EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondents**
Mr T Afolabi	AND	Barchester Healthcare Limited (1) Ciprian Groza (2) Elvigia Ward (3) Janilla Balagot (4)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY AT Plymouth **ON** 19 December 2023
By Cloud Video Platform

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person
For the Respondents: Miss E Moncur, Solicitor

JUDGMENT

The judgment of the tribunal is that the claimant's claims were presented out of time and are all hereby dismissed.

RESERVED REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not the claimant's claims were presented in time.
2. I have heard from the claimant. The respondent did not call any evidence, but Miss Moncur questioned the claimant on behalf of the respondents. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to any factual and legal submissions made by and on behalf of the respective parties.
3. The Facts:
4. The claimant Mr Taiwo Afolabi describes himself as being of Black African (Nigerian) origin. He was employed as a healthcare assistant at the Hunter Care Centre in Cirencester from 10 June 2019 until 23 December 2020. His employer was the first named respondent Barchester Healthcare Limited. The second, third and fourth named respondents are all

managers who were employed by the respondent at that time. The claimant was dismissed by letter dated 21 December 2020 with effect from 23 December 2020, and he was paid four weeks' pay in lieu of notice. The reason given for his dismissal was misconduct, which related to the handling of a vulnerable resident who is said to have suffered injury.

5. The claimant wrote a letter to the first respondent complaining of "wrongful dismissal" on 13 January 2021, and he requested an appeal against the decision. The first respondent declined to process an appeal. From February 2021 the claimant then took legal advice from a firm of solicitors practising as DPH Legal, whose stationery suggests that they are "Employment Law Specialists". They sent a letter dated 6 April 2021 to the first respondent, which ran to eight pages. It gave considerable background detail, and it asserted that the claimant had been subjected to direct race discrimination, harassment related to his race, victimisation, and detriment because he had made protected public interest disclosures. That letter suggested that the first respondent should compensate the claimant, which the first respondent declined to do. The claimant has produced a copy of an invoice showing that he paid in excess of £1,200 plus VAT for these legal services.
6. The claimant accepts that he received advice at that time, and that he knew that there was a time limit of three months within which to issue proceedings. He knew that it was necessary to obtain a certificate from ACAS before doing so, and he had engaged solicitors to help him do this. The claimant suggests he was then unable to present these proceedings because he could not afford to pay his solicitors to do so. He has suggested today that he thought that if he did not pay his solicitors to do so then he could not present the proceedings himself.
7. Given the background detail which had been set out in the solicitors' letter before action, and the advice given to the claimant, and the fact that the solicitors were soi-disant "Employment Law Specialists", I consider it inconceivable that they would not have advised the claimant that he was able to present the proceedings himself if he could not afford to engage them to do so. At the time that they were advising the claimant, it was still within the relevant time limits. In addition, this is particularly the case because at that time the claimant had commenced the Early Conciliation Process with ACAS as the necessary prerequisite for presenting proceedings. However, no action was then taken at that time either by the claimant or his solicitors to take the next step and to present these proceedings.
8. The claimant had commenced the Early Conciliation Process with ACAS against both the first and second respondents on 17 March 2021 (Day A), and the Early Conciliation Certificate was issued in respect of the first and second respondents on 28 April 2021 (Day B). The claimant commenced the Early Conciliation Process with ACAS against both the third and fourth respondents one day later on 18 March 2021 (Day A), and the Early Conciliation Certificate was issued in respect of the first and second respondents on 29 April 2021 (Day B). However, as stated above no action was taken to rely on these Early Conciliation Certificate and to commence Tribunal proceedings.
9. The claimant subsequently presented these proceedings, but only some two years later on 30 May 2023. The claimant presented the proceedings himself. He accepts that he has had access to the Internet throughout, and that he looked up online how to present these proceedings himself. He ticked two boxes, indicating that his claims were for unfair dismissal and for whistleblowing. His grounds of application were commendably concise, and apart from referring to unspecified derogatory comments, and in passing that he was Black, there was no indication that his claim went beyond the claim for unfair dismissal related to whistleblowing. He did not tick the box to suggest that he was presenting a claim of race discrimination, and he did not repeat any of the allegations which had been set out in such considerable detail by his solicitors some two years earlier.
10. The respondents submitted a response denying the claims and arguing that they had been presented out of time. The Tribunal office then listed this preliminary hearing to determine whether the Tribunal has jurisdiction to hear the claimant's claims. On 20 July 2023 the claimant was directed to give an explanation as to why the claim had been presented out of time. In an email dated 31 July 2023 the claimant gave the following reasons: "I accept

that the claim is submitted out of time - this is purely due to financial constraints I found myself in and all what I was facing as a result of this unlawful dismissal from my work …"

11. The claimant has also provided a more detailed statement ahead of this hearing, but it complains of his perceived unfairness as to the reasons of his dismissal and does not address in any way his reasons for presenting the claim some two years out of time, nor why it would be just and equitable to extend the time limits.
12. The Claimant's Claims:
13. It is not entirely clear what claims the claimant now seeks to pursue. His claim clearly complains of unfair dismissal and whistleblowing. He had less than two years' continuity of service, and so the tribunal has no jurisdiction to hear a claim of "general" unfair dismissal. However, no such length of service is required to pursue a claim for "automatically" unfair dismissal for reasons of whistleblowing, and this claim is therefore potentially before the tribunal.
14. It is not clear whether the claimant is also seeking to pursue a claim relating to race discrimination. Such claims were alleged by his solicitors some two years earlier, and these proceedings named three individual respondents apart from his employer, which is consistent with the discrimination claim rather than an unfair dismissal claim (because the latter can only be brought against the former employer). In his grounds of application the claimant comments that he is Black, and refers to derogatory comments, but does not say at any stage that is pursuing a claim of race discrimination.
15. The claimant accepted today that the main thrust of his claim was one of unfair dismissal because he had made protected public interest disclosures, but he also said that he did wish to pursue allegations of discrimination and in particular allegations relating to potential harassment.
16. I have decided in the interests of justice to give the claimant the benefit of the doubt and assume that he intended these proceedings to encompass a claim for race discrimination, and to apply the appropriate legislation accordingly.
17. Having established the above facts, I now apply the law.
18. The Law:
19. One of the relevant statutes is the Employment Rights Act 1996 ("the Act"). The claimant presents a claim for "automatically" unfair dismissal under section 103A of the Act. Section 111(2) of the Act provides that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination, or 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.
20. This is also a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant appears to allege direct discrimination, harassment, and victimisation. The protected characteristic relied upon is race, as set out in sections 4 and 9 of the EqA.
21. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three 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. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.
22. With effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.
23. Section 207B of the Act provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting

proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

24. Section 140B EqA provides: (1) This section applies where a time limit is set by section 123(1)(a) or section 129(3) or (4). (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when the time limit set by section 123(1)(a) or section 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by section 123(1)(a) or section 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exerciseable in relation to that time limit is extended by this section.
25. The relevant law relating to Early Conciliation ("EC") and EC certificates, and the jurisdiction of the Employment Tribunal to hear relevant proceedings is as follows. Section 18 of the Employment Tribunals Act 1996 defines "relevant proceedings" for these purposes. This includes in subsection 18(1) the discrimination at work provisions under section 20 of the EqA. Section 140B EqA sets out how the EC process is taken into account. Where the EC process applies, the limitation date should always be extended first by section 140B(3) or its equivalent. However, where this date as extended by section 140B(3) or its equivalent is within one month of the date when the claimant receives (or is deemed to receive) the EC certificate, time to present the claim is further extended under section 140B(4) for a period of one month (applying Luton Borough Council v Haque [2018] ICR 1388 EAT). In other words, it is necessary first to calculate the primary limitation period, and then add the EC period. Having reached that date, it is necessary to ask whether it is before or after one month after Day B (the date of issue of the EC certificate). If it is before then the limitation date is extended to one month after Day B. Otherwise, if it is after one month after Day B, then limitation will be extended to that later date.
26. I have been referred to and have considered the following cases, namely: Palmer and Saunders v Southend-on-Sea BC [1984] ICR 372; Porter v Bandridge Ltd [1978] IRLR 271 CA; Wall's Meat Co v Khan [1978] IRLR 499; London Underground Ltd v Noel [1999] IRLR 621; Dedman v British Building and Engineering Appliances [1974] 1 All ER 520; London International College v Sen [1993] IRLR 333 CA; Cullinane v Balfour Beattie Engineering Services Ltd UKEAT/0537/10; Wolverhampton University v Elbeltagi [2007] All E R (D) 303 EAT; British Coal v Keeble [1997] IRLR 336 EAT; Robertson v Bexley Community Service [2003] IRLR 434 CA; Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640; Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT; Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA; London Borough of Southwark v Afolabi [2003] IRLR 220 CA; Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23.
27. The Time Limits:

28. In this case the claimant's effective date of termination of employment was 23 December 2020. The normal time limit of three months would therefore have expired at midnight on 22 March 2021. The claimant had commenced the Early Conciliation process against all four respondents just before this date, and given that the limitation period expired during the Early Conciliation process, the normal time limits were extended by one month from Day B. This meant that the time limit for bringing these proceedings against the first two respondents expired one month after Day B on their Early Conciliation Certificate which was therefore on 28 May 2021. The time limit for bringing proceedings against the third and fourth respondents expired one month after day B on their Early Conciliation Certificate namely on 29 May 2021. The claimant presented the proceedings just over two years later on 30 May 2023.
29. Unfair Dismissal
30. The grounds relied upon by the claimant for suggesting that it was not reasonably practicable to have issued proceedings within the relevant time limit are that (i) he was under the impression that he could only do so if he paid solicitors professionally to do so; and (ii) that he could no longer afford to engage them.
31. The question of whether or not it was reasonably practicable for the claimant to have presented his claim in time is to be considered having regard to the following authorities. In Wall's Meat Co v Khan Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the claimant, see Porter v Bandridge Ltd. In addition, the Tribunal must have regard to the entire period of the time limit (Elbeltagi).
32. In Palmer and Saunders v Southend-on-Sea BC the headnote suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the Industrial Tribunal taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, in determining whether or not it was reasonably practicable to present the complaint in time, an Industrial Tribunal may wish to consider the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit. The Industrial Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used. Contrary to the argument advanced on behalf of the appellants in the present case and the obiter dictum of Kilner Brown J in Crown Agents for Overseas Governments and Administrations v Lawal [1978] IRLR542, however, the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time. The views expressed by the EAT in Bodha v Hampshire Area Health Authority on this point were preferred to those expressed in Lawal:-
33. To this end the Tribunal should consider: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) whether the claimant had been advised by anyone, and the nature of

any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.

34. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) concluded that "reasonably practicable" does not mean reasonable (which would be too favourable to employees), and does not mean physically possible (which would be too favourable to employers) but means something like "reasonably feasible".
35. Subsequently in London Underground Ltd v Noel, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing so. As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of practicability … the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204).
36. The Employment Tribunal must make clear findings about why the claimant failed to present his originating application in time, and then assess whether he has demonstrated that it was not reasonably practicable to have presented it in time (London International College v Sen.
37. If the claimant professes ignorance of his right to make a claim and/or the legal regime in respect of time limits, the overarching question for the tribunal is whether that state of mind (that is the ignorance or the mistake) was itself reasonable. It is not likely to be reasonable if it arises from a failure to make such enquiries as ought to have been made in all the circumstances (Wall's Meat Co Ltd v Khan).
38. Underhill P as he then was considered the period after the expiry of the primary time limit in Cullinane v Balfour Beattie Engineering Services Ltd (in the context of the time limit under section 139 of the Trade Union & Labour Relations (Consolidation) Act 1992, which is the same test as in section 111 of the Act) at paragraph 16: "The question at "stage 2" is what period - that is, between the expiry of the primary time limit and the eventual presentation of the claim - is reasonable. That is not the same as asking whether the claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted - having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months."
39. In my judgment there is no real reason why the claimant failed to comply with the relevant time limit. There was no physical impediment preventing compliance. The claimant clearly knew of his rights and the relevant time limits within those time limits. The respondent cannot be said to have misrepresented the position. There does not appear to be any substantial fault on the part of any advisor.
40. In my judgment it was reasonably practicable for the claimant to have issued proceedings within the relevant time limit as extended. He had received specialist employment law advice and was aware of his potential claims. He knew the Early Conciliation process which was completed satisfactorily. He had been advised of and knew the statutory time limits. Given the advice at the time I do not accept that the claimant had been told that he could not have issued proceedings himself, but that he had to pay solicitors do it. It is much more probable that his solicitors would have told the claimant that he could do it for free himself, which indeed he did do some two years later. Any such misunderstanding would not have been reasonable because the claimant was clearly in a position to make the necessary enquiries within the relevant time limit.
41. In addition, and in any event, the claimant has had access to the Internet throughout this time, and to wait a further two years before deciding to issue proceedings in person means in my judgment that even if it were not reasonably practicable to have issued proceedings within time, then they were not issued within a reasonable time thereafter.
42. For all these reasons I have no hesitation in dismissing the claimant's unfair dismissal claim.

43. Discrimination Claim
44. The grounds relied upon by the claimant for suggesting that it would be just and equitable to extend the time limit are that: (i) he was under the impression that he could only do so if he paid solicitors professionally to do so; and (ii) that he could no longer afford to engage them.
45. I have considered the factors in section 33 of the Limitation Act 1980 which is referred to in the Keeble decision. For the record, these are 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 parties cooperated with any request for information; the promptness with which the claimant acted once the facts giving rise to the cause of action were known; and the steps taken by the claimant to obtain appropriate professional advice.
46. However, it is clear from the comments of Underhill LJ in Adedeji, that a rigid adherence to such a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion. He observed in paragraph 37: “The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time including in particular … “The length of, and the reasons for, the delay”. If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking.”
47. This follows the dicta of Leggatt LJ in Abertawe Bro Morgannwg University Local Health Board v Morgan at paragraphs 18 and 19: “[18] … It 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 the circumstances to put a gloss on the words of the provision or to interpret it as if it contained such a list … [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).”
48. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that 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". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.
49. This strictness of approach was approved by the Court of Appeal in Adedeji, a case in which the Court approved a refusal to extend time where the originating application was presented just three days out of time. Underhill LJ approved the assertion that there is a public interest in the enforcement of time limits and that they are applied strictly in employment tribunals.
50. Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan (at the EAT) before the Employment Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was.
51. However, As Sedley LJ stated in Chief Constable of Lincolnshire Police v Caston at paragraphs 31 and 32: “In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened, and ought not to happen, in

relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it."

52. In my judgment there was no impediment which precluded the claimant from issuing these proceedings within the relevant time limit as extended. He had received specialist employment law advice and was aware of his potential claims. He knew of the Early Conciliation process which was completed satisfactorily. He had been advised of and knew the statutory time limits. Given the advice at the time I do not accept that the claimant had been told that he could not have issued proceedings itself, but that he had to pay solicitors do it. It is much more probable that they would have told the claimant that he could do it for free himself, which indeed he did do some two years later. Any such misunderstanding would not have been reasonable because the claimant was clearly in a position to make the necessary enquiries within the relevant time limit.
53. In my judgment there was no good reason for delaying the issuing of these proceedings, and no good reason to wait a further two years after the limitation period to do so.
54. The claimant has not persuaded me on the balance of probabilities that there was any compelling reason why he was unable to present these proceedings earlier. The burden of proof is on the claimant to persuade me that it would be just and equitable to extend the time limit, which he has been unable to do. Accordingly, his discrimination claims are also dismissed.
55. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 16; a concise identification of the relevant law is at paragraphs 18 to 26; how that law has been applied to those findings in order to decide the issues is at paragraphs 28 to 54.

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Employment Judge N J Roper
Dated 19 December 2023

Judgment sent to Parties on 12 January 2024

For the Tribunal Office

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