EMPLOYMENT TRIBUNALS

Claimant: Mr A white
Respondent: Yodel Delivery Network Limited

Heard at: Watford (in public by CVP) **On:** 14 July 2023

Before: Employment Judge McCarthy

REPRESENTATION:

Claimant: In person
Respondent: Ms J Ferrario (of Counsel)

PRELIMINARY HEARING IN PUBLIC

RESERVED JUDGMENT

The judgment of the Tribunal is as follows:

1. The complaints of unfair dismissal and unauthorised deduction from wages were both not presented within the applicable time limit. It was reasonably practicable to do so. The complaints of unfair dismissal and unauthorised deduction from wages are therefore dismissed.

2. The complaints of disability and race discrimination were both not presented within the applicable time limit, but it is just and equitable to extend the time limit. The complaints of disability discrimination and race discrimination will therefore proceed.

REASONS

Introduction

3. By a claim form presented on 5 December 2022 (having entered early conciliation on 4 October 2022 and having received a certificate against the respondent dated 15 November 2022), the claimant complains of unfair dismissal, unauthorised deductions from his wages, disability and race discrimination.

4. The respondent submits that all the claimant's complaints are time barred and should be struck out on the basis that the Tribunal does not have jurisdiction to hear these complaints.

5. A public preliminary hearing was listed "*to determine if the Tribunal may hear the claims, as the ET1 appears to have been presented out of time.*"

6. On 3 July 2023, the claimant sent the following email to the Tribunal attaching a letter.

   "*To whom it may concern.*

   Please see the letter. I'm asking for some more time as the lawyer has declined to represent me and I need to find another lawyer."

   I asked the claimant whether in this email (which had not been copied to the respondent) he was seeking a postponement of today's hearing. The claimant confirmed that he had been asking for more time at the beginning of July. He did not have another lawyer but confirmed that he did not wish to make an application for a postponement of today's preliminary hearing and that he was able to proceed. I was satisfied that it was still fair to proceed with today's preliminary hearing notwithstanding the claimant was unrepresented.

7. I apologise for the delay in producing this judgment. The delay was because of leave and other pressures of work.

Claims and Issues

8. I clarified with the claimant what claims he was making at the outset of the preliminary hearing. He clarified that his claim of race discrimination related to the act of dismissal only and his claims of disability discrimination covered his period of employment, with the last alleged act of disability discrimination being his dismissal. He confirmed he was also bringing a claim of unfair dismissal and unauthorised deduction from wages for any sums owed to him from his employment. He was not able to particularise what these sums were. In relation to the disability discrimination complaint, the claimant relied on the physical impairment of Osteoarthritis of his hip. He also said that he had previously had a stroke. The respondent disputed disability.

9. We discussed the issues to be determined at the hearing and how I would be considering:

9.1 Were the race and disability discrimination complaints made within the time limit in the Equality Act 2010 (section 123)? I would be deciding:

9.1.1. Were the complaints made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaints relate/ or the end of any period of conduct extending over a period?

9.1.2. If not, were the complaints made within such further period as the Tribunal thinks is just and equitable?

9.2. Were the unfair dismissal and unauthorised deductions complaints made within the time limit in the Employment Rights Act 1996 (in section 111 and 23)? I would be deciding:

9.2.1. Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the effective date of termination / date of payment of the wages from which the deduction was made?

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

9.2.3. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within such further period as the Tribunal considers reasonable?

Procedure/Documents and evidence heard

10. I heard oral evidence from the claimant on his own behalf. I was also provided with a bundle of documents and a note from the respondent's counsel which included written submissions. The claimant confirmed that he had had an opportunity to consider this note prior to the preliminary hearing. The claimant did not provide any written witness statement or submissions.

Factfinding

11. I only make findings of facts where necessary to resolve the issue of time limits before me. As to the background to the claim itself there is clearly a body of disputed evidence and I make no findings of fact in relation to that background. References to page numbers are to the bundle of documents.

12. The claimant contends that he was employed by the respondent from 4 October 2002 until his dismissal. He contends he was most recently employed as a CSS General. It is agreed that prior to his dismissal the claimant had been absent from work for an extended period. The claimant contends that he had Osteoarthritis of the hip and the respondent refers in its Grounds of Resistance to the claimant being on long-term sickness absence that was related to pain that the Claimant experienced in his leg and back.

13. The respondent contends that the claimant's employment was terminated with notice on 27 April 2022 by reason of capability. The respondent contends that the "claimant's dismissal came at the conclusion of a full and fair sickness absence procedure" it says it only took the decision to dismiss when it had obtained enough information to ascertain that the Claimant was not able to return to work in the foreseeable future.

14. I find that the claimant was dismissed at a meeting to discuss his absence from work on 27 April 2022. I am satisfied that the claimant was aware that he had been dismissed on this date. The claimant had stated in his ET1 form that he had been dismissed on 22 April 2022, but at the start of his evidence, the claimant gave clear and unequivocal evidence about his dismissal. He told me that his employment came to an end at a meeting with the respondent on 27 April 2022 with immediate effect. He said he was not given any notice of his dismissal and knew he had been dismissed as he was told by the respondent not to enter the respondent's premises again and if he did, he would be trespassing. He told me that after this date he had no further contact with the respondent, which was "*very hard to take*". He also told me that his union representative (who had accompanied him at the meeting of 27 April 2022), told him that evening that the union would launch an appeal against his dismissal on his behalf and, following 27 April 2022, he visited the DWP to see what benefits he was entitled to. In cross examination the claimant accepted that it was "*clear to [him] that he had been dismissed*" but he clarified that this was "*pending an appeal*."

15. The claimant did not contact ACAS (either directly or indirectly) to commence Early Conciliation until 4 October 2022 for more than five months after the termination of his contract. The claimant's original explanation for why he had delayed in presenting his claim was that "*his wages were still being paid, he was very stressed, he had no idea what was really happening, and he thought he would keep going, waiting for his appeal and maybe he would get his job back".* He also said he "did not know anything about time limits whatsoever" and was unaware of the need to bring his claims within 3 months. He also told me that there were a lot of issues in the background during the five month period between his dismissal and contacting ACAS. He said he was trying to get physiotherapy and was working to "*get his back and spine back into shape*", he was in a lot of pain, dealing with his divorce and continuing to take medication for a previous stroke. He said it was a lot to take in all at once.

16. The claimant told me in evidence that despite the termination of his employment on 27 April 2022, he still continued to receive his salary each month until the end of August 2022 (i.e. for four months after the termination of his employment). The claimant accepted he made no attempt to contact the respondent to report that he was still being paid salary or to query why he was still being paid. The claimant said that as he had not received a P45 and was continuing to receive salary, it made him question whether he was still employed or not. The claimant became aware at the end of September 2022 that the respondent had stopped making salary payments, as salary payments were made at the end of each month. The claimant contacted ACAS to commence early conciliation within four days of the end of that month.

17. The claimant's main reason for not presenting his claim until 5 December 2022 was because he said he was waiting for his appeal to be dealt with. He said he was "*waiting for the respondent to call him for an appeal meeting.*" However, during the preliminary hearing, the claimant provided no evidence to support his belief that an appeal had been "lodged" with the respondent. The claimant had not included a copy of his appeal in the bundle and, in evidence, confirmed that he had never seen or been provided with a copy of any such appeal by his union representatives. Despite this he still believed one had been lodged on his behalf, as his union had told him that they would file one on his behalf. He confirmed in evidence that he had never been asked by his union representatives to fill out any forms or asked to provide any information about his appeal. The claimant said that he did not think that he needed to check the content of any appeal. He said that the union representative at been at the dismissal meeting and if the union needed any further information on his appeal then they would have approached him.

18. The claimant confirmed in evidence that he had never been contacted by the respondent regarding an appeal, nor had he ever been invited to an appeal meeting. The claimant confirmed that in the five months prior to contacting ACAS to commence early conciliation, he had never contacted the respondent himself to enquire about his appeal, when his appeal meeting would be or query the delay. As noted above, the claimant's evidence was that the last time the respondent contacted him was on 27 April 2022.

19. When asked by Ms Ferrario whether he had tried to get in touch with his union representative when he had heard nothing further about his appeal after a number of months, the claimant said that he was told that the appeal was going to be filed on his behalf and "*he left it*". He said he had assumed that his appeal would take months and that it was a long, drawn out process. When asked whether he had discussed his appeal with his union during the five months following his dismissal, he said that he was sure he had had telephone calls with his union representatives about his appeal. I find the claimant did not proactively pursue his appeal.

20. The claimant had access to various sources of advice and information in the six months following his dismissal and I find he was aware of these sources and had opportunity to take such advice. The claimant had a longstanding relationship with his union and had been aware since 2010 how to contact his union in the event of any issue or dispute with the respondent. He said that in 2010 he had been given a card detailing who to contact in the union but expressed a lack of faith in local union representatives in relation to earlier issues that had come up in the workplace. When he had attended the meeting on 27 April 2022, he had been accompanied at his meeting by a union representative. The claimant said in evidence that after his dismissal he had continued to be represented by his union (the GMB) until just "a few days" prior to this preliminary hearing. His ET1 form includes details of a union representative from the GMB and I can see that there are correspondence between the respondent's solicitors and the GMB in the preliminary hearing bundle. The claimant said that during the five months between his dismissal and the start of early conciliation, he accepted that he didn't have too much contact with his union but said he did discuss his case with his union

representatives at various points on the telephone. The claimant said that in the five months following his dismissal he had visited the citizens advice bureau but said he had been advised to stay with his union if he had representation.

21. The claimant was familiar with researching matters. The claimant talked about the library and how "*when I get time I do research in there*". He explained that the librarian at his library would help him to do this and that it was the librarian who had helped him to submit his Employment Tribunal claim on 5 December 2022 and who had told him that he had submitted it late- but he decided to submit it anyway.

22. The claimant had previously been proactive in seeking advice and/or contacting ACAS when he was in dispute with the respondent. The claimant told me that in January 2022 he had contacted ACAS in relation to a dispute over his pay. He said he had been "docked three days pay" and contacted both ACAS and his union. He said that he had contacted ACAS after becoming frustrated with his union. Despite having contacted ACAS a few months before on another matter, the claimant did not contact (directly or indirectly) ACAS regarding his complaints more than five months after his dismissal. The claimant told Ms Ferrario in cross examination that it had never occurred to him to contact ACAS in the five months following his dismissal.

23. The ACAS certificate records that early conciliation commenced on 4 October 2022 and an Early Conciliation certificate was issued on 15 November 2022. The Claimant was asked by Ms Ferrario what had prompted him to start early conciliation and who had contacted ACAS. The claimant provided no explanation as to what had prompted him to start Early Conciliation at this stage and he said he was not sure whether it was him or his union representative who had contacted ACAS to commence early conciliation.

24. The claimant said he was told to fill out an ET1 form but was not sure whether this information had come from his union or ACAS. What is clear is that he knew to request advice from his union as to "*what needed to be done*". The claimant drafted and submitted his ET1 form himself as the relevant union representative was on holiday. The claimant presented his ET1 form to the Employment Tribunal on 5 December 2022.

The Law

Time Limits in Unauthorised deduction from wages claims

25. Section 23 ERA provides that a worker has a right to complain to an employment tribunal of an unauthorised deduction from wages. However, Section 23(2)-(4) ERA (see below) sets out the time limit for bringing such complaints. An employment tribunal will not have jurisdiction to consider a complaint under section 23 ERA if the complaint is not presented in time.

Section 23(2)-(4)

(2) "Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with-

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or
(b) ….

(3) Where a complaint is brought under this section in respect of –
(a) A series of deductions or payments, or
(b) …..

The references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

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

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it was presented within such further period as the tribunal considers reasonable."

Time Limits in Unfair dismissal cases

26. The time for presenting a complaint of unfair dismissal is determined by s.111(2) of the Employment Rights Act 1996 which provides:-

"(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

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

Not Reasonably Practicable

27. The onus of proving that presentation in time was not reasonably practicable rests on the claimant. This "*imposes a duty upon him to show precisely why it was that he did not present his complaint*"- ***Porter v Bandridge Ltd 1978 ICR 943, CA*.**

28. "The relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done - Lady Smith in ***Asda Stores Ltd v Kauser EAT 0165/07***

29. What is reasonably practicable is a question of fact and so a matter for the tribunal to decide- ***Wall's Meat Co Ltd v Khan 1979 ICR 52, CA*****:** '*The test is empirical and involves no legal concept. Practical common sense is the keynote"- Lord Justice Shaw.*

30. The existence of an impending internal appeal was not in itself sufficient to justify a finding that it was not reasonably practicable to present a complaint to a tribunal within the time limit -***Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA*****.**

31. As Lord Scarman commented in *Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, CA*, where a claimant pleads ignorance as to his or her rights, the tribunal must ask further questions: 'What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived?'

32. Even if a claimant satisfies a tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his or her favour. The tribunal must then go on to decide whether the claim was presented 'within such further period as the tribunal considers reasonable'.

Time limits in Discrimination claims

33. The relevant time-limit is at section 123 Equality Act 2010. Section 123 provides:

> (1) **Subject to section 140B, proceedings on a complaint within section 120 may not be brought after the end of—**
> **(a) the period of 3 months starting with the date of the act to which the complaint relates, or**
> **(b) such other period as the employment tribunal thinks just and equitable.**
>
> **(2) ….**
>
> **(3) For the purposes of this section—**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
> **(b) failure to do something is to be treated as occurring when the person in question decided on it.**
> **(4) ……**

34. The normal three-month time limit needs to be adjusted to take into account the early conciliation process and any extensions provided for in section 140B Equality Act.

35. Unlawful discrimination claims may be considered out of time provided that the claim is presented within 'such other period as the employment tribunal thinks just and equitable' — s123(1)(b) Equality Act 2010. The test is less strict than in unfair dismissal cases and the tribunal has a wide discretion. The Tribunal should not extend time without receiving representations from the respondent.

36. It is for the claimant to show that it would be just and equitable to extend time. The exercise of discretion has been said to be the exception, not the rule (**Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576**). LJ Auld stated at paragraph 25

'It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.'

37. As confirmed by the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23, Underhill at paragraphs 37 and 38 stated that the best approach is for the tribunal to **assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. This will include the length of and reasons for the delay**. If it checks those factors against the list in **Keeble,** well and good; but he would not recommend taking it as the framework for its thinking. The **British Coal Corporation v Keeble** [1997] IRLR 36 set out below, as well as other potentially relevant factors:

- The extent to which the cogency of the evidence is likely to be affected by the delay.
- The extent to which the party sued had co-operated with any requests for information.
- The promptness with which the claimant acted once they knew of the possibility of taking action.
- The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action

The fact that the claimant was awaiting the outcome of a grievance or appeal is also a relevant, but not a decisive, factor.

38. In **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640, Leggatt LJ, having referred to section 123, stated, at paragraphs. 18-19 of his judgment:

"18. … [I]t is plain from the language used ('such other period as the employment tribunal thinks just and equitable') that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see [Keeble]), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see [Afolabi]. …

19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the

respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

39. In the case of **Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327** at Sedley LJ [31] and [32] that there is "no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised" and that whether to grant an extension "is not a question of either policy or law" but "of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it". For this reason, the exercise of the discretion is rarely subject to successful appeal.

Discussion and Conclusions:

Unfair dismissal claim

40. The time for presenting a claim of unfair dismissal is determined by section 111(2) of the Employment Right's Act 1996 (the "ERA") which provides that the relevant time limit for bringing a claim is within three months (allowing for any early conciliation extension) of the effective date of termination. I concluded that the effective date of termination was 27 April 2022 and so the time limit provided for in section 111(2) ERA expired on 26 July 2022. This date is not subject to the usual modification by s.207B ERA (to take account of early conciliation), as in this case s207B ERA has no effect as early conciliation was not commenced before the expiry of the normal time limit. The claimant did not present his claim for unfair dismissal until 5 December 2022 and therefore his claim was not presented within three months of the effective date of termination and was presented over four months out of time.

41. I then moved to consider whether it was reasonably practicable for the claimant to present his claim before the end of the relevant period of three months. I was mindful that the burden rests on the claimant to show that it was not reasonably practicable and that the discretion to extend that time limit as provided by s.111(2)(b) is a stricter test than its equivalent in other claims for which a just and equitable test is provided- such as unlawful discrimination claims. If the claimant cannot satisfy this test the claim is out of time without further consideration. If he can, then the claimant has to satisfy me that the time within which the claim was presented is itself a further reasonable period of time.

42. On the basis of my findings of fact, I find that it was reasonably practicable for the claimant to present his claim of unfair dismissal before the end of the relevant period of three months. Knowledge of one's rights, how to enforce them and knowledge of the procedure to do so are all potentially available to an out of time claimant to explain why, in any particular case, it was not reasonably practicable to present a claim, as are genuine mistakes or misunderstandings which were reasonable to make in the circumstances. I have decided the evidence does not assist the claimant with any of these potential explanations. I have reached that conclusion for a number of reasons.

43. I accepted the claimant's explanation for the delay- that he believed an appeal had been lodged by his union on his behalf and was waiting to be invited to an appeal hearing and he was unaware of the time limits for bringing his claims.

44. I considered whether it was reasonable for this claimant to labour under the belief that he had a pending appeal which had been lodged on his behalf by his union. I am not satisfied that it was a reasonable for the claimant to believe that he had a pending appeal and labour under this belief for over five months and without taking any reasonable steps to clarify the position with the respondent or his union. The claimant was never provided with a copy of any appeal by his union or contacted by them to discuss the contents of his appeal. He never received an acknowledgement from the respondent of an appeal or was invited to an appeal meeting. He never contacted the respondent to ask when his appeal would be heard or to enquire about the delay. He didn't raise his concerns with his union representative and instead just "*left it*" presuming that the appeal would be a long drawn-out process.

45. I then turned to the claimant's argument that he was ignorant of the time limits for bringing a claim. I am not satisfied that the claimant was reasonably ignorant of his rights and the procedure to enforce them (including the time limit for bringing his claim). The claimant had a number of opportunities for finding out what rights he had and how to enforce them and did not reasonably take them prior to the expiry of the normal time limit. The claimant confirmed that he was represented by his union at his dismissal meeting and continued to be represented by them until only a few days before this preliminary hearing. I concluded that he had access to competent advice and various opportunities for finding out that he had rights. He was aware of ACAS, having used them to discuss a pay dispute a few months before. The claimant said that he had visited the Citizens Advice Bureau and that he was familiar with researching concepts with the assistance of the librarian he referred to in his evidence and would have access to various online resources which provided information on time limits. He did not submit that he had been misled by his union or provided with the wrong advice.

46. Whilst the claimant stated in evidence that he was stressed and in pain in the months following his termination and I considered that he had been on a period of long term absence before he was dismissed, he did provide any evidential basis or submissions to suggest that his health had made it not practicable for him to present his claim in time. He explained that he was spending some of his time in the months after his dismissal trying to improve his physical health, such as through physiotherapy. I do not find that the clear issues with the claimant's physical health assist the claimant and am not satisfied that any such issues explained why it was not reasonably practicable to bring a claim. The claimant also refers to how he was still being paid for a period after this dismissal and whilst I accept that this may have caused some confusion, I am not satisfied that such confusion was reasonable. I found that the claimant was clear that he had been dismissed on 27 April 2022 but he made no efforts to clarify with the respondent why he was continuing to be paid and whether it was an error during the number of months that such salary payments were made.

47. For the reasons I have given, the claimant has not established the facts of the reason why a timely claim was not reasonably practicable and I am satisfied that it was reasonably practicable for the claim of unfair dismissal to have been presented in time. As a result, there is no requirement to consider the second limb of the test.

48. The claim of unfair dismissal is therefore dismissed.

Unauthorised deduction from wages claim

49. The time for presenting a claim of unauthorised deduction of wages is determined by section 23(2)-(4) ERA. I conclude that last date from which an unauthorised deduction from wages claim could run was also 27 April 2022. The time limit provided for in section 23(2) ERA expired on 26 July 2022. This date is not subject to the usual modification by s.207B ERA (to take account of early conciliation) as in this case s207B ERA has no effect as early conciliation was not commenced before the expiry of the normal time limit. The claimant did not present his claim for unfair dismissal until 5 December 2022 and therefore his claim was not presented within three months of the last date on which an unauthorised deduction could run and was presented over four months out of time.

50. I then moved to consider whether it was reasonably practicable for the claimant to present his claim of unauthorised deductions from wages before the end of the relevant period of three months. I was mindful that the burden rests on the claimant to show that it was not reasonably practicable and that the discretion to extend that time limit as provided by s.111(2)(b) is a stricter test than its equivalent in other claims for which a just and equitable test is provided- such as unlawful discrimination claims. If the claimant cannot satisfy this test the claim is out of time without further consideration. If he can, then the claimant has to satisfy me that the time within which the claim was presented is itself a further reasonable period of time.

51. For the same reasons as set out in paragraphs 41-46 above the claimant has not established the facts of the reason why a timely claim was not reasonably practicable, and I am satisfied that it was reasonably practicable for the claim of unauthorised deduction from wages to have been presented in time. As a result, there is no requirement to consider the second limb of the test.

52. The claim of unauthorised deduction from wages is therefore dismissed.

Race and Disability Discrimination Complaints

53. The time for presenting a complaint of disability discrimination is set by s.123(1) of the Equality Act 2010 which provides:- (1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of— (a)the period of 3 months starting with the date of the act to which the complaint relates, or (b)such other period as the employment tribunal thinks just and equitable.

54. My first consideration was to identify when time starts to run in relation to this race and disability discrimination complaints. Taking the race discrimination complaint first.

55. The claimant clarified that the act to which his race discrimination complaint relates is his dismissal only. I found that the claimant's dismissal took place on 27 April 2022 and so conclude that time started to run on 27 April 2022. The time limit provided for in section 123(1) Equality Act 2010 expired on 26 July 2022. This date is not subject to the usual modification by s140B Equality Act 2010 (to take account of early conciliation) as in this case by s140B Equality Act 2010 has no effect as early conciliation was not commenced before the expiry of the normal time limit. The claimant did not present his complaint for race discrimination until 5 December 2022 and therefore his complaint was not presented within three months of (allowing for any early conciliation extension) of the act to which the complaint relates and was presented over four months out of time.

56. Moving onto the claimant's disability discrimination complaint. The claimant's complaint of disability discrimination requires further particularisation (and possibly permission to amend) but in his ET1 claim form the claimant alleges there was conduct extending over a period with the end of that period being his dismissal on 27 April 2022. It seems to me that the claimant's circumstances from 21 January 2022 (when his absence commenced) that lead to termination of employment are part and parcel of his claim of disability discrimination and the absence process followed that leads to termination of employment should be used for present purposes to assess time limits. Anything earlier than that may or may not form part of conduct extending over a period and will be subject to a discrete consideration of time limits by another Tribunal when the complaint has been fully particularised, and it has heard all the relevant evidence.

57. On this basis the latest date from which the claimant's complaint of disability discrimination could run from was 27 April 2022 and even then the complaint was presented more than four months out of time. The time limit provided for in section 123(1) Equality Act 2010 expired on 26 July 2022. This date is not subject to the usual modification by s140B Equality Act 2010 (to take account of early conciliation) as in this case s140B Equality Act 2010 has no effect as early conciliation was not commenced before the expiry of the normal time limit. The claimant did not present his complaint for disability discrimination until 5 December 2022 and therefore his complaint was not presented within three months of (allowing for any early conciliation extension) of the end of the period of alleged conduct extending over a period and was presented four months and one week out of time.

58. As both the race and disability discrimination complaints were not presented in time, I moved on to consider whether the complaints of race and disability discrimination made within such further period as the Tribunal thinks is just and equitable. The discretion to extend time on a just and equitable basis is a fundamentally different test to the not reasonably practicable test and less strict. I am given wide judicial discretion to permit complaints of unlawful discrimination to proceed out of time – such discretion to be exercised have regard to fairness, justice, relevance and reason. In her submissions, Ms Ferrario reminded me that Section 123 does not specify any factors to which a

tribunal is to have regard when considering whether to exercise the discretion to extend time for just and equitable reasons. Ms Ferrario also referred me to the cases of **British Corporation v Keeble [1997] IRLR 336 EAT** and **Adedeji v University Hospital Birmingham NHS Foundation Trust [2021] EWCA Civ 231**. As **Adedji** notes, whilst the requirements of s.33 of the Limitation Act 1980 may assist in setting out potentially relevant factors and serve as a useful reminder of the sort of considerations that might help balance the prejudice between the parties of granting or refusing the extension of time, it was not a "list" that should be used as a framework and if one or more of the s.33 factors are not relevant, the statutory test does not require me to consider it.

59. The claimant's delay in presenting his race and disability discrimination complaints was four months and one week. The latest date on which the normal time limit expired being 26 July 2022 and the claimant having presented his claim on 5 December 2022. The reason for the claimant's delay in presenting his claim was that he was waiting to be contacted about an appeal he believed his union had lodged upon his behalf to see whether he could get his job back and was ignorant of the time limits for bringing a claim. I have found, with respect to the reasonably practicable test applicable to the claimant's unfair dismissal and unauthorised deductions complaints that the claimant's approach was not a reasonable one but in relation to the application of the "just and equitable" test in relation to the claimant's discrimination complaints, the fact the claimant was waiting for his appeal to be heard and mistakenly believed that an appeal was still pending is a relevant factor which I regard as assisting his application.

60. It is clear that the fact the claimant was continuing to receive salary for four months after his dismissal (which was likely in error but in the absence of any submissions from the respondent I make not findings in relation to this) gave him some level of comfort (including financial) to wait longer for his appeal to be dealt with and to see "whether he could get his job back" before bringing a claim and allowed him to focus on improving his physical health after a period of long term absence. The salary payments also caused confusion and I accept the claimant's submission that it made him wonder whether he was employed or not, particularly as he had not received a P45. As salary payments were made at the end of each month, the claimant would not have been aware that the respondent had ceased paying him until the end of September 2022. The claimant approached ACAS within 4 days of the end of September 2022 – the ACAS early conciliation certificate records that first contact is made with ACAS on 4 October 2022. I find that it was having spoken to ACAS the claimant knew of the possibility of taking action and took prompt action to obtain appropriate legal advice from his unions and establish "*what needed to be done*." I accept the claimant's evidence that he completed and submitted his claim form as he was informed that the relevant union representative was on holiday. I note that the claimant did not further delay in presenting his claim (by waiting for the union representative to return from leave), instead he completed it himself. Against these considerations of just and equitable discretion to extend time, I regard these factors as assisting his application.

61. I also considered as a relevant factor to note and weigh was the absence of any real prejudice to the respondent. The respondent has been aware of the claim

since the end of January 2022 (with the notice of claim being sent out on 27 January 2023. It has been able to present a response, as the issues are broadly set out in the claim and it has been in a position to secure such evidence as may be relevant to the circumstances of the claimant's recent employment history, the absence procedure followed and the claimant's dismissal. What is clear is that there is no particular substantial prejudice evidenced or advanced by the respondent beyond the fact that it has a time limit point to argue in addition to merits until the time limit point is determined. The respondent contends in its response that "*The Claimant's dismissal came at the conclusion of a full and fair sickness absence procedure, during which the Respondent held several meetings with the Claimant to understand the nature of his condition and to explore whether any adjustments could be made to facilitate a return to work. The Respondent confirms that it only took this decision when it had obtained enough information to ascertain that the Claimant was not able to return to work in the foreseeable future".* Therefore, I conclude that the history and events relevant to this matter, including the respondent's absence procedure is likely to be one which was well documented including meeting notes, contemporaneous correspondence between the claimant, his managers and HR but also occupational health reports/medical reports. The respondent has not suggested that contemporaneous documentation has been destroyed or lost. There is always a general risk of some deterioration in the quality of evidence as time goes on. To the extent that this is a relevant factor in this case, the risk of fading recollections is a neutral factor affecting the claimant and respondent equally. This is not a case where there is any concealment or lack of cooperation arising as relevant considerations.

62. The circumstances then fall to be considered against the overall balance of hardship of allowing or refusing the application. If it is refused, the claimant cannot advance his claims of discrimination at all. If it is granted, the respondents will be required to defend the claimant's complaints on their merits. In this case I am satisfied the relevant factors tip in favour of extending time for presentation of the claimant's race and disability discrimination complaints.

63. Whilst the claimant's complaints of disability and race discrimination were not presented within the applicable time limit, I conclude it is just and equitable in all the circumstances to extend the time limit for presentation of these discrimination complaints. The claimant's complaints of disability and race discrimination will therefore proceed.

64. A further preliminary hearing will be listed to discuss the complaints which proceed, to list the final hearing and, if appropriate, make case management orders.

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Employment Judge McCarthy

Date: 3 October 2023

JUDGMENT AND REASONS
SENT TO THE PARTIES ON
4 October 2023

FOR THE TRIBUNAL OFFICE

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