equality Act 2010, including discrimination.

49. Section 111(2)(a) ERA provides that a claim for unfair dismissal shall not be considered by an Employment Tribunal unless it is presented to the Tribunal

before the end of the period of three months beginning with the effective date of termination or Section 111(2)(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 the period of three months. What amounts to a further reasonable period under Section 111(2)(b) ERA is a matter of fact for the Tribunal to decide in all the particular circumstances of the case (*Nolan v Balfour Beatty Engineering Services EAT 0109/11*) having regard to the strong public interest in claims being brought promptly and within a primary limitation period of three months (*Cullinane v Balfour Beatty Engineering Services Ltd and anor EAT 0537/10).*

50. Section 23(2) ERA provides that complaints for unauthorized deductions must be brought within three months of the last deduction. Section 23(4) ERA provides that if the Tribunal is satisfied that it was not reasonably practicable for a complaint under this Section to be presented before the end of the three months, the Tribunal may consider the complaint if it is presented within such further period as the Tribunal considers reasonable.

51. Section 207B ERA extends the time limits to facilitate early conciliation. The test of what is 'reasonable' under Section 111(2)(b) requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in the circumstances for proceedings to be instituted, having regard to the strong public interest in claims being brought promptly and within a primary limitation period of three months.

52. In *Marks & Spencer v Williams-Ryan [2005] ICR* it was noted that Section 111(2) ERA should be given a liberal interpretation in the employee's favour. In determining whether it was reasonably practicable for the claimant to comply with the three month limit, the Tribunal should ask a) what was the substantial cause of the employee's failure to comply with the time limit and b) whether, in the light of the finding in relation to a) above, whether it was reasonably practicable to present the claim in time (*Tesco Stores Ltd v Kayani UKEAT/0128/16*). A suggested approach to the term reasonably practicable was made in *Palmer and Saunders v Southend on Sea Borough Council [198] 1 WLR 1129.* In that case the Court of Appeal suggested that the best approach was to consider "was it reasonably feasible to present the complaint to the industrial tribunal within the relevant three months". If the employee relies on ignorance for the delay, the test is whether their lack of knowledge was reasonable (*Porter v Bandridge Ltd [1978] ICR 943 CA*). In *Trevelyans (Birmingham) Ltd v Norton 1991 ICR 488 EAT,* it was held that when a claimant knows of his right to complain of unfair dismissal, he is under an obligation to seek information and advice about how to enforce that right.

53. In *Schultz v Esso Petroleum Co Ltd 1999 ICR 1202*, the court emphasised that the test was one of practicability, *what could be done,* and not whether it was reasonable not to do what could have been done. *Wall's Meat Co Ltd v Khan [1979] ICR 52, EWCA,* provides guidance as to the Tribunal's discretion in such matters. *Porter v Bandridge Ltd [1978] ICR 943, EWCA*, states that the burden of proof is upon the claimant, and that in respect of ignorance of rights, the correct test is not whether the claimant knew of his rights but whether he ought to have known of them.

54. Section 123 EqA provides that a complaint may not be brought after the end of: Section 123(1)(a) the period of three months starting with the date of the act to which the complaint relates, or Section 123(1)(b) such other period as the Tribunal thinks is just and equitable. For the purposes of Section 123 EqA, Section 123(3)(a) provides that conduct extending over a period is to be treated as done at the end of the period.

55. The Tribunal has a wide discretion to extend time, but the burden is on the claimant to show that it is just and equitable to do so; the exercise of the discretion is the "exception" rather than the rule (*Robertson v Bexley Community Centre [2003] IRLR 4343].* When considering the exercise of the discretion under Section 123(1)(b), the Tribunal should assess all the factors of the particular case which it considers relevant, including in particular the length of and the reasons for the delay (*Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23*). The so-called Keeble factors (*British Coal Corporation v Keeble [1997] IRLR 336)* can provide a useful guide for Tribunals considering whether to exercise its discretion. They are a "valuable reminder" of what may be taken into account, but their relevance depends on the facts of the individual case and Tribunals do not need to consider all the factors in each and every case (*Department of Constitutional Affairs v Jones 2008 IRLR 128, CA).*

56. In *Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530*, it was held that where a series of acts is alleged to amount to conduct extending over a period, the Tribunal should consider whether the respondent was responsible for an ongoing situation or a continuing state of affairs, or whether there was a succession of unconnected or isolated specific acts. If there was a succession of unconnected or isolated specific acts, the time begins to run from the date of each individual act.

57. If the claimant relies on ignorance of their rights as a relevant factor, the question for the Tribunal is whether their ignorance was reasonable in all the circumstances (*Perth & Kinross Council v Townsley UKEATS/0010/10).* I should note that the respondent particularly referred me to this case.

Conclusions – Application of law to the facts
Unfair dismissal and unauthorized deductions ERA

58. I find that the claimant did not have two years' service with the respondent, and is therefore unable to bring a claim of "ordinary" unfair dismissal under Section 94 ERA. I find, and the claimant presented no evidence in support, that his claim does not fall within any of the exceptions to the requirement for two years' service contained in Section 108(2)-(5) ERA. I considered in particular whether his claim fell within Section 108(3)(h) regarding redundancy. However, I found no evidence that any of Sections 105(2A)-(7N) applied in his case. I find no evidence that the claim falls within any of the automatically unfair reasons for dismissal, and have referred myself to Sections 100-107 ERA. The claim for unfair dismissal under the ERA is dismissed for want of jurisdiction.

59. If I am wrong in terms of the application of Section 108(2-5) ERA, and given my finding that the claim was brought out of time (paragraphs 14-16 above),

I must consider whether it would have been reasonably practicable for the claimant to bring the claim within the three month time limit under Section 111 ERA, and if it was not reasonably practicable, whether the claim was presented within such further time as the Tribunal considers reasonable. These are questions of fact, which I deal with in turn. I also deal here with the claim for unauthorized deductions, given that the legal test for both claims is the same.

60. I find that for reasons of his anxiety and shattered confidence, and due to the particular impact of Covid19 on him (paragraphs 31-37 and 38-40 above), it would not have been not reasonably practicable for the claimant to bring his claims for unfair dismissal and unauthorized deductions within the three month time period under Sections 23 and 111 ERA.

61. When there has been a delay between the expiry of the time limits and the presentation of the claim, in deciding what would have been a reasonable time in which to present the claim, the Tribunal must have regard to all the circumstances of the case, including what the claimant did, what he knew or reasonably ought to have known about the time limits, and why it was that the further delay occurred. I find that the claims for unfair dismissal and unauthorized deductions were not brought within a further reasonable period following the expiry of the time limit.

62. I find that the claimant's stated ignorance of the time limits was not reasonable (paragraph 26 above). I find that the claimant ought reasonably to have been aware of the time limits for bringing a claim, given that he had carried out research with and spoken to a number of organisations and individuals, had started early conciliation within the required time limits, and accepts that he was told about the time limits during his discussions with the CAB and ACAS (paragraphs 20-24 and 26 above). For the avoidance of doubt, I find that it is not the claimant's case that he was given incorrect advice by the CAB about the time limits, rather that they told him that time limits were not strictly applied. In any event, I am mindful of *Riley v Tesco Stores Ltd and anor 1980 ICR 323, CA* and note that incorrect advice from a CAB adviser is treated as the fault of the claimant himself. I find that in all the circumstances the claimant should have been able to present the claim sooner than he did. The claimant knew by the time of the letter dated 15 February 2021 that he had not been successful in the appeal/grievance. I find that he was sufficiently informed to commence early conciliation in time, in fact 5 days after the outcome of the grievance was sent to him. In addition, he knew at the end of January 2021 when he received his final payslip that he had not been paid the money he claims that he is owed.

63. Whilst I find that his anxiety and shattered confidence impaired the claimant's thinking and ability to perform tasks other than going to work and his activities of daily living such that it prevented him from submitting the claim in time, I find that he did not bring the claim within a reasonable period thereafter. I find that it would have been reasonable for him to have submitted the claim sooner than he did, given that there is no evidence of any particular change in his circumstances between the expiry of the time limit and his presenting the claim, apart from the passage of time itself, which ultimately enabled him to submit the claim.

64. Considering all the factors in this case, I find that the delays of 4½ months and just over 3 months in bringing the claims for unfair dismissal and unauthorized deductions respectively were not reasonable in the circumstances of this case. In making this finding I have particular regard to the claimant's explanations for the delay, which I have weighed against the public interest in claims being brought promptly and within a primary limitation period of three months. The claims for unfair dismissal and unauthorized deductions are dismissed for want of jurisdiction.

EqA claims

65. The test for extending the time limits in relation to claims under the EqA is different to that under the ERA. The discretion to allow out of time claims to proceed within whatever period the Tribunal considers to be just and equitable is broader than the discretion to allow late claims (in this case under the ERA) to proceed where it was not reasonably practicable to present the claim in time and where the claim was presented within a reasonable time thereafter.

66. Having considered all the relevant factors in this case, including in particular the length of and the reasons for the delay, I find that is just and equitable to extend the time limits for bringing the claims under Section 123(1)(b) EqA.

67. I find that the claimant ought reasonably to have known about the time limits for bringing the claim, given his contact with relevant organisations (paragraphs 18-26 above). However, as discussed above (paragraphs 31-37 and 38-40 above) I find that the claimant's explanations of anxiety and shattered confidence, and Covid19 given his particular personal circumstances, are relevant reasons for his delay of 4½ months in presenting the claim despite his knowledge of the time limits. I find that whilst the claimant was able to continue working during the delay of 4½ months in bringing the claim, he was struggling to maintain his employment and this was the focus of his energy and efforts during the period of the delay. I find that the claimant was struggling mentally, due to the impact of his dismissal and his related beliefs as well as the difficulties linked to the pandemic. I note that the UK entered the third national lockdown in early January 2021, with restrictions being gradually eased from March 2021.

68. There was a delay of some 4½ months in the claimant bringing the claim, and I must consider the impact of that time on the respondent's ability to present evidence. I note that that the claimant has not provided dates in relation to the majority of the allegations he makes, and that much of the detail of the allegations was provided during the preliminary hearing in October 2022. However, I note that some detail was provided in the grievance submitted on 18 December 2020, including the names of some individuals, and that there was a grievance hearing in January 2021. Whilst there is limited detail in terms of dates, the claimant has named specific individuals and described the circumstances in which he alleges that the relevant acts or omissions occurred. I find that the respondent was on notice of the outline nature of the claimant's concerns in January 2021, and also that the respondent was on notice that the claimant was considering making a claim, at the latest by 20 February 2021 when early conciliation started. Whilst it is likely that there may be an impact on the respondent's

ability to present evidence given that the complaints relate to incidents which are alleged to have taken place over two years ago, given the grievance and related hearing, and the start of early conciliation, as discussed above, I do not find that this impact presents an insurmountable prejudice to the respondent's case. This finding is particularly the case given the respondent's own failures to cooperate with these proceedings, in particular the failure to comply with the order made on 3 March 2022 for over 10 months (paragraph 45 above). I find that this failure weakens the respondent's arguments in terms of the impact of the delay on its ability to present its case.

69. As part of the case management orders made by Employment Judge Barker following the preliminary hearing on 7 October 2022, she noted that "The claimant's claims also appear to have more than little reasonable prospects of success, in that he was able to explain the events that had happened to him during his employment clearly and was able to explain why he believes that the actions of the respondent's employees amounted to unlawful discrimination on the basis of the above protected characteristics". Whilst I find that the claimant was at times inconsistent in his evidence, in particular in relation to his knowledge of the Tribunal and its processes, and when the acts or omissions complained of ended, in terms of the details of his claims and their potential merits, I find no reason to reach a different view on the potential merits of his case to Employment Judge Barker. In this context, I note that the claimant is a litigant in person. I find that the likely prejudice to the claimant if he is unable to have his claims determined outweighs the prejudice to the respondent caused by the delay in bringing the claim.

70. The claims under the EqA shall therefore proceed. Whilst they were made outside the time limits in Section 123(1)(a) EqA, it is just and equitable to extend those time limits under Section 123(1)(b) EqA so that the claims are in fact made in time.

Employment Judge **Swaffer**

24 April 2023