



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102856/2023

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Held in Glasgow on 2 October 2023

Employment Judge L Wiseman

Ms Tracey Smith

Claimant

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The Restaurant Group (UK) Limited

Respondent

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided:

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- (i) the claimant was a disabled person in terms of section 6 of the Equality Act at the relevant time and
- (ii) the claim is timebarred and a tribunal does not have jurisdiction to determine the claim.

REASONS

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1. This hearing was a preliminary hearing to determine two issues: (i) whether the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 and (ii) timebar.

2. The tribunal heard evidence from the claimant and was referred to a number of jointly produced documents. The tribunal made the following material findings of fact.

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Findings of fact

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3. The claimant commenced employment with the respondent on the 25 April 2022. She was employed as an Assistant Manager until the termination of her

employment on the 17 November 2022. The letter of termination of employment (page 173) referred to a meeting which had taken place on the 10 November and confirmed employment had been terminated because the claimant had failed to pass the probationary period.

- 5 4. The claimant, two days prior to meeting on the 10 November, had written to the respondent regarding various matters and this letter was treated as a grievance. A grievance meeting took place on the 21 December and a grievance outcome was issued on the 23 January 2023. The claimant appealed against that decision on the 29 January. A grievance appeal
10 meeting took place on the 27 June and a grievance appeal outcome letter was issued on the 17 July 2023.
- 15 5. The claimant was admitted to hospital on the 14 August 2022 on an emergency basis and underwent surgery for an emergency laparotomy and small bowel resection and strangulated incisional hernia repair. The hernia meant part of the small bowel had pushed through the weakened stomach muscles and died. This part of the small bowel, which had become not-viable, had to be removed and the hernia repaired. The surgeon was unable to use mesh to repair the hernia because of the infection of the abdominal wall. The hernia was sewn up but the claimant was advised this was unlikely to be
20 successful.
6. The claimant's discharge letter was produced at page 92.
7. The claimant's wound became infected and she was re-admitted to hospital on 28 August 2022 for treatment with antibiotics.
- 25 8. The claimant was reviewed by Mr Whalen, Consultant Colorectal Surgeon on 13 September 2022 (page 82) and reported to him that she was getting on very well and remaining active. Mr Whalen noted that it was difficult to be sure whether or not there was any sign of hernial recurrence but in any event he would like her BMI to be below 30 before any elective surgery was considered.

9. The claimant was reviewed again by Mr Whalen on 14 March 2023 (page 80). He confirmed the claimant does, clinically, have an incisional hernia, but that he wanted her to have a BMI of less than 30 before an elective repair of the hernia was contemplated. Mr Whalen noted the claimant had been made
5 “redundant” 6 weeks after her operation after having had a period of sickness following her surgery. Mr Whalen noted that he would have expected her to have taken at least 8 – 12 weeks to recuperate from her surgery.
10. The background to the claimant’s admission to hospital was that she had had a surgical procedure in 2016 (Sub-Total Cholecystectomy) to remove her
10 gallbladder. This was done by keyhole surgery but the claimant understood this had weakened her stomach muscles and led to a subsequent hernia.
11. The claimant was absent from work from 17 August 2022 (Fit Note produced at page 190) until 27 September 2022 when she was signed off as fit to return to work on a phased return, with no pushing or lifting of heavy objects. The
15 claimant had been advised to take 8 – 12 weeks off work for recuperation. The claimant returned to work after only 7 weeks.
12. The claimant was referred to Occupational Health on 17 October 2022 and a report was produced on page 186. The report noted the claimant’s surgery and her return to work and noted the claimant got fatigued easily. The
20 claimant was taking Dihydrocodeine for the pain. The report also referred to the claimant having type 2 diabetes which was controlled by diet, and having a pituitary adenoma. The advice from occupational health was to continue with the slow increase in hours to promote recovery. The report confirmed the claimant was fit for work but had to continue with a phased return and lighter
25 duties.
13. The claimant’s employment was terminated on 17 November 2023.
14. The claimant sought advice from her trade union, Unite, and completed a Member’s Declaration and Form of Authority form (page 176) which she signed on the 8 December 2022. The form was a request for the union to
30 grant her legal assistance to pursue a claim. The form also included a clause that *“I understand that until the Union or its solicitors tell me that they will lodge*

a claim in the employment tribunal on my behalf, it remains my responsibility to ensure that any legal claim that I wish to pursue is registered issued in the employment tribunal within the time limit, which for most employment tribunal claims is three months less one day from the date of the act I am complaining about or my dismissal by my employer”.

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15. The claimant decided to approach ACAS herself for early conciliation on the 23 January 2023 (page 3) although she named a trade union representative as her representative. The claimant named her employer as TRG Concessions. The Early Conciliation Certificate was issued on 3 February 2023, and sent to the trade union representative.

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16. The claimant, who did not know the early conciliation certificate had been issued to her representative, subsequently contacted ACAS on 8 March 2023 to enquire about the certificate. The claimant learned at that point that it had been issued and sent to her representative. The claimant was sent a copy of the early conciliation certificate.

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17. The claimant knew the time limit for commencing proceedings in the Employment Tribunal was three months less one day.

18. The claimant contacted her legal representative, Mr Lawson, in early February 2023. On 8 March 2023, she emailed him a copy of the early conciliation certificate.

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19. Mr Lawson had, on 15 February 2023, decided to initiate an early conciliation process against TRG Concessions Ltd. The early conciliation certificate (page 4) was issued on 29 March 2023.

20. The claimant's claim to the Employment Tribunal was presented on 29 April 2023 (page 5). The claimant brought claims of disability discrimination in terms of sections 13, 15 and 20 of the Equality Act and unauthorised deduction of wages in terms of section 23 of the Employment Rights Act. (The breach of contract claim was withdrawn by the claimant's representative at the preliminary hearing on 29 June 2023).

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21. The claimant has reduced capacity for lifting: for example, she cannot lift a basket of wet washing or bags of shopping.
22. The claimant also suffers from fatigue. The claimant returned to work after only 6 weeks rather than the 8 – 12 weeks advised by the Consultant. The claimant struggled on her return to work. She worked several day in a row and then spent the next day in bed. The claimant was unsure what caused the fatigue because she is also diabetic and severely deficient in iron and vitamin B12.
23. The claimant suffered from bowel incontinence 2/3 times a month after the surgery and she takes painkillers to deal with the cramps.
24. The claimant confirmed that all of the above issues would be resolved if she had a successful hernia repair. At present, the risks of surgery are too great, and surgery cannot be contemplated until she has lost a significant amount of weight.

Claimant's submissions

25. Mr Lawson noted there was no dispute regarding the following dates:
- 10 November 2022 - claimant told she had not passed the probationary period;
 - 17 November 2022 – effective date of termination of employment;
 - 15 November 2022 – claimant submitted a grievance;
 - 21 December 2022- grievance meeting;
 - 23 January 2023 – grievance outcome;
 - 23 January 2023 – claimant initiated early conciliation;
 - 29 January 2023 – claimant submitted a grievance appeal;
 - 3 February 2023 – early conciliation certificate issued;
 - 15 March 2023 – second early conciliation process started;

- 29 March 2023 – second early conciliation certificate issued;
 - 8 March 2023 – claimant contacted ACAS regarding the first early conciliation certificate;
 - 29 April 2023 – ET1 presented;
 - 5 • 27 June 2023 – grievance appeal; and
 - 17 July 2023 – grievance appeal outcome.
26. Mr Lawson submitted the key date was the effective date of termination (17 November 2022). The limitation period concluded on 16 February 2023. Mr Lawson accepted that if the first early conciliation certificate was relied upon, then the claim had been presented late by some 54 days. If however the second early conciliation certificate was relied upon then the claim had been presented in time.
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27. Mr Lawson submitted the first early conciliation certificate could not be relied upon to extend time because the designation of the respondent had been incorrect. Mr Lawson referred the tribunal to the cases of ***Drake International Systems Ltd v Blue Arrow Ltd 2016 ICR 445*** and ***Unison v Lord Chancellor 2017 UKSC 51***. Mr Lawson distinguished the case of ***Mist v Derby Community Health Services NHS Trust 2016 ICR 557*** because in this case the respondent was taking a technical legal argument to defeat a claim. Mr Lawson submitted that until the Employment Tribunal used its discretion to cure a minor defect on an ACAS certificate, the certificate was defective and should not be relied upon to support a timebar argument.
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28. Mr Lawson submitted that should the tribunal find the claim was presented late, it would be just and equitable to allow the discrimination claim to proceed. The delay related to the early conciliation process. The claimant did not receive the early conciliation certificate until 8 March, at which point the claim was timebarred. It was submitted that with regard to the claim in respect of wages, it was not reasonably practicable to have presented the claim on time because the claimant did not have the early conciliation certificate.
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29. Mr Lawson confirmed the impairment relied upon by the claimant was an abdominal impairment and the impact of the surgical procedures. He referred the tribunal to the Guidance to be taken into account and submitted the cumulative effects caused a substantial adverse impact on the claimant's ability to carry out normal day to day activities. The hernia was likely to recur and would require surgery: if not, then the condition would last for the rest of the claimant's life.
30. The claimant was limited in what she could lift and was restricted in bending.
31. Mr Lawson invited the tribunal to find the claimant was a disabled person in terms of the Equality Act and was so at the relevant time of her dismissal.

Respondent's submissions

32. Ms Stobart accepted the chronology set out by Mr Lawson was not in dispute and that the effective date of termination was 17 November 2022. She noted the claimant had spoken with the trade union and completed the form at page 176 on 8 December 2022. The form noted it was her responsibility to lodge any legal claim.
33. Ms Stobart noted that no evidence had been given regarding the interaction between the claimant, her trade union and the claimant's legal representative. The claimant's legal representative was instructed/involved as at 15 February 2023, and initiated (a second) early conciliation process on that date. The claimant then sent the first early conciliation certificate to the legal representative on 8 March.
34. Ms Stobart submitted that much had been made of the name of the respondent, but the claimant's conciliation certificate was much more accurate (TRG Concessions) because it had at least been taken from the name on the letter of dismissal. TRG Concessions is a division of The Restaurant Group plc and the correct address had been noted. The claimant's legal representative had used the name TRG Concessions Ltd. This was not the correct name. The correct name of the respondent was The Restaurant Group UK Ltd.

35. Ms Stobart submitted that on 8 March when the claimant's representative was alerted to the early conciliation certificate having been issued, he should have presented a claim to protect the claimant's position. However, nothing was done until 29 April.
- 5 36. Ms Stobart suggested the first question for the tribunal was whether the first early conciliation certificate was valid. She referred the tribunal to the *Mist* case, and to paragraph 54; and to *De Mota v ADR Network and The Co-operative Group Ltd UKEAT/0305/16*. Ms Stobart submitted the claimant was encouraging the tribunal to engage in satellite litigation. She was trying to get round the time limits. The tribunal does not have the right to look behind a valid early conciliation certificate, which is what the first certificate was.
- 10 37. Ms Stobart also referred to the case of The Commissioners for *HM Revenue and Customs v Garau UKEAT/0348/16* and submitted there was no scope for more than one early conciliation certificate.
- 15 38. Ms Stobart submitted the tribunal had no discretion other than to accept the first early conciliation certificate. In any event, it would not be just and equitable to allow the claim to proceed late. The claimant was fully aware of her rights and had a trade union representative and a legal representative. If there was fault in presenting a late claim, the claimant had a remedy against one or both of those representatives. There would be prejudice to the respondent in allowing the claim to proceed late because memories of events were fading.
- 20 39. The claim in respect of wages could have been presented in time because the claimant knew of the time limits and was under a duty to keep the trade union up to date with the progress of her claim. Ms Stobart invited the tribunal to find the claim was timebarred.
- 25 40. Ms Stobart submitted, with regard to the issue of whether the claimant was a disabled person that the key question for the tribunal was what were the substantial adverse effects said to have occurred and where did they stem from. The claimant had had a bowel resection and a repair to a strangulated
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hernia in August 2022, but the hernia repair was not likely to last. The claimant returned to work on or about 29 September 2022 on restricted duties.

41. The claimant had prepared a disability impact statement (lodged in August 2023) but the tribunal had to look at things at as the time of dismissal. Clearly there were abdominal impairments post-surgery, but would they last for 12 months. There was no evidence to suggest this. Mr Whalen said recovery would be 8/12 weeks to completely recuperate, so recovery would be expected by mid-November.
42. The claimant told the tribunal that fatigue could be due to diabetes or iron and vitamin B12 deficiency. There was nothing to link it to the effects of surgery or the fact there is an incisional hernia.
43. The claimant spoke of pain post-operation, but painkillers had not been prescribed until after November 2022.
44. The occupational health report noted the claimant could not lift kegs. Ms Stobart submitted this was not a normal day to day activity. Looking forward from November 2022, it would not have been known the claimant could not lift bags of shopping.
45. The claimant made reference to bowel incontinence, but it was not clear what caused this. It was not mentioned in the occupational health report or the doctors notes. It was submitted this had not been within anyone's knowledge as at November 2022.
46. Ms Stobart submitted the effects of the impairment were not likely to last for 12 months. The difficulty for the claimant's representative was that he had conflated the surgery and the incisional hernia.
47. Ms Stobart invited the tribunal to find the claimant was not a disabled person in terms of the Equality Act because the effect of her impairment was not substantial or long term.

Discussion and Decision

Was the claimant a disabled person at the relevant time

48. The tribunal had regard to the provisions of section 6 of the Equality Act which provides that a person has a disability for the purposes of the Act if s/he has a physical or mental impairment and the impairment has a substantial and long term adverse effect on his or her ability to carry out normal day to day activities.
49. The tribunal also had regard to the Guidance on matters to be taken into account in determining questions relating to the definition of disability.
50. The claimant in this case had a physical impairment arising from the various abdominal surgical procedures undertaken and their impact. There was no dispute in this case regarding the fact the claimant, in 2022, required emergency surgery to remove part of the small bowel and to repair a hernia. The first part of the operation was successful, but a mesh could not be used to repair the hernia because of the level of infection. The claimant has an incisional hernia. This hernia will be a long term condition unless the claimant loses sufficient weight to allow for surgery to repair it.
51. The respondent disputed the claimant had been a disabled person at the relevant time (that is, the time leading up to and including dismissal) and challenged what the substantial adverse effects were and what they stemmed from. Ms Stobart submitted the difficulty in this case was that the claimant had conflated the surgery and the incisional hernia.
52. The tribunal had regard to the fact that following the claimant's surgery in August 2022 the Consultant, Mr Whalen, expected the claimant to have taken 8 – 12 weeks to recuperate from the surgery. The tribunal noted that when reviewed in September the claimant told Mr Whalen she was “getting on very well” and “remaining active”. The tribunal accepted that post-surgery the claimant would have been fatigued and would have been told not to lift anything heavy. The indication/expectation was, however, that the claimant would have recovered from the surgery within 12 weeks.
53. The claimant told the tribunal that she has a reduced capacity for lifting items. The claimant, when she returned to work, could not lift/move a keg of beer. The claimant said she could not lift a basket of wet washing, bags of shopping

or a bag of cat litter. The claimant felt her ability to lift had not improved and she also struggles to bend down. The tribunal did not doubt the claimant's evidence, but in the absence of any explanation could not understand whether this arose from the surgery or having an incisional hernia.

5 54. The claimant also told the tribunal she gets very fatigued. The claimant returned to work 6 weeks after her surgery in 2022: this was much earlier than the estimated period of recovery of 8 – 12 weeks given by the Consultant. The claimant said she felt very tired after being at work, but when asked whether it was not surprising she felt fatigue after a serious operation and returning to work after only 6 weeks, the claimant referred to being diabetic, which makes 10 her tired, and to being very deficient in iron and vitamin B12, which can also cause fatigue. The claimant referred to the deficiency being caused by the removal of part of the bowel, but this appeared to be only the claimant's opinion.

15 55. The tribunal, as stated above, accepted the claimant would have been tired after the surgery, but the period of recuperation was 8 – 12 weeks. The evidence of the claimant suggested that the fatigue was caused by the early return to work and/or being diabetic and/or having a deficiency in iron and vitamin B12. There was nothing in the claimant's evidence to suggest fatigue 20 was an ongoing effect of the surgery, or of the incisional hernia.

56. The claimant also told the tribunal she suffered from bowel incontinence 2/3 times a month, and this caused stomach cramps. The claimant said this had lasted "a while" after surgery. The claimant was unsure what caused this. The claimant is prescribed dihydrocodeine for the pain. The last prescription for 25 this was October 2022. The tribunal took from this evidence that the bowel incontinence which had occurred was no longer occurring.

57. The claimant also referred to "not being very fast" on her feet. There was no evidence to suggest this was an effect of the surgery or of having an incisional hernia.

30 58. The tribunal concluded from this that the claimant's evidence was confusing and that the surgical interventions had been conflated with the incisional

hernia. There was no doubt, however, that the various surgical procedures had left the claimant with an incisional hernia, which will be a long term condition unless the claimant loses sufficient weight to safely undergo surgery to repair the hernia. The tribunal asked whether the hernia had a substantial adverse effect on the claimant's ability to carry out normal day to day activities. The tribunal concluded that it did insofar as the claimant's ability to lift/move heavy objects is impaired. The claimant cannot lift everyday household items like a basket of wet washing, or bags of shopping. The claimant requires assistance to help her with these normal day to day activities. It would have been helpful if the claimant had given more evidence regarding day to day activities, for example, housework, getting into and out of a car, stretching up and bending down, however on the limited evidence before the tribunal, I was satisfied the impact on the claimant's ability to lift heavier objects was substantial.

59. The tribunal decided the claimant was a disabled person within the meaning of section 6 of the Equality Act and that she was so at the relevant time.

Timebar

60. The tribunal next determined the issue of timebar. Mr Lawson argued that the tribunal should not look behind the second early conciliation certificate which had been used when presenting the claim (in time). The first early conciliation certificate was, in his submission, defective (because the name of the respondent had omitted Ltd and was therefore incorrect) and the respondent should not be allowed to rely on it to support their position that the claim was timebarred.

61. The tribunal, in considering the submissions made by Mr Lawson, had regard to the statutory scheme governing early conciliation. The essential outline of the scheme is found at section 18A (1) – (4) of the Employment Tribunals Act 1996. The scheme provides that before a prospective claimant presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in a prescribed manner, about those matters. ACAS, upon receiving the

prescribed information, sends it to a Conciliation Officer. The Conciliation Officer endeavours to promote a settlement between the persons who would be parties to the proceedings. If that is not possible, a certificate is issued to the prospective claimant. The prospective claimant may not present an application to institute relevant proceedings without a certificate.

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62. The tribunal also had regard to the cases to which it was referred. The *Mist* case held that whilst section 18A of the Employment Tribunals Act required a prospective claimant to provide prescribed information to ACAS which included the prospective respondent's name and address, the requirement was not for the precise or full legal title, provided ACAS had sufficient information to be able to contact the prospective respondent to attempt to conciliate. In the *De Mota* case the EAT held that it was a mandatory requirement of an early conciliation certificate that it must name only one respondent. In *Drake* the EAT warned against satellite litigation in terms of the early conciliation process/certificate. In *Commissioners for H M Revenue and Customs* the EAT held that the early conciliation provisions did not allow for more than one certificate of early conciliation per matter to be issued by ACAS. If more than one certificate was issued it was outside the statutory scheme and had no impact on the limitation period.

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63. There was no dispute in this case regarding the fact the claimant contacted ACAS on the 23 January 2023 to initiate the early conciliation process. This was after her dismissal. The claimant named the prospective respondent as TRG Concessions. The conciliation process did not lead to a settlement and an early conciliation certificate was issued on the 3 February 2023.

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64. Mr Lawson argued the early conciliation certificate that was issued on the 3 February 2023 was defective because it had not correctly named the employer because "Ltd" had been omitted from the name. The tribunal, having had regard to the *Mist* case (above) could not accept that submission. There is no requirement for the precise or full legal title of the prospective respondent to be used, provided ACAS has sufficient information to be able to contact the prospective respondent and attempt conciliation. The tribunal noted that the address provided by the claimant and noted by ACAS on the early conciliation

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certificate was the same address used by Mr Lawson in the second early conciliation procedure and also the same address used by the respondent. It was, therefore, the correct address and there was no suggestion made (by either party) that ACAS had been unable to make contact with the respondent named by the claimant in order to attempt conciliation.

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65. The tribunal concluded the first early conciliation certificate (reference number R111359/23/58) was a valid certificate and was not defective for the reason stated by the claimant. The claimant had provided sufficient information to ACAS to enable them to contact the respondent for the purposes of conciliation.

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66. The tribunal acknowledged the claimant did not receive the early conciliation certificate until 8 March 2023 because it had been sent to her trade union representative. The claimant did not provide any explanation why she had not contacted her trade union representative to enquire about the early conciliation certificate in circumstances where she had named them as her representative.

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67. The tribunal also acknowledged that a second early conciliation process was started by the claimant's legal representative on 15 February 2023. There was no explanation why this was done. The tribunal did not think it unreasonable to assume the claimant must have informed her legal representative that she had commenced early conciliation the previous month.

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68. Mr Lawson invited the tribunal to disregard the first early conciliation certificate and to rely on the second early conciliation certificate because that one was not "defective" in terms of the respondent's name and was the one that had been used when presenting the claim to the employment tribunal. Mr Lawson sought to distinguish the case authorities referred to because in this case the claim had been accepted by the tribunal using the second early conciliation certificate. The tribunal could not accept that submission because if the logic of Mr Lawson's argument was applied to the name used in the second early conciliation process, that certificate must also be "defective" because it did not name the respondent correctly.

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69. The tribunal, furthermore, and relying on the case of ***The Commissioners for HM Revenue and Customs*** (above) was satisfied the early conciliation provisions do not allow for more than one certificate of early conciliation per “matter” to be issued by ACAS. If more than one such certificate is issued, a
5 second or subsequent certificate is outside the statutory scheme and has not impact on the limitation period.
70. Mr Lawson submitted the respondent should not be allowed to look behind the second early conciliation certificate and that this type of satellite litigation was not to be indulged. The tribunal could not accept that submission because
10 the first early conciliation certificate was a valid certificate and it is the certificate that should have been used in respect of making the claim to the Employment Tribunal. The respondent was not looking behind the second early conciliation certificate. The respondent knew of the first early conciliation process and questioned why the certificate arising from that process had not
15 been relied upon. The tribunal considered there was weight in the respondent’s submission that obtaining a later early conciliation certificate was an endeavour to circumvent time limits.
71. The tribunal concluded the first early conciliation certificate was valid and ought to have been used by the claimant in making her claim to the
20 employment tribunal. Mr Lawson accepted that if the first early conciliation certificate was relied upon then the claim had been presented 54 days late (it was agreed the claim should have been presented on or before 3 March 2023). The tribunal, having had regard to the terms of section 123 Equality Act, next considered whether it would be just and equitable to allow the
25 discrimination claim to proceed. Tribunals have a broad discretion to extend time in discrimination cases.
72. I was referred to the ***British Coal Corporation v Keeble*** case (above) and to checklist contained in section 33 of the Limitation Act 1980 which deals with the exercise of discretion in personal injury cases and requires the Court to
30 consider the prejudice that each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case, in particular the length of and reasons for the delay; the extent to which the cogency of the

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

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73. I also had regard to the case of ***Department of Constitutional Affairs v Jones 2008 IRLR 128*** where the Court of Appeal emphasised that the above factors are a valuable reminder of what may be taken into account, but their relevance depends on the facts of the individual case, and tribunals do not need to consider all the factors in each and every case.

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74. I firstly had regard to the fact the claimant sought legal advice and assistance from her trade union on 8 December 2022, shortly after her dismissal. The form completed by the claimant (page 176) was not only a request for legal assistance but was also a declaration signed by the claimant which, amongst other things, confirmed she had been given and had understood the information about the deadline date for lodging an employment tribunal case. I also had regard to the fact that the claimant, in her evidence to the tribunal, confirmed she understood the time limit for presenting a claim. The claimant did, on cross examination, suggest she thought she had “12 weeks” from the date of contacting ACAS in which to make a claim, but I did not find this aspect of the claimant’s evidence to be credible because it was wholly undermined by her evidence in chief and by the declaration she had signed in December.

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75. The claimant also had legal advice and assistance from a legal representative. The claimant could not recall when her representative had been instructed but it must have been on or before 15 February 2023 (when Mr Lawson initiated the second early conciliation process).

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76. I next had regard to the fact the claimant initiated the first early conciliation process on 23 January 2023. The claimant named her trade union as her representative: accordingly, when the early conciliation certificate was issued on 3 February 2023, it was sent to the trade union.

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77. The tribunal accepted the claimant was not aware the first early conciliation certificate had been issued, but there was no evidence to explain why, having initiated the process on 23 January, the claimant had not taken any action prior to 8 March to chase this up with either ACAS or the trade union or indeed her legal representative when he was instructed in/about mid-February. There was a complete absence of evidence regarding contact between the claimant, the trade union and the legal representative.
78. The Declaration signed by the claimant (page 176) included a clause set out in bold type that the claimant understood that until the Union or it's solicitors told her that they would lodge a claim in the employment tribunal on her behalf, it remained her responsibility to ensure that any legal claim that she wished to pursue was presented within the time limit. The time limit for employment tribunal claims was then set out. The claimant provided no evidence to the tribunal to explain if/when she was told the union or its solicitors would lodge a claim on her behalf, or why she had not ensured the claim was presented in time.
79. The claimant sent the first early conciliation certificate to her legal representative on 8 March. There was, however, no evidence to explain to the tribunal why a claim was not presented on or about 8 March. The tribunal acknowledged the claimant may have decided to wait for the conclusion of the second early conciliation process, but the fact remains that a claim could (and should) have been presented using the first early conciliation certificate.
80. The tribunal noted the second early conciliation certificate was issued on 29 March 2023. There was, however, no evidence before the tribunal to explain why a claim was not submitted until 29 April 2023.
81. The tribunal concluded from the above points that the claimant had had access to advice and assistance from her trade union and a legal representative. The claimant was aware of and understood the time limit for presenting a claim to the employment tribunal. The claim was presented late and there was a real lack of evidence to explain the reasons for that.

82. The tribunal next considered the prejudice that each party would suffer as a result of the decision reached. The tribunal accepted that if the claim is timebarred the claimant will be unable to proceed with her claim and have her allegations of discrimination determined. The tribunal balanced this with there
5 being the possibility of a remedy elsewhere for the claimant.
83. The tribunal also accepted there would be a prejudice to the respondent in allowing a late claim to proceed in circumstances where there was no good reason to explain the delay in this case. Further, although there has not been significant delay in this case, the tribunal accepted that any delay will impact
10 on people's memories.
84. The tribunal decided, having had careful regard to all of the above points, that it would not, in the circumstances of this case, be just and equitable to allow the claim to proceed.
85. The tribunal next had to determine whether, in respect of the claim of an
15 unauthorised deduction from wages, it would have been reasonably practicable to present the claim in time. Mr Lawson, in his submissions, argued that it would not have been reasonably practicable to present the claim on time because the claimant did not have the early conciliation certificate. The tribunal acknowledged the claimant did not receive the early conciliation
20 certificate until 8 March but given the terms of the Declaration signed by her (page 176) and the absence of evidence to explain why the claimant had not acted sooner to obtain the early conciliation certificate, the tribunal could not accept this submission.
86. The tribunal concluded it was reasonably practicable for the claim to have
25 been presented in time in circumstances where the claimant was not ignorant of her right to bring a claim or the time limit for doing so; had started the early conciliation process and could have taken action to obtain the certificate much earlier than 8 March.
87. The tribunal further concluded that, even if it is wrong in the above conclusion,
30 the claim was not presented within such further time as was reasonable. The

claim could have been presented on or about 8 March: in fact it was not presented until 29 April. There was no evidence to explain this delay.

88. The tribunal decided it was reasonably practicable for the claim to have been presented in time. The claim was late and is timebarred.

5 89. The tribunal, in conclusion, decided the claims brought by the claimant were timebarred and a tribunal does not have jurisdiction to determine the claim.

10 **Employment Judge: L Wiseman**
Date of Judgment: 31 October 2023
Entered in register: 01 November 2023
and copied to parties