EMPLOYMENT TRIBUNALS

Claimant: **Mr J Nielssen**

Respondent: **Red Pill Productions Limited**

Heard at: **East London Hearing Centre (In person)**

On: **Monday 21 August 2023**

Before: **Employment Judge S Shore**

Representation
For the claimant: In Person
For the respondent: Mr R O'Dair (Counsel)

OPEN PRELIMINARY HEARING

RESERVED JUDGMENT

1. The Claimant's claims of direct discrimination because of disability, harassment related to disability, failure to make reasonable adjustments, victimisation, unauthorised deduction from wages, breach of contract, failure to pay holiday pay and failure to provide written reasons for dismissal are all dismissed as they were all presented outside the relevant time limits and I find that it would not be just and equitable to extend time in respect of the discrimination claims and that it was reasonably practicable for the Claimant to have presented the other claims in time.

REASONS

History of Case

1. The Claimant was employed by the Respondent as an Account Director from 31 May 2022 to 20 September 2022. The Respondent's case is that the Claimant was dismissed because he had failed to pass his extended probation period. The Claimant says that he was discriminated against. He also says that he is owed wages and notice pay. He says that he was entitled to a written

statement of the reasons for his dismissal. The nature of the discrimination was disability discrimination. Disability is one of the protected characteristics listed in Section 4 of the Equality Act 2010.

2. The Claimant began Early Conciliation with ACAS on 4 January 2023 and obtained an Early Conciliation Certificate on 25 January 2023. He presented his claim (ET1 form and particulars of claim) [6-25] on 24 February 2023.

3. The Respondent presented its response (ET3 form) [28–35] and grounds of resistance [36–42] on 30 March 2023.

4. The response was accepted on 25 April 2023.

5. In its grounds of resistance, the Respondent raised issues of jurisdiction regarding all the Claimant's claims [36]. It was submitted that all the Claimant's claims were out of time.

Law

6. The law on time limits in respect of the Claimant's disability discrimination claims is set out at Section 123 of the Equality Act 2010 where it states that proceedings on a complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Employment Tribunal thinks just and equitable.

7. Conduct extending over a period is to be treated as done at the end of the period. Failure to do something is to be treated as done when the person in question decided on it.

8. The period of three months can be extended by the ACAS Early Conciliation period (Section 140B Equality Act 2010) but this only applies when conciliation starts within three months of the date of the act complained of or, if there was a series of acts, the date of the last act.

9. The position with the Claimant's other claims is different to the discrimination claims, but the same as one other. Any claim for breach of contract, failure to pay notice pay, failure to pay holiday pay, unauthorised deduction from wages or failure to provide written reasons for dismissal must be presented: -

    9.1. Within three months of the effective date of termination (plus any ACAS extension) for failure to provide written reasons for dismissal (Section 93(3) Employment Rights Act 1996).

    9.2. Within three months (plus any ACAS extension) of any payment that was not made (Section 27 Employment Rights Act 1996).

    9.3. Within three months (plus any ACAS extension) of the effective date of termination (Article 7 Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994).

Discussion at hearing

10. I was provided with a large number of documents just before the hearing.

11. The Tribunal was copied into an email from Mr O'Dair to the Claimant dated 18 August 2023, that attached a skeleton argument and copies of the following cases: -

    11.1. **Geys v Société Générale London Branch** [2013] 1 AC;

    11.2. **Meaker v Cyxtera Technology UK Limited** [2023] EAT 17;

    11.3. **Nottinghamshire County Council v Meikle** [2004] EWCA Civ 859; and

    11.4. **Feltham Management Ltd & Others v Feltham & Others** UKEAT/ 0201/16/RN.

12. I was also provided with a bundle that had been produced by the Respondent that ran to 378 pages, a witness statement from Liam Corrigan of the Respondent and a witness statement from Henry Collins of the Respondent. Where I refer to documents from the bundle, I have put the relevant page numbers in square brackets.

13. Employment Judge Reid decided this hearing should be held to determine whether the Claimant's claim should be allowed to proceed or should be struck out because the claims had not been presented in time. The Respondent submitted that the claims were presented out of time. The Notice of Hearing for this hearing was sent to the parties on 25 June 2023 [61-62]. The case was given a time estimate of one day.

14. The Claimant is unrepresented. I reminded him that the Tribunal operates on a set of rules (I have set out a link to those rules below). Rule 2 sets out the overrunning objective of the Rules (their main purpose) which is to deal with cases justly and fairly. It is reproduced here.

"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far that is practicable –

(a) Ensuring that the parties are on an equal footing;

(b) Dealing with cases in ways that are proportionate to the complex that are importance to the issues;

(c) Avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) Avoiding delay so far as compatible with proper consideration and the issues, and

(e) Saving expense.

The Tribunal shall seek to give effect to the overriding objective in interpreting or exercising any power given to it by these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall cooperate generally with each other and with the Tribunal."

15. I reminded the parties that the purpose of this hearing was for me to consider whether or not the Claimant's claims had been presented in time and whether they should be allowed to proceed in accordance with the various statutory time limits that applied to them. Once I had decided that matter, I would then make any Case Management Orders that may be necessary after I determine at the initial time point.

16. The Tribunal wrote to the Claimant on the instruction of Employment Judge Reid on 16 June 2023 [59–60] requiring him to provide a statement in numbered paragraphs explaining why his claim was not brought in time and explaining anything else he thinks is relevant to why time should be extended by the Tribunal.

17. The Claimant produced a document entitled "Claimant's defence re: Respondent's "application for an Order for dismissal of claim" [63–65] and 9 attached pieces of evidence which were produced in the bundle at pages 66 to 80.

18. The Claimant commented that he had not been given the opportunity to discuss the contents of the bundle with the Respondent before it was produced. I clarified with the parties that early in the case, there had been a general Case Management Order made by the Tribunal on its own initiative, that required to parties to produce a final hearing bundle jointly, but there had been no similar Order in respect of the bundle to be prepared for this Preliminary Hearing.

19. I checked with Mr Nielssen that he had received the bundle prepared by the Respondent and he confirmed that he had. I asked him if he thought any relevant document was missing from that bundle that would be necessary for the hearing today. He said he thought his submissions regarding the time point that he had been ordered to make by Judge Reid were missing. I confirmed they were in the bundle at pages 63 to 80.

20. The Claimant had not received Mr O'Dair's email of 18 August 2023 addressed to the Claimant and copied to the Tribunal that included the four cases listed above and Mr O'Dair's written submissions. Therefore, I paused the hearing from 10:35am to 11:45am to enable the Claimant to read all the documents.

21. On the resumption, Henry Collins gave evidence on affirmation for the Respondent. He relied on a witness statement that was dated 8 August 2023.

22. The Respondent also produced a two-paragraph witness statement from Liam Corrigan, the Creative Director of the Respondent. Mr Corrigan and Mr Collins conducted the meeting with the Claimant on 20 September 2022 at which, it is asserted by the Respondent, that the Claimant was dismissed.

23. Mr Corrigan's statement was limited to confirming that he had read Mr Collins' witness statement and that it was true. I can give little weight to witness statement where the witness concerned does not attend the Tribunal. It was not clear from the documents in the bundle, including the Claimant's ET1 grounds of complaint, what his exact complaints were. Following the guidance in the case of **Cox v Adecco Limited** UKEAT/0339/19/AT, I tried to finalise the Claimant's list of potential claims when he was giving evidence.

24. It soon became clear that Mr Nielssen wished to add complaints to those already in his ET1. I explained that process to him and respectfully suggested that he read the recent EAT decision in the case of **Vaughan v Modality Partnership** UKEAT/0147/20/BA. I found that it was not in furtherance of the overriding objective to deal with applications to amend within this hearing, as we would be hard-pressed to finish what the hearing had been listed to achieve without dealing with applications to amend.

25. I dealt with the claims that the Claimant intended to add on the basis that I was not going to give leave to amend to include them at this hearing but would consider them as factual allegations that still required the leave of the Tribunal to proceed at some point in the future. In that way, I was giving the Claimant the best opportunity of expressing his case at its fullest. If the case proceeded to a final hearing, that hearing could deal with the question of whether the amended claims should be allowed to proceed.

26. The Claimant's argument support of his contention that his claim should be allowed was contained in his document titled "Claimant's defence re: Respondent's "application for an Order for dismissal of claim" [63–65].

27. Unfortunately, the document itself was light on detail but I can summarise Mr Nielssen's position as follows. The Claimant's case is that in a probation review meeting on 20 September 2022 with Mr Collins and Mr Corrigan, the Claimant was initially told that his employment would end but was given the option of either working his notice period or leaving immediately. He said that he was considering this matter when the decision was taken away from him and he was advised that his employment would be terminated immediately and that he would be paid in lieu of his notice period (a "PILON").

28. The Claimant said he refused to accept termination of his employment on that basis and therefore believes that as he had completed his three-month probation period on 31 August 2023 (3 months after he commenced employment on 31 May 2022) and there was no contractual provision allowing the Respondent to extend his contractual probation period. He was therefore entitled to one month's notice (the contractual notice payable to him on completion of his probationary period), which meant that the effective date of his termination of employment was on 20 October 2022.

29. The Claimant accepted that the ACAS Early Conciliation dates were set out above and that he presented the claim on 24 February 2023.

30. Mr Nielssen says that he worked on the case during Christmas and New Year 2022 at a time when he was dealing with depression which had intensified due

to his experience with the Respondent. He says he was prescribed anti-depressants and was also taking medication for attention deficit hyperactivity disorder (ADHD).

31. The Claimant produced no medical evidence relating to either medical condition or their effect on his ability to prepare the claim for Employment Tribunal.

32. The Claimant says he was confused over his status at the meeting of 20 September 2022, when "garden leave" was mentioned. The Claimant says that he believed that the phrase of "garden leave" meant that he would remain employed by the Respondent until his notice expired. Taking only the words said in the meeting, I can understand why the claimant may have come to that belief.

33. The minutes of the meeting on 20 September 2022 [132-139C] were not disputed by the Claimant.

34. The Claimant said that his confusion was exacerbated by the follow-up letter from the Respondent after the meeting on 20 September 2022 which was dated the same date [144] in which it was stated: -

"With your acceptance, your probation would end effectively immediately. Therefore, the last day that your services will be required is Tuesday 20 September 2022, save for any necessary follow-ups from your Line Manager in respect of your hand-over".

35. The Claimant cited the above paragraph as evidence that his employment had not been terminated on 20 September 2022, as he was still required to make himself available for any necessary follow-up. He also said that he believed the words to mean that his acceptance (agreement) was required.

36. The Claimant also cited the fact that he was required to hand over property belonging to the Respondent on 6 October 2022. He accepted that he was not required to do any work for the Respondent after 20 September 2022.

37. In respect of the limitation period on Claimant for failure to provide a written reasons for dismissal, the Claimant made no submissions and gave no evidence.

38. In respect of his claim for holiday pay, notice pay, (which includes in my view, a claim that more properly be described as unauthorised deduction from wages) and breach of contract (which is the correct designation of the Claimant's claim for expenses and notice pay) the Claimant accepted that all these monies became due and payable on either 26 September 2022 when he said the Respondent's final pay run in respect of his employment was carried out, or 30 September 2022, which is the last day of that month. I find that it does not matter which of the two dates the payment was due for the purposes of this decision because whichever it was, both dates meant that the claim was out of time.

39. The Claimant says that he requested clarification of the relevant dates in his case but the request was ignored by the Respondent. The Claimant added that to safeguard his position in respect of the potential of claims being dismissed

for being out of time, he ensured he presented his claim in time on the basis of primary limitation expiring on 5 October 2022, which produced a limitation date of 4 January 2023. He therefore started ACAS Conciliation on that day.

40. Mr Collins' evidence was that there were concerns about the Claimant's performance at work that resulted in the Respondent undertaking an exercise of obtaining feedback from the Claimant's team as to his performance and behaviours. Mr Corrigan, Mr Collins and Claudia Mallon met with the Claimant on 9 September 2022 [116-124] for a probationary review meeting. Following that meeting, Ms Mallon sent the Claimant a letter dated 12 September 2022 [125-126] confirming an agreement had been made in the meeting to extend the Claimant's probationary period to 30 September 2022. The letter also required the Claimant to produce strategies for improving the performance and behaviour issues mentioned at the meeting [125 – 126].

41. The Claimant did not dispute the accuracy of the minutes of the meeting on 9 September 2022.

42. Mr Collins and Mr Corrigan then met the Claimant on 20 September 2022 [131-139C] and they decided that the Claimant's strategies for addressing the issues that had been raised were not convincing. They offered the Claimant the option of either dismissal with no notice worked and a PILON or dismissal with notice, which he would work. Mr Collins said the Claimant initially chose to work his notice but then changed his mind. When the Claimant changed his mind Mr Collins and Mr Corrigan decided to terminate the Claimant's employment immediately and use the contractual clause in the Claimant's contract that permitted the Respondent to terminate the Claimant's employment and impose pay in lieu of notice.

43. After I heard the evidence, I asked Mr O'Dair to speak first in his closing submissions. He relied upon the written submissions were made and supplemented them with brief oral submissions.

44. The Claimant relied on his witness statement and added to these with brief oral submissions.

45. At the end of submissions, it was 16:20pm and I reserved my decision.

Claims

46. In his Schedule of Loss, the Claimant made reference to automatic unfair dismissal. He did not elaborate on what that claim was. I could not see from any of the documents or statements that the Claimant had produced how he could advance a claim for automatic unfair dismissal. He did not have sufficient continuance service to make a standard claim for unfair dismissal under Section 98(4) Employment Rights Act 1996.

47. Mr Nielssen objected to being asked "spot questions" about his claims. I disagreed with his characterisation that I was asking him "spot questions" which implied that the questions I was asking him about his claim were either

an ambush on him or that they came as a surprise. He had been notified of this hearing some weeks ago and must have been aware that the Tribunal would want to discuss his claim with him. It is not unreasonable for a Tribunal to expect a Claimant to know what his claims are some six months after he issued the claim.

Disability

48. The Claimant contends for three disabilities as the basis of his disability discrimination claims: -

    46.1. Type 1 diabetes;

    46.2. ADHD; and

    46.3. Depression and Anxiety

Diabetes

49. The Claimant claims indirect disability discrimination and harassment. He alleges that on 20 September 2022, Claudia Mallon would not allow the Claimant to leave when he said he was having issues with his diabetes. The incident happened whilst the Claimant was waiting for Mr Collins and Mr Corrigan to return for the second part of their meeting.

50. The Claimant claims that on 2 September 2022, at a company day, the Claimant had left to do some exercise. On 20 September 2022, he alleges that Claudia Mallon criticised the Claimant for doing the exercise on a company day. The Claimant regards this as harassment related to the protected characteristic of disability. This incident was not in the Claimant's ET1 or in the documents written for the purposes of this hearing and I can see no reference to the matter in the notes of the meeting on 20 September 2022.

ADHD

51. The claimant says that when he presented his Strategies at the meeting on 20 September 2022, he mentioned obtaining funding from Access to Work for the Respondent disregarded his presentation.

52. The second part of his claim regarding ADHD also related to discussion at the meeting on 20 September 2022 when the Claimant's spelling and grammar was criticised in messages he had sent to colleagues on a messaging platform called Lark. The Claimant noted that the Lark system did not allow him to use Grammarly, which he usually used on other platforms to check his spelling and grammar. He accepted this was not mentioned in his ET1 and would require an application for amendment.

53. The Claimant said that because of his ADHD he needed things to be set out in writing and highlighted this on 20 September 2022. The Respondent had failed to provide information in writing for him which he claims is direct discrimination

because of disability. This is set out in paragraph 25 – 27 in his grounds of complaint.

Depression and Anxiety

54. The Claimant said that he had highlighted his history of depression and anxiety to Liam Corrigan, who had said that he (Mr Corrigan) had a friend who could not get out of bed. The Claimant said that this was harassment related to his depression and anxiety because of the pejorative comparison being made between the Claimant and Mr Corrigan's friend, with the implication that the Claimant was not ill.

55. The Claimant referred to paragraphs 5 – 8 in his ET1 [19] and said that after the company event on 2 September 2022, the Claimant had a conversation with the CEO of the Respondent. Mr Nielssen alleged that the CEO was drunk and was critical of him. He says the effect of the conversation was to exacerbate his anxiety and depression. This was harassment related to disability.

56. The Claimant said that Kellie Gelar harassed him because of his depression and anxiety on 13 September 2022, causing a panic attack by the way that she had spoken to him (paragraph 15 – 17 of the ET1 [20]).

57. Thereafter, the Claimant said that on 30 September 2022, the Respondent continued bullying the Claimant by failing to pay him the monies that were owed to him thereby exacerbating his depression. This continued to 6 October when he was ultimately paid.

58. The Claimant also complained about a complaint that had been made about him by a colleague called Victor Bultana that was referred to at paragraph 7 of Mr Collins' witness statement. The Claimant accepted this was not in his ET1 or the document provided for this hearing.

59. The Claimant claims that all the acts of discrimination alleged were connected and that the final act was the payment of the monies that were due to him on 6 October 2022.

60. He says his dismissal on 20 September 2022 was an act of direct dismissal because of disability.

61. I gave the opportunity to the Claimant to go through his ET1 and grounds of complaint again and identify any further acts of disability discrimination that he wished to bring to my attention. He said that on 16 September 2022 he was sent a text by his Line Manager telling him that he had to produce his strategies on the morning of his return from sick leave and required him to work through sick leave. This was harassment related to disability (paragraph 18 of ET1 [20].

62. In paragraph 19, the Claimant complained that he should have had a return-to-work meeting on 20 September 2022 but instead was taken into the meeting at which he was dismissed. That was an act of harassment (paragraph 19 of his ET1 [20]).

63. In paragraph 20, the Claimant advised the Respondent on 20 September 2022 that its mental health support programme not recognised by the organisation they had listed. This is an act of harassment [21].

64. In paragraph 21 [21], the Claimant said he spent weeks trying to work through the details on instructions in the handbook to receive help with his disabilities. He said that this is an act of harassment.

65. In paragraph 22 [21], the Claimant says that when he was presenting his strategies, he asked for clarities in the areas that were not clear within the letter which were disregarded. That is an act of harassment.

66. In paragraph 23 [21], the Claimant mentioned the issue of Grammarly which continued at paragraph 24 and 25.

67. At paragraph 26 [21], the Claimant was criticised because he failed to say please and thank you in messages. The Claimant did not have the factual of this claim and said that this was harassment and related to disability.

68. The Respondent refused to discuss reasonable adjustments with the Claimant on 20 September 2022 which was a breach of the duty to provide reasonable adjustments under Sections 20 and 21 of the Equality Act 2010.

69. At paragraph 30 [22], the Claimant said "when I highlighted this that it was unlawful for them to do so, and that the policies outlined within the handbook, contract, ACAS and government were not being followed, the CEO and OD looked at the HR Manager to check which she instantly disagreed. The Claimant says that that is an act of victimisation in that he says he was raising issues about disability in the meeting and the Respondent dismissed him shortly afterwards.

70. The Claimant took me to the minutes at the start of the meeting [131] as evidence.

71. The Claimant claims holiday pay, notice pay (which was incorrectly expressed as an authorised deduction of wages) and expenses which is a breach of contract claim for which the Claimant could not provide me with a figure at this hearing.

Decision

General Findings on Contractual Position

72. I find that the Claimant entered into a contract of employment with the Respondent dated 27 May 2022 that was in two parts: a Summary of Information [66-68] and a Statement of Terms [69-80]. This was not disputed by either party.

73. Clause 10.1 of the Statement of Terms [72] contained the only contractual clause about the probation period. That clause stated:

"The probation period for this contract is set out in the Summary of Key Information."

74. The Summary of Key Information simply stated:

    "Probation Period 3 months."

75. I therefore find that there was no express contractual right for the Respondent to extend the Claimant's probation period. I also find that the probation period would have ended on 30 August 2022, three months from the claimant's date of commencement.

76. It was agreed that a probation review meeting was held on 9 September 2022 [116-124]. I find that the Claimant made no complaint that the review took place after the expiry of the probation period and did not object in the meeting or at any point during his employment that the probation period had been extended.

77. It was agreed that the Claimant was told that his probation period was extended by three weeks to 30 September 2022 in the meting and that this was confirmed in the Respondent's letter to the Claimant dated 12 September 2022 [125-126].

78. I find that the Claimant agreed an extension of his probation period to 30 September 2022 by his acquiescence to the Respondent's actions on 9 September 2022 at the probation review meeting and the subsequent letter of 12 September 2022. The claimant did not dispute that his probation period had been extended at the meeting on 20 September 2022. I find that the Claimant's requisite notice period, therefore, was the two weeks set out in the Summary of Key Information [66].

79. It was not disputed that Clause 21 of the Statement of Terms [78] gave the Respondent the right to terminate the Claimant's employment at any time and with immediate effect by paying a PILON.

Specific Findings

Failure to Provide Written Reasons for Dismissal

80. The time limit in claims of failure to provide the reasons for dismissal is contained in section 93(3) of the Employment Rights Act 1996. Time starts to run on the effective date of termination. I find that the effective date of termination of the Claimant's employment was 20 September 2022 because of the following: -

    80.1 I find that the Respondent could have used clearer language to the Claimant in the meeting by, for example, not referring to "garden leave" on 20 September 2022. In the meeting, Ms Mallon stated [139A] "It is an end of probation, and we have two option (sic): you are going on garden leave, paid or you are working your notice."

80.2 However, she went on to say [141] "This is a dismissal." It was also made clear to the Claimant that his notice entitlement was two weeks. He did not dispute this at the time.

80.3 I find that the Respondent could have used clearer language in the letter confirming dismissal of 20 September 2022.

80.4 However, I do not find that the Claimant has shown on the balance of probabilities that he genuinely believed that his employment did not end on 20 September 2022. He made numerous references at this hearing to his employment ending "immediately".

80.5 There is no mention in the agreed minutes of the 20 September meeting of the Claimant taking issue with the Respondent's decision to reject the Claimant's change of heart about working his notice and dismissing him.

81. Whilst I find that the letter of 20 September 2022 could have been clearer, I also find that it was clear that the last day on which the Claimant was required to attend work was 20 September 2022. The letter did not state that the Claimant had been placed on "garden leave" and the Claimant was told that his employment was ending on 20 September 2022:

> *"…the last day that your services will be required is Tuesday 20th September 2022, save for any necessary follow ups from your line manager in respect of your handover."*

82. I do not accept the Claimant's point that because he had not accepted the pay in lieu of notice that the dismissal was not effective until he had accepted it.

83. The very argument supposes that the Claimant had been notified of his dismissal with immediate effect on 20 September 2022.

84. The Claimant did not raise the case of **Geys v Société National** but in furtherance of his duty to the Tribunal, Mr O'Dair did. I distinguished the facts of **Geys** from the of this case for the following reason:

84.1 The case of **Meaker** makes it clear that **Geys** does not apply to the determination of the effective date of termination for unfair dismissal purposes. I find that the circumstances in this case require me to find the effective date of termination, so any **Geys** argument does not apply.

85. Having determined that the last act of discrimination that the Claimant can rely upon was on 20 September 2022, he had to start early conciliation by 19 December 2022 for his discrimination claims to be in time. He obviously did not do this.

86. Further, any argument that the termination date should have been 30 September (because that is when the probation period had been extended to) or 4 October 2022 (two weeks after 20 September) would not have assisted the claimant, as he commenced early conciliation on 4 January 2023, which was still out of time.

87. I therefore find that the Claimant should have presented his claim of failure to provide written reasons for dismissal to the Tribunal by 19 December 2022. He did not and therefore his claim was out of time. I will deal with whether or not it was reasonably practicable for him to present this claim and all the other claims where reasonable practicability is the test together below.

Holiday Pay

88. The time limit for holiday pay is set out in Regulation 30 of the Working Time Regulations 1998.

    "The Employment Tribunal shall not consider a complaint under this Regulation unless it is presented (a) before the end of the period of three months beginning with the date on which it is alleged that the holiday pay should have been paid or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practical for the complaint to have been presented before the end of that period."

89. I find that the law on holiday pay is clear. Time begins to run from the date that the payment was due. Therefore, the latest date upon which payment was due was 30 September 2022 which means the claim should have been submitted by 29 December 2022. It was not, so the claim is out of time.

Breach of Contract

90. The time limit for wrongful dismissal/breach of contract claims is set out in Article 7 of the Employment Tribunal's Extension of Jurisdiction (England and Wales) Order 1994. This states the Employment Tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented (a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim or (b) when the Tribunal is satisfied that it was not reasonable and practicable for the complaint to be presented within whichever of those periods is applicable.

91. I have found that the effective date of termination was 20 September 2022, so the claim should have been presented before midnight on 19 December 2022. It was therefore out of time.

Reasonably Practicable Test

92. The question of what is reasonably practical or means what was reasonably feasible (**Palmer & Another v Southend on Sea Borough Council** [1984] ICR 372). In the case of **Dedman v British Building and Engineering Appliances Limited** [1974] ICR 53, the Court of Appeal stated the relevant questions were:-

    92.1 what were the Claimant's opportunities for finding out [their] rights?

    92.2 did [they] take them, if not, why not?

    92.3 [were they] mislead or deceived?

93. The Claimant in this case was at pains to tell me that he knew what his rights were and said that he specifically calculated the date for starting ACAS Early Conciliation having calculated his rights. Ignorance of the time limits therefore cannot be raised by the Claimant in this case. Unfortunately, he has simply made a miscalculation of the law on the effective date of termination and the applicable time dates for the other claims. The Claimant knew his rights and was not deceived or misled by the Respondent.

94. Where the ill health of a Claimant is reminded upon, it should be supported by medical evidence which should not only support the Claimant's claim to be ill but also show that the illness prevented the Claimant from submitting the case in time. The claimant produced no medical evidence whatsoever that explained his asserted inability to present the claim in time.

95. In the case of **Schultz v Esso Petroleum Co** [1999] ICR 1202, it was held that the Claimant's incapacity due to illness took place at the end of the limitation period in question, and it was not reasonably practicable for him to have made the claim during that period. However, in the Court of Appeal's view, the Employment Tribunal failed to have regard to all the surrounding circumstances which included the fact that the Claimant had been trying to avoid litigation by pursuing an appeal against his dismissal and it was necessary to consider what should have been done during the whole of the limitation period.

Disability Discrimination

96. I find that the latest acts that the Claimant could rely upon as an act of discrimination are the acts alleged at the meeting on 20 September 2022. I find that the attempt at this hearing to claim that the payment of the PILON on 6 October 2022 was an act of discrimination is an attempt to extend the start of the period in respect of the limitation date for the discrimination claims.

97. That means primary limitation expired at midnight on 19 December 2022. The Claimant's claims are therefore out of time. I make that finding because:-

    (i) That the Claimant had not before today claim that the failure to pay the monies due to him on 6 October 2022 were an act of disability discrimination. I find that he has elaborated his claim to bring the claims of disability discrimination within time. The claim of failure to make reasonable adjustments has a time limit that starts to run when the adjustments are made. The Claimant did not work again after 20 September 2022 so that claim begins to run on that date.

    (ii) All the other claims that predate 20 September 2022 were presented out of time.

Discrimination Complaint

98. Time limits are set out in Section 123 of the Equality Act 2010 which says that proceedings may not be brought after the end of (a) the period of three months starting with the date of the act which the complaint relates, or (b) such other period as the Employment Tribunal thinks is just and equitable.

99. In **Robertson v Bexley Community Centre TA Leisure Link** [2003] IRLR 434, the Court of Appeal stated that where an Employment Tribunal consider exercising the discretion under Section 123(1)(b) of the Equality Act 2010, there is no presumption that they should do so unless they can justify fairly to exercise the discretion. Quite the reverse. The Tribunal cannot hear a claim unless the Claimant convinces it that it is just and equitable to extend time. This does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds.

100. In exercising the discretion to allow out of time claims to proceed, the Tribunal may also have regard to the check list contained in Section 33 of the Limitation Act 1980 **(British Coal Board v Keeble & Others** [1990] IRLR 336*).* Section 33 requires the Tribunal to consider the prejudice that each party would suffer in the result of the decision reached and to have regard to all the circumstances of the case, in particular; the length and reasons of the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the parties sued have co-operated with any request for information from the claimant; the speed with which the Claimant acted once they knew of the facts giving rise to the cause of action; and the steps taken by the Claimant to obtain advice once he knew of the possibility of taking action.

101. In this case I find that the Respondent will be prejudiced in having to defend a claim that was out of time. The Claimant would be prejudiced by not being able to bring the claim that he would have been able to bring had it been brought within time. I find that the balance of prejudice falls in favour of the Respondent.

102. The Claimant has not given good reasons for the delay and has not given no medical evidence to support the reason. The cogency of the evidence is not materially and adversely affected by delaying issuing the proceedings and neither is the extent to which the Respondent has co-operated with requests for information. The Claimant said he asked for information from the Respondent but could have made his own enquiries about the dates he enquired about. I find that the respondent did not mislead or deceive the Claimant.

103. The Claimant acted on a timetable based on his understanding of the relevant time limits, so the promptness of when he acted once he knew he had a course of action is irrelevant, as he knew he had a course of action from the date of his dismissal.

104. In **Adedeji v University Hospital Birmingham NHS Foundation Trust** [2021] EWCA Civ 23, the Court of Appeal held it was not healthy for the **Keeble** factors to be taken as the starting point for the Tribunal's approach. The best approach for a Tribunal in exercising the discretion to assess all the factors is to consider the particulars that it considers relevant including length and reason of delay.

105. Whilst I have some empathy with the Claimant's situation, I find that the claims that he has presented are not very strong. For example, some of his allegations of disability discrimination are actually allegations that acts of the Respondent exacerbated an existing medical condition.

106. I find that the practical consequences of a decision to dismiss all the Claimant's claims on time points is that the Respondent would not have to defend what I find to be relatively weak claims that in many ways are based on his misunderstanding of the law on matters such as time limits, the nature of claims such as those of failure to make reasonable adjustments, the law of contract , and how notice periods work.

107. I find that the balance of prejudice weigh significantly in favour of the Respondent being more prejudiced than the Claimant and therefore I refuse to use my discretion to extend time on the just and equitable basis.

108. I find that all the Claimant's claims are out of time. I find that it was reasonably practicable for the Claimant to make the claims in time that required that test. I find that it would not be just and equitable to extend the time for the disability discrimination claims.

109. All the Claimant's claims are dismissed.

Employment Judge S Shore

7 September 2023