



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4105998/2022 and 4105999/2022

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Held in Glasgow on 23 June 2023

Employment Judge M Robison

10 **Mrs E Lew-Gorzynska**

**First Claimant
In Person [via
Interpreter - Ms
M Moore]**

15 **Mr I Lew-Gorzynski**

**Second Claimant
In Person**

20 **David Cargill House**

**Respondent
Represented by:
Mr G Cunningham -
Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Employment Tribunal has no jurisdiction to hear the second claimant's claim (number 4105999/23) on the grounds that it is time barred. That claim is therefore dismissed.

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The first claimant's claim proceeds, having been combined with her subsequent claim number 4102119/2023.

REASONS

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1. This preliminary hearing was listed on 6 March 2023, to consider the following: "whether or not the Tribunal has jurisdiction to hear the second claimant's claims, or any of them, on the basis that the claims are time-barred; and in doing so, to consider whether there were any post-termination acts alleged by the second claimant, or a series of continuing acts, which operated to extend the time limit for presentation of his claims".

2. This claim relates to claims for breaches of both the Equality Act 2010 and the Employment Rights Act 1996 being pursued by the first claimant and the second claimant, who are mother and son, and who both worked for the respondent.
- 5 3. The second claimant was dismissed on 18 April 2022 and pursued an unsuccessful claim for unfair dismissal (4103524/2022). The first claimant had pursued a successful claim for unpaid wages (4100160/2022) while still employed by the respondent, subsequently lodged this claim, after which she resigned and lodged a further claim (4102119/2023) claiming unfair
10 constructive dismissal. That claim was combined with this one in an order made by the Employment Tribunal on 30 June 2023.

Postponement request

4. Prior to this hearing, on 19 June 2023, the second claimant sought a
15 postponement of this hearing on the grounds that he had not received the notice of hearing. That however had been refused on the basis that he had known that this hearing was to consider the above question since the preliminary hearing on 6 March 2023 which he had attended in person, and that it related to the narrow issue of time bar only.
5. At the outset of the hearing, the claimant pointed out that he had applied for
20 a postponement and indicated that he was not prepared for this hearing. He had not lodged any productions. He repeated his position throughout his evidence. At one point the first claimant interjected to renew the application for a postponement.
6. I did not grant a postponement of the hearing, because there had been no
25 change in circumstances since the decision to refuse the postponement had been made on 19 June 2022.
7. At the outset of the hearing, the second claimant also advised that he had
30 understood that this hearing was to relate only to whether the discrimination claim was time barred. However, it is clear from EJ Macleod's note following the preliminary hearing on 6 March 2023 that this hearing was listed to consider time bar in respect of all of the claims.

8. The second claimant also stated at the outset that he thought that the decision would be based on legal submissions only, and he had not appreciated that he would require to give evidence, and had not prepared to do so. I explained to him that given the legal questions which I had to determine, it was necessary for him to give evidence to explain his position.
9. During evidence, the second claimant advised that he was not prepared to answer some questions because he had understood that the only issue to be considered was whether his discrimination claims were time barred. However, as I advised, his evidence related to the factual background in respect of which there was no requirement for preparation, and he did ultimately answer the questions he was asked.
10. During the course of giving evidence the second claimant referred to letters which he said that he had on his laptop but he had not lodged. He also referenced further alleged acts of post-employment discrimination which took place after the ET1 was lodged and it transpired he had referenced in the further particulars, but without giving details. He advised that he wished to amend his claim to add those details.
11. I considered however that it was appropriate to proceed to conclude the second claimant's evidence and to deal with the matter raised at this hearing.
12. I advised that if I considered following the conclusion of the hearing that it was not possible to make a decision based on the evidence that I had heard and the paperwork lodged to date, that I would reconsider my position. I also advised that if the claim were to proceed, the second claimant would be entitled to make an application to amend to add any further allegations of discriminatory treatment.
13. As it transpired, the hearing was adjourned at the conclusion of the evidence of the second claimant because he became unwell, as fully narrated in the note issued on 27 June 2023 following this preliminary hearing. No further witnesses were due to be called in any event.

14. I directed that written submissions should therefore be lodged, so that the second claimant had a further week to provide written submissions, which both he and the respondent did on 30 June 2023.
15. Further and in any event, I decided that I could make the decision based on the material I had before me. With regard to the letters which the second claimant referenced, although he had not lodged them, there was no challenge to their existence or content in cross examination. I was prepared to accept the evidence of the second claimant about them and their content in its entirety.
16. Further, an opportunity to amend to add details about an alleged act of discrimination which took place after the ET1 form had been lodged would make no difference to the question of whether the ET1 form itself had been lodged out of time.
17. Reference is made in this judgment to productions which were lodged by the respondent.

Findings in fact

18. Based on the evidence that I heard at this hearing and the productions lodged, I make the following relevant findings in fact.
19. The second claimant was employed by the respondent from around 2011. He was dismissed on 18 April 2022.
20. On or around 19 April 2022, he wrote to the chair of the trustees of the respondent, Mr Norman Fyfe, alleging that documents had been forged by managers employed by the respondent in an employment tribunal claim pursued by his mother (the first claimant) against the respondent relating to unpaid wages (4100160/2022). The consent judgment relating to that case (held in Glasgow on 22 March 2022) was lodged at page 151.
21. The second claimant received no response from Mr Fyfe or the respondent to the letter dated 19 April 2022. He sent another letter about a month later, around 20 May 2022, advising that he had not had a response, and attaching the letter again.

22. On 27 June 2022, the second claimant lodged a claim for unfair dismissal, notice pay, holiday pay and breach of contract (4103524/2022).
23. On or around 11 or 12 August 2022, the second claimant wrote again to Mr Fyfe, repeating the allegations that he had previously made that two managers of the respondent had forged documents. Mr Fyfe replied by e-mail stating that he would not comment on Tribunal matters.
24. Also on 11 or 12 August 2022, the second claimant sent another letter in which he reported to Mr Fyfe his belief that his mother (the first claimant, who was then still employed by the respondent) was being bullied, harassed and discriminated against at work.
25. By e-mail dated Friday 12 August 2022, Mr Fyfe advised that he would investigate the matter.
26. On Monday 15 August 2022, Mr Fyfe advised that having investigated the matter that he had found nothing to support the allegations which the second claimant had made about his mother's treatment.
27. The second claimant was surprised to receive that response so quickly, because he thought that it would not be possible to investigate such a serious allegation in one working day, and he would expect that both he and his mother would have been interviewed.
28. On or around 15 August 2022, the second claimant wrote to Mr Fyfe, disagreeing with the conclusion he reached following the investigation.
29. Mr Fyfe replied within a day or two that that was the final response of the committee and the decision stands.
30. The second claimant's position is that it was at that time that he realised that he had been discriminated against because he had reported his allegations to the manager that line managers employed by the respondent had been forging documents and discriminating against his mother. He believed that he had not been treated the same as other employees in the workplace.

31. On 22 September 2022, the second claimant then made an application to amend his claim for unfair dismissal (4103524/2022) to add a claim for race discrimination. That application to amend (which the second claimant described as to change the label) was heard on the first day listed to hear the final hearing in that case, that was 26 October 2022. That application was refused in an oral judgment issued that day (page 153).
32. That case then proceeded to a final hearing, heard 27 and 28 October and 8 and 9 December 2022, after which the second claimant's claims for unfair dismissal, wrongful dismissal, and holiday pay were dismissed (page 153).
33. Following the first two days of the final hearing, the second claimant requested and was sent written reasons in regard to the refusal of the amendment dated 31 October 2022.
34. On 7 November 2022, the first and second claimants contacted Acas to initiate early conciliation in relation to these claims.
35. On 9 November 2022, early conciliations certificates were issued (page 33 and 34).
36. On 12 November 2022 the first claimant lodged this claim in regard to her own claim as well as that of her son (the second claimant) on one claim form (described as a "multiple" because there was more than one claimant) (page 8).
37. These claims included allegations by both claimants that they had been discriminated against because of their race by the respondent.
38. The second claimant knew that there was a three month time limit for lodging such claims, but understood this ran from the date of the last act of discrimination, which he alleged was the letter from Mr Fyfe dated 15 August 2022.
39. From that date until after 26 October 2022, the second claimant was preparing for the final hearing in his unfair dismissal case (4103524/2022), in respect of which he was representing himself. It was only after that that he had time to consider his position and to lodge this claim alleging discrimination.

40. Following a case management preliminary hearing in relation to this claim, at the request of EJ Hoey (page 50), the second claimant lodged further particulars of his claim in February 2023 (page 72). This included further details of his race discrimination claims as well as details about claims for protected interest disclosure detriment, unauthorised deductions from wages and breach of contract.

Tribunal deliberations and decision

41. It is submitted by the respondent that the claims sought to be pursued by the second claimant in this case are all time barred.

42. The second claimant was dismissed on 18 April 2022. He lodged a claim for unfair dismissal, as well as wrongful dismissal, breach of contract and unpaid holiday pay, on 27 June 2022 (4103524/22). He sought to add claims for race discrimination but his application to amend to include such claims was refused (see decision of EJ Maclean 31 October 2023).

43. He subsequently lodged this claim (4105999/22) in a “multiple” with his mother as the lead claimant (4105998/22). An ET1 was lodged on 12 November 2022 which referenced only race discrimination. Further particulars were lodged in February 2023 on the direction of EJ Hoey when the second claimant provided further details of the race claim, but also added claims of protected disclosure detriment, deductions from wages and breach of contract.

44. As discussed at the hearing, the legal tests in relation to the claims for discrimination and the other claims are different. I therefore considered the discrimination claims first, that is the provisions of the Equality Act 2010, before considering the other claims under the Employment Rights Act 1996.

Time bar - discrimination

45. In regard to the discrimination claims, section 123 of the Equality Act 2010 requires that proceedings are brought within three months of the date of the act of discrimination alleged.

46. With regard to the date of the discrimination being complained about, in this case the second claimant's claims are contained in the ET1 and further particulars, listed separately from the claims being pursued by the first claimant, his mother.
- 5 47. The ET1 references only a claim for race discrimination in regard to the holding of the disciplinary hearing and in being dismissed following that hearing (page 32).
48. The second claimant makes further reference to allegations of discrimination in the further particulars, which he says continued for 11 years, but he specifically references incidents (without giving details) between 2017 and 10 January 2022, that is when he was still employed by the respondent.
49. However, the second claimant also makes allegations that he was discriminated against after he was dismissed. He alleges that the last act of discrimination was the letter which Mr Fyfe sent to him dated 15 August 2022, 15 which was a reply to the second claimant's letter alleging that his mother had been discriminated against, harassed and bullied.

Post-employment discrimination

50. The second claimant argues that there was a continuing course of conduct, such that the discrimination which he alleges occurred on 15 August 2022 was the last act in a series of acts of discrimination which amount to a continuous course of discriminatory conduct.
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51. He thus relies on section 123(3) of the Equality Act 2010, which states that for the purpose of determining time limits, conduct extending over a period is to be treated as done at the end of that period.
52. The second claimant seeks to rely on alleged discrimination which occurred after he was dismissed as the last act of conduct extending over a period. The claimant relies on section 108 of the Equality Act 2010 which allows a claimant in certain circumstances to pursue a claim after the end of the employment relationship.
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53. In particular, section 108(1) of the Equality Act 2010 relates to “relationships which have ended” and states that a person must not discriminate against another if “the discrimination arises out of and is closely connected to a relationship which used to exist between them; and conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act”.
54. Thus discrimination which takes place after a claimant has left their employment is covered by the Equality Act 2010, and section 108 makes it clear that a person will discriminate against another where any discrimination arises out of and is closely connected to a relationship which used to exist between them. There is therefore no doubt that on the face of it the second claimant can pursue claims of discrimination after his employment has ended, and that the last act in the series could potentially occur after he had been dismissed.
55. In this case the second claimant references being discriminated against by management and states in the ET1 that that the last discriminatory act took place on August 15. Although as Mr Cunningham argued there was little detail or specification relating to what was being referenced in either the ET1 or subsequent further particulars lodged, it was apparent from the papers lodged and from the second claimant’s oral evidence that this is a reference to the reply from Mr Fyfe following his letter of complaint dated 12 August 2022.
56. The second claimant’s position therefore is that the discrimination continued after he had left employment. Although he said in his ET1 that the last act of discrimination was 15 August, he references in his further particulars events subsequent to his dismissal that he relies on five different acts of discrimination post dismissal, as follows: the letter of April 2022 sent to Mr Norman Fyfe, the second letter to him in August 2022, a threatening e-mail in the respondent’s name in September 2022, the opinion of the respondent from his ET3 that he is being harassed by the second claimant, and refusal of entry to the premises in December 2022 and January 2023.
57. Mr Cunningham argues that in general there is insufficient specification of the acts identified to satisfy the statutory test under section 108, in particular:

- a. none of the correspondence identified has been lodged with the Tribunal;
- b. the second claimant did not give oral evidence about it during the hearing;
- 5 c. it is not clear whether the April letter was before or after the dismissal;
- d. there is no specification of how the respondent not replying to that letter could constitute discrimination;
- e. this is a letter which the second claimant wrote in April 2022 in which he alleges that certain managers employed by the respondent had
10 forged documents in relation to his mother's previous claim (41000160/22) in respect of which there was a consent judgment issued 22 March 2022;
- f. correspondence from the second claimant to the respondent could not constitute acts of the respondent;
- 15 g. it is not possible to construe the letter from Mr Fyfe dated 15 August as conduct amounting to discrimination against the second claimant;
- h. There is no specification of the actual conduct which took place in September 2022, neither is the actual date identified;
- i. The refusal of entry to the building appears to be the same conduct
20 previously identified.

58. I therefore had to consider whether the alleged last act of discrimination on August 15 could amount to discrimination if proved. It is self-evident however that the last act in the series must itself be found to be an act of discrimination,
25 otherwise they cannot form part of the continuing act.

59. With regard to the operation of section 108, it is not sufficient merely to show a close connection between the two parties, but it must relate to a relationship which used to exist between them (*See Butterworth v Police and Crime Commissioners Office for Greater Manchester* 2016 ICR 456 EAT).

30 60. While in principle I accept acts of post-employment discrimination could form part of a continuing act of discrimination, for section 108 to be properly relied on in this case, the second claimant would require to show that any alleged discrimination arises out of and is closely connected to a relationship which

used to exist between them, and which would otherwise have constituted discrimination if it has occurred during his employment.

5 61. In this case the second claimant argues that the sending of the letter of August 15 is an act of post-employment discrimination. Although the claims are lacking in detail, it is clear, and the second claimant confirmed in evidence that, the letter and its contents relate to his mother's case and how she was allegedly treated and not how he was treated. The discriminatory treatment that he alleges took place during his employment is different. In this case, the letter of August 15 is a response to an allegation made by the second claimant about his mother's previous employment tribunal decision. It does not relate to his employment relationship with the respondent. Even if the second claimant was not employed by the respondent he could well have written that letter on behalf of his mother.

15 62. I conclude therefore that this act does not relate to their relationship as employer/employee. I conclude that the acts relied on cannot properly be categorised as post-employment discrimination by the respondent of the second claimant. There is no reasonable prospect of the second claimant successfully establishing that this was an act of discrimination against him.

20 63. Although the claimant has referenced other acts of post-employment discrimination, these are not specified and in any event he states in terms that the letter of 15 August 2022 was the last act of discrimination, the claimant did not mention in evidence any of the other incidents which might be categorised as post-employment discrimination.

Continuing act

25 64. Even if the letter of 15 August 2022 could in principle form the basis of a claim for post-employment discrimination by the second claimant, the second claimant would also require to prove that this forms a course of conduct following on from discrimination which he alleges took place in respect of his dismissal and treatment prior to that.

30 65. The second claimant's position is that the discrimination, which he alleges he was subjected to during employment, continued after he had left employment.

66. As noted above, section 123(3) states that for the purpose of determining time limits, conduct extending over a period is to be treated as done at the end of that period.
67. The second claimant in this case alleges that letters written in April and August 2022 and the response or lack of response to them are aspects of continuing discrimination against him following his dismissal. His position is that the last act of discrimination, before lodging his claim, took place on 15 August 2022, which would make the claim in time.
68. The second claimant must establish that there is a continuing act, and the test is whether there has been a continuing state of affairs as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed (see *Hendricks v Commissioner for Police for the Metropolis* [2003] ICR 530 at 545, para [52]).
69. The question is whether there is continuing discrimination or a series of distinct acts. Where there is a series of distinct acts, time will begin to run when each act is completed. Continuing acts would imply a continuing state of affairs.
70. Here the second claimant relies on his allegedly discriminatory disciplinary hearing and dismissal and subsequent reply to a letter relating to his mother's claim. These acts are not however connected in any way. One relates to treatment of him and the other relates to treatment of his mother. Thus it cannot be said that the reply to the letter forms part of a continuing act of discrimination against him because there is no link between the letter and his treatment by the respondent. If the reply to the letter is capable of amounting to discrimination at all, it may be discrimination against the first claimant, it does not relate to the second.
71. Relying on *Pugh v The National Assembly for Wales* UKEAT/0251/16 at [50]), Mr Cunningham argued that the Tribunal should reject any argument that the acts constitute conduct extending over a period because the averments do not disclose a good arguable case or prima facie case of such conduct.

72. I agreed that an act which cannot in principle amount to discrimination against the second claimant cannot form part of a continuing state of affairs. As discussed above, the second claimant's case as evidenced by him does not disclose a prima facie case of discriminatory conduct against him.

5 **Date of the last act of discrimination**

73. If then the last act of discrimination alleged in relation to a claim by the second claimant is properly his dismissal, which he alleges is discriminatory, then the last act of discrimination must be the date of his dismissal which was 19 April 2022. On the face of it then, he should have lodged any claims relating to any
10 alleged discrimination occurring during his employment within three months of that date, that is by 17 July 2022.

74. Acas early conciliation was not intimated until 7 November 2022. This is after the primary time limit, and therefore the second claimant cannot avail himself of any early conciliation extensions.

15 75. The claim in this case was lodged on 12 November 2022. The claim was therefore lodged some four months outwith the three month limit in regard to any alleged acts of discrimination taking place during his employment.

76. On the face of it, this claim was lodged out of time.

Just and equitable extension

20 77. In terms of section 123(1)(b) of the Equality Act 2010, where the claim is not brought within three months of the last act of discrimination, the Tribunal has discretion to extend time by such other period as the Tribunal considers just and equitable.

78. A Tribunal has a very general broad discretion on the just and equitable
25 question and can have regard to all relevant facts and circumstances. Mr Cunningham referred the Tribunal to examples of factors given in guidance in *British Coal Corporation v Keeble* 1997 IRLR 336), namely:

- a. Prejudice;
- b. The length of, and reasons for the delay;

- c. The extent to which the cogency of evidence is likely to be affected by the delay;
- d. The extent to which the party sued has co-operated with requests for information;
- 5 e. The promptness with which the claimant acted once he knew the facts giving rise to the cause of action; and
- f. The steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

10 79. The Court of Appeal in *Southwark London Borough Council v Afolabi* 2003 ICR 800 confirmed that these factors are guidance for tribunals, but two factors are almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent.

15 80. Mr Cunningham submitted that the length and reason for the delay in this case favours refusing an extension of time. The reason given by the second respondent was that he was too busy attending to his unfair dismissal claim. The allegations of discrimination go back 11 years, which the Tribunal should take into account.

20 81. While I noted that the second claimant references (in his further particulars lodged February 2023) discrimination going back 11 years, he gives examples only of incidents between 2017 and 2022 while he was at work. While the second claimant now argues that his disciplinary hearing and dismissal were discriminatory, he lodged a claim for unfair dismissal on 27 June 2022 but did
25 not include any claim for discrimination.

82. With regard to the reasons for the delay, these appear to be two-fold. Principally, the second claimant's position is that it was not until he received the letter of 15 August 2022 that he came to believe that he had been discriminated against. It is unclear what it was that made him come to that
30 view, because the correspondence related to treatment of his mother. In any event, he did not at that time seek to lodge a claim for discrimination because he said that he was too busy preparing for the hearing in his unfair dismissal

claim. The claimant did however seek to amend his unfair dismissal claim to include a claim for discrimination, but he did not intimate such a claim until 22 September 2022.

- 5 83. Although the amendment was refused, it is accepted that the test applied by a Tribunal to decide whether an amendment should be accepted, and the test to determine whether a new claim has been lodged in time, are different.
- 10 84. I consider it to be significant that the second claimant now claims he has been discriminated against for 11 years and references incidents from 2017. He lodged a claim of unfair dismissal in June 2022, but did not include any reference to these alleged acts of discrimination.
85. The second claimant confirmed in evidence that he was aware of the three month time limit for lodging claims. He had already lodged and was pursuing a claim for unfair dismissal in this Tribunal which he had lodged in time. He could have, but did not, include a claim for discrimination at that time.
- 15 86. I take account of the fact that although the second claimant claims he was discriminated against for the whole period of his employment, he apparently did not recognise that any of the conduct that he claims he was subjected to might be discriminatory until August 2022. It is unclear what it was about the reply on 15 August 2022 that led him to believe that previous treatment may have amounted to discrimination. The claims which the claimant now makes that he was discriminated against lack detail and specification.
- 20 87. An employment tribunal is entitled to consider the merits of the claim and the prospects of success when deciding whether it is just and equitable to extend time. In this case, I take account of the fact that the claimant himself did not recognise his treatment as discriminatory after 11 years in the job, that he only came to believe that he was being discriminated against when he got a reply to a letter after he had been dismissed which related to his mother's claim and not his own, and he has failed to set out full details of the alleged discrimination in the ET1 and further particulars. While the second claimant claims discrimination, he took no steps to lodge a claim, although he was
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aware that he could lodge a claim in the employment tribunal from at least June 2022 when he lodged his claim for unfair dismissal.

- 5 88. On the matter of prejudice to the respondent, I accepted that the respondent will be prejudiced if the claimant is now permitted to pursue a claim for discrimination which he alleges stretches back for 11 years, and in respect of which he relies on incidents from 2017. Even if the claimant had provided details of the instances on which he seeks to rely, it is inevitable that the cogency of evidence will have been affected by the delay in lodging the claim.
- 10 89. In all these circumstances, I conclude that it would not be just and equitable to extend time in this case.
- 15 90. However, I consider it appropriate to point out that the letters which the second claimant wrote after his dismissal apparently relate to treatment of his mother, the first claimant. The first claimant's claim will proceed and the allegations that the incidents which the second claimant complains about after he was dismissed will be considered in the context of her claim, given they are referenced in the first claimant's ET1 and further particulars. Accordingly these incidents will be aired in the Tribunal, although in the claim pursued by the first claimant and not the second claimant.

The other claims

- 20 91. The second claimant was invited by EJ Hoey to provide further specification of other claims it is understood that he had advised he intended to pursue at a case management preliminary hearing which took place on 16 January 2023.
- 25 92. These claims relate to public interest disclosure detriment, unauthorised deductions and breach of contract. The claimant did not reference these claims in his ET1 but included them in the further particulars which he lodged in February 2023. It is apparent from the further particulars that these allegations relate primarily to treatment of the second claimant during the period of his employment. As noted above the claimant was dismissed on 18
- 30 April 2022.

93. Complaints about detriment following a protected disclosure under section 48 of the Employment Rights Act 1996 must be lodged within three months of the detriment which a claimant claims to have suffered as a result of making the protected disclosure. The second claimant in his further particulars
5 references disclosures which he made in 2021 and 2022, including the letters to Mr Fyfe in April and August 2022. Whether those letters could be categorised as a protected disclosure is a matter that would require to be determined, but in any event the claimant makes no reference to any detriment which he has suffered as a result of these disclosures. Given the
10 claimant's employment was terminated in April 2022 and no reference is made to any detriment suffered subsequently as a consequence of making the disclosures, it is apparent that the latest time would run would be from the date of the termination of his employment.
94. Claims for unlawful deductions from wages (under section 13 of the
15 Employment Rights Act 1996) must also be lodged within three months of the date of the last deduction. Again the last possible time when a deduction would be made would be when the claimant's employment was terminated in April 2022.
95. A breach of contract claim must also be lodged within three months of the
20 date of termination of the contract giving rise to the claim (Article 7 of the Employment Tribunals (Extension of Jurisdiction Scotland Order 1994).
96. It is apparent therefore that these claims should have been lodged within three
25 months of the termination of the claimant's employment, which was 18 April 2022, and therefore they should have been lodged by 17 July 2022. On the face of it, these claims have been lodged out of time.
97. In regard to each of these types of claims, the Tribunal is given discretion to allow late claims where it was not reasonably practicable to lodge a claim, provided the claim was lodged within a reasonable time thereafter.
98. Where the claim is lodged out of time, the tribunal must consider whether it
30 was not reasonably practicable for the claimant to present the claim in time, the burden of proof lying with the claimant. If the claimant succeeds in

showing that it was not reasonably practicable to present the claim in time, then the tribunal must then be satisfied that the time within which the claim was in fact presented was reasonable.

- 5 99. The Court of Appeal set out the correct approach to the test of reasonable practicability (*Lowri Beck Services Ltd v Brophy* [2019] EWCA Civ 2490). Lord Justice Underhill summarised the essential points as follows:
- 10 a. The test should be given “a liberal interpretation in favour of the employee” (*Marks and Spencer plc v Williams-Ryan* [2005] EWCA Civ 479, which reaffirms the older case law going back to *Dedman v British Building & Engineering Appliances Ltd* [1974] ICR 53);
 - 15 b. The statutory language is not to be taken as referring only to physical impracticability and for that reason might be paraphrased as whether it was “reasonably feasible” for the claimant to present his or her claim in time: see *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119....
 - 20 c. If an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will [not] have been reasonably practicable for them to bring the claim in time (see *Wall’s Meat Co Ltd v Khan* [1979] ICR 52); but it is important to note that in assessing whether ignorance or mistake are reasonable it is necessary to take into account any enquiries which the claimant or their adviser should have made;
 - 25 d. If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee (*Dedman*)...
 - e. The test of reasonable practicability is one of fact and not law (*Palmer*).
- 30 100. The claimant lodged these claims more than four months out of time. Even then these claims were not included in the ET1 which was lodged in November 2022, but they were added through further particulars which were lodged in February 2023.

101. In this case the claimant said in evidence that he was aware of the three month time limit.

102. It is particularly significant that in this case that the claimant lodged a claim for unfair dismissal within the three month time limit. That included a claim for breach of contract. It cannot therefore be said then that it was not reasonably practicable or reasonably feasible to have lodged the claim in time when the claimant had managed to do so within the correct time limits for the unfair dismissal claim. The claimant otherwise gave no reason in evidence why had lodged these particular claims late.

103. I conclude that these claims were lodged out of time, that the claimant could have presented these claims within the three month time limit, and therefore this Tribunal has no jurisdiction to hear them.

Conclusion

104. I conclude that all the claims which the second claimant seeks to pursue are time barred and therefore this Tribunal does not have jurisdiction to hear them so the second claimant's claim is dismissed.

105. This claim will proceed in respect of the first claimant's claim only, which has been combined with a further claim lodged by the first claimant (4102119/2023), in respect of which a case management preliminary hearing will take place on 26 July 2023.

Employment Judge: M Robison
Date of Judgment: 14th July 2023
Entered in register: 17th July 2023
and copied to parties