



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms S Smith

**Respondent:** Keys Childcare (Holdings) Limited

**Heard at:** Cardiff; by video

**On:** 29 April 2024

**Before:**

## Representation

Claimant: Ms Smith represented herself as a litigant in person

Respondent: Mr Brockley (Counsel)

# RESERVED JUDGMENT

1. The complaint of constructive unfair dismissal was not presented within the applicable time limit. It was reasonably practicable to do so. The complaint of constructive unfair dismissal is therefore dismissed;
2. The complaints of direct disability discrimination, discrimination arising from disability, failure to make reasonable adjustments, harassment related to disability, harassment related to sexual orientation and constructive discriminatory dismissal were not presented within the applicable time limit. It is not just and equitable to extend the time limit. The complaints are therefore dismissed;
3. The Claimant's complaints of post termination victimisation and unauthorised deduction from wages continue and will be listed for a case management hearing.

# REASONS

## Background

1. The Claimant presented her ET1 claim form on 5 October 2023 complaining of constructive unfair dismissal, disability discrimination, sexual orientation discrimination and "other payments." The Respondent filed an ET3 response denying the claims and alleging they were out of time. A case management hearing took place before Employment Judge Ryan on 10 January 2024 where he clarified the claims. EJ Ryan noted there were various complaints of sexual orientation harassment, disability harassment, direct disability discrimination, and failure to make reasonable adjustments dating from January

2022 onwards which it is said culminated in the Claimant resigning on 10 February 2023 (with the effective date of termination being 10 March 2023). It is recorded this is alleged to amount to both a discriminatory dismissal and an “ordinary” constructive unfair dismissal. EJ Ryan also recorded the Claimant was bringing a complaint of post termination victimisation relating to a complaint made by the Respondent to the Claimant’s new employer on 18 July 2023. It is said to be victimisation for a protected act of a grievance dated 23 January 2023.

2. EJ Ryan recorded that if the effective date of termination was 10 March 2023, and allowing for the possibility of a continuous act of discrimination, there was a primary limitation period expiring on 9 June 2023. He noted the Claimant commenced Acas early conciliation on 26 July 2023. He noted that the post termination victimisation claim was within time. EJ Ryan recorded there was clearly an issue as to whether all of the claims other than post termination victimisation were out of time and he decided to list the case for a preliminary hearing on time limits and the question of disability. The question of disability was subsequently conceded. It meant that before me to decide at the preliminary hearing was (as set previously by EJ Ryan):

2.1 For the Claimant’s constructive unfair dismissal claim, was it was reasonably practicable to present the complaint of unfair dismissal within the time limit? If not, was it was presented within a reasonable period?

2.2 For the Claimant’s discrimination complaints, would it be just and equitable to extend the time limit for presenting the complaints of Discrimination in respect of the protected characteristics of Disability and Sexual Orientation?

3. EJ Ryan made provision for the Claimant to provide a witness statement concerning the time issue and for the parties to exchange documents relating to the time issue. The Respondent was then to prepare a preliminary hearing file.

4. I had a preliminary hearing file extending to 105 pages. The Claimant gave oral evidence. During the course of her evidence it emerged she may have further relevant documents and she emailed a further set of documents relating to contact with the GMB and Acas. She was then recalled and gave further evidence. The Respondent also provided some additional documents relating to their contact with Acas. The Claimant also sent through a subject access request she had made. Mr Brockley also provided some written submissions in advanced of the hearing. The Claimant was offered, but ultimately said she did not need, more time to read Mr Brockley’s written submissions. I also heard oral closing submission from both parties. We were struggling for time and the Claimant also had health concerns which meant we needed to bring the hearing to a quick conclusion. I ended the hearing with my decision to be delivered in writing.

**The legal framework - Reasonable practicability – Constructive Unfair Dismissal complaint**

5. Mr Brockley has summarised the legal framework in his written submissions, and I do not repeat it here. For the benefit of the Claimant as a litigant in person I simply summarise here some key points.

6. For the Claimant's constructive unfair dismissal claim I have to decide whether it was reasonably practicable for her to have brought her claim within time. The test of reasonable practicability is in essence the question of whether it was reasonably feasible for the complaint to have been presented in time. When assessing that factors which can be relevant can include:

- The substantial cause of the failure to comply with the time limit (including whether the employee was prevented from complying for example by illness);
- Whether the employee at the time of dismissal knew of their right to complain to an employment tribunal and, if not when thereafter they knew;
- What efforts the employee has made to understand their rights and seek advice;
- Whether there was any misrepresentation about any relevant matter by someone, such as the employer, to the employee;
- 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; the nature of any advice which the advisor may have given, for example relating to time limits;
- Whether there was any substantial fault on the part of the advisor which led to the failure to present the complaint in time. The case law suggests that if professional advisors given unsound advice or fail to give advice on a relevant issue then the failure of the advisors will be attributed to the claimant, and will not provide a good excuse for not presenting the claim in time. This includes trade union representatives who are generally assumed to know relevant time limits and to appreciate the necessity of presenting claims in time. The case law suggests the remedy for defective advice would instead potentially lie in a negligence claim against the advisor;
- Whether employer processes were being used such as grievance processes and appeals; although for example an appeal against dismissal does not mean of itself it was not reasonably practicable for a claim to have been brought in time.

7. A claimant's complete ignorance of their right to claim may make it not reasonably practicable to present a claim in time, but the claimant's ignorance must itself be reasonable. The tribunal has to look at matters such as the opportunities the claimant had to find out their rights, whether they took them and if not why not. The case law suggests that if a claimant knows she has rights but does not know there is a time limit, again the question is whether that ignorance of the time limits was reasonable. For example, in John Lewis Partnership v Charman UKEAT/0079/11, it was accepted that it would not be reasonable if the

claimant ought reasonably to have made inquiries about how to bring an Employment Tribunal claim, which would have in turn inevitably put them on notice of time limits.

### **The legal framework – Equality Act complaints - the just and equitable test**

8. In Equality Act discrimination complaints, a different test applies. The tribunal has a wide discretion to decide whether to substitute another period for the primary 3 month time period on the grounds that it is just and equitable to do so. In exercising the broad discretion there is no set list of factors for a tribunal to take into account. It is not a checklist, tick box exercise. However, factors which tend to be potentially relevant can include:

- The length of the delay;
- The reasons for the delay (albeit it is not the case that the absence of a good reason in itself means that the tribunal may not extend time. If there is an explanation or apparent reason for the delay it is likewise one of the relevant matters to take into account);
- Whether the delay has prejudiced the respondent (for example by preventing or inhibiting it from investigating the claim whilst matters were fresh). But again the question of prejudice is not necessarily determinative;
- The promptness with which the claimant acted once she knew of the possibility of taking action;
- The steps taken to obtain professional advice.

9. The tribunal must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other: But no one factor is determinative of the question as to how the tribunal ought to exercise its wide discretion in deciding whether it is just and equitable to extend time. It is a balancing exercise, and different factors can point in different directions.

### **Summary of the evidence before me relating to time limits**

10. In around 2014 or 2015 the Claimant was diagnosed with Autonomic Neuropathy having suffered severe symptoms for some years and having spent significant periods of time in hospital. Her condition includes heart difficulties and seizures. At that time the Claimant was wheelchair bound. The Claimant had rehabilitation to walk again but remained with severe symptoms and by 2018 was suffering multiple seizures and was regularly in hospital.

11. In 2020 new medication was trialled and since then the Claimant's health has improved as against the period 2010 to 2020. But the Claimant describes suffering ongoing chronic pain relating to a bowel condition, a weakened immune system, daily fatigue, frequent palpitations fluctuating blood pressure that contributes to migraines, dizziness and fatigue. She has also been diagnosed with hypermobile EDS meaning that she can easily dislocate joints causing pain and difficulties moving.

12. The Claimant says she has been able to manage her condition sufficiently so that she can work. But she says that comes as a cost and she is constantly engaged in managing her condition. She says when not in work she has to sleep for long periods.

13. The Claimant says she has 6 monthly check ups with the cardiologist, neurologist and sleep specialist and much of these appointments consists of her explaining how she is self-managing her symptoms. The Claimant has provided some medical documentation from 2015 to 2022 but I do not have for example clinical records of the content of the 6 monthly checks up from around the time of the events in question.

14. The Claimant started working for the Respondent as a residential activity worker in January 2021. As already stated, the discrimination complaints the Claimant is seeking to bring are from the period January 2022 until the Claimant's resignation. The Claimant raised a grievance on 23 January 2023. By 26 January 2023 the Claimant was receiving advice and support from her then union, the GMB. In particular, she emailed Maxine Buckley ("MB") thanking MB for getting back to her, giving MB details about relevant managers, and asking for advice about her rights in relation to a shift the Claimant was due to work the following Monday. The Claimant was concerned that the person the Claimant she was complaining about would be present and she also raised concerns that this individual had not been suspended. The Claimant said to MB that the level it was impacting on her mental health was grossly unfair. The emails provided by the Claimant show her seeking further advice from MB on 27 January and 30 January 2023 about the situation and an upcoming grievance meeting.

15. A grievance meeting took place on 31 January 2023 where the Claimant was represented by MB. On 1 February 2023 the Claimant sought further advice from MB about her rights following a suggestion the Claimant should use annual leave when the Claimant had not been in work (where the Claimant thought the Respondent should have put in place steps to allow the Claimant to be in work). The Claimant also sent the Respondent an email about this, and sent the Respondent a time line document with 35 attachments in support of her grievance complaints.

16. MB advised the Claimant to lodge a second grievance which the Claimant did on 10 February about the alleged lack of protection in work meaning she had to cancel shifts and not work/being forced to take annual leave. She said GMB's advice was to make the second grievance and use annual leave in the meantime. The second grievance was acknowledged by HR.

17. The Claimant then also resigned on 10 February 2023 giving 4 weeks' notice. I do not have a copy of her resignation.

18. On 15 February 2023 the Claimant sent the Respondent further documents relating to her second grievance and said she had since handed in her resignation as the way the situation had been deal with had contributed to her loss of faith and trust. The email was acknowledged by HR who, on 15 February 2023, said that due to it being highly emotive for the Claimant she

should take some time to reconsider her decision to resign and not resign in haste.

19. On 17 February 2023 the Claimant learned that her grandmother was very ill in Oldham hospital and was expected to pass away over the next few days. This was a very difficult time for the Claimant. Her grandmother was very unwell and likely to pass away, and the situation also meant the Claimant had to engage with family members that she did have contact with, and which caused difficulties for the Claimant. The Claimant was also facing difficulties with her child's health. The Claimant spoke about the particular circumstances in her oral evidence that are personal to her child. It is not necessary for me to repeat them for the parties to understand this Judgment. But the Claimant attended medical appointments for her child on 17 January 2023 and 16 February 2023 and at this time of mid-February 2023 had considerable worry and care commitments for her child alongside the situation with her family and grandmother.

20. At around that time in mid-February 2023 the Claimant went to see her grandmother and spent 4 days away with her husband and child.

21. On 24 February 2023 the Claimant received the grievance outcome for her first grievance which was not upheld. The Claimant emailed MB that day saying she was not happy with the grievance outcome and seeking advice on how to proceed with an appeal. There was no reference in the email to the Claimant having resigned on 10 February. MB gave the Claimant some advice. MB said she was away on leave the following week but could pass the Claimant's case on to a colleague. The Claimant agreed to this and told MB she had also sent in an appeal but wanted some help writing something more formal if possible. MB put the Claimant in contact with a colleague, John Evans who made contact with the Claimant on 28 February 2023.

22. The Claimant says that on 26 February she read the email from HR about the potential to retract her resignation. She says that she did not read the email prior to this time due to the situation with her grandmother and also taking pre-booked holiday time.

23. On 27 February the Claimant emailed HR to say after time to reflect she agreed her resignation was done under extreme pressure and stress and asked instead for a transfer to another home. HR responded to say that as the Claimant had not responded in a timely manner her resignation had been accepted and processed and the Claimant should instead reapply for employment. It was put to the Claimant in cross examination this showed the Claimant was able to engage and recognise that to try to avoid loss of employment she needed to do something. The Claimant said that at that point in time her grandmother was still alive. She said HR's email had resonated with her that it was highly emotive, and she did not want to regret her resignation after the fact. She said she had a clearer frame of mind at that time.

24. It was put to the Claimant she would at that time have been capable of taking a step such as making enquires about presenting an Employment Tribunal claim. The Claimant said the grievance was ongoing and she appealed. She said after her grandmother died everything became too much but before then she was

about to do some things and function to a degree. She said that at that time she also did not know about bringing an Employment Tribunal claim. She said she was hoping the grievance would find in her favour, and she would get an apology and be able to work in another of the Respondent's homes. She said she had not thought beyond that, and she was trying to get through one problem at a time.

25. The Claimant said when she first raised her grievance she had struggled to get help from the GMB and had to send emails and make phone calls to get help. The Wrexham GMB office was local to her, but she would often have to ring the Conwy Office to speak to someone. She said eventually MB handed her over to someone else, but she found out her grandmother was dying and cancelled everything. She said she did not discuss her resignation with the GMB before she did it. The Claimant could not be certain if she discussed her resignation with the GMB after resigning. She said it was possible if they called she may have told them, but things were quite blurry in her mind about that week. The Claimant said when she resigned she just wanted to get away and she was not thinking about if there were laws around that or not. She said the Respondent had also asked her to reconsider her resignation. She said MB was also already struggling to answer emails and phone calls and she did not consider at the time her resignation to be an issue; it was one less stress not working there. She thought maybe in one email to MB she mentioned resigning but could not be sure. If there was such an email, I do not have it.

26. On 28 February the Claimant appealed the first grievance outcome.

27. The Claimant says her grandmother passed away on 29 February although that date cannot be correct as it was not a leap year so it must have been around 28 February or 1 March.

28. According to the Respondent's ET3 the Claimant worked her last shift on 3 March. On 4 March the Claimant was told her grandmother's funeral would take place on 13 March.

30. According to the Respondent's ET3 on 7 March the Claimant attended a grievance investigation meeting for her second grievance.

31. The 10 March 2023 was the Claimant's last date of contractual employment and (on the Claimant's best case) set time running for the complaints in question.

32. The grievance appeal meeting for the first grievance was due to take place on 16 March 2023, but the Claimant withdrew from the process. She says she withdrew due to grief from her grandmother's passing and the stress of the whole situation. She says that the thought of an appeal process was too much to bear on top of everything else including her child's health. The Claimant says that at this point in time she was taking her life one day at a time trying to ensure her own health did not deteriorate further. She said the death of her grandmother had also flared up other difficulties within her family.

33. On 17 March 2023 the Claimant was sent the grievance outcome for her second grievance which was not successful. The Claimant did not exercise her right of appeal.

34. The Claimant said she did have advice from the GMB about the appeal, but then her personal circumstances became overwhelming, and she stopped everything as she could not function properly. She said she would have told the GMB about withdrawing from the appeal as it was upsetting but also a relief. She could not be certain if it was in writing or a phone call. She said she was not really functioning and was on auto pilot and her top priority was not to spiral her own health because if she did she could not care for her child and could not function. She said if she had more cardiac seizures it could have life threatening consequences and things like stress and lack of sleep can cause a flare up. She said her condition has peaks and troughs and sometimes the most she can do is get out of bed. The Claimant said she needs recovery periods, and first day after a shift cycle finishes she will sleep for 24 hours. She says that's when she has no extra stress.

35. The Claimant said the GMB never told her about tribunal time limits, and she did not know about time limits until she later rang Acas. She said she was also not given advice about issuing a claim or speaking to Acas.

36. The Claimant says that by the end of May 2023 she had started working elsewhere, however, according to her ET1 Claim Form she started new employment on 3 June 2023. The Claimant said in evidence she had applied for the new job via Indeed and had an interview the week before, so the end of May 2023. The Claimant says, however, that she was still trying her hardest to stay afloat mentally and physically and her child still had his health challenges.

37. 9 June 2023 is the date by which the Claimant should have entered Acas early conciliation in respect of her complaints running up to and including the date of the termination of her employment. It was put to the Claimant in cross examination if the Claimant were well enough to attend a job interview she would be able to present an Employment Tribunal claim (in time). The Claimant disagreed saying that it would cause so much added stress it would have meant she would be unable to work. The Claimant accepted that she had not seen her GP about her health during this period. She said that with a long term chronic health disorder she self manages the condition and knows what steps to take if she is deteriorating so that she is not hospitalised. She said at the time she had to do a lot of sleeping and resting.

38. On 10 June the Claimant emailed the Respondent about collecting her belongings. On 20 June the Claimant emailed the Respondent about missing belongings.

39. On 18 July there was an incident in the Claimant's new workplace where the Respondent made a complaint about the Claimant. This incident is the subject of the Claimant's post termination victimisation complaint. She says she then felt enough was enough and she decided to get help/advice. The Claimant says that at this point in time despite having very little energy, time or headspace she went to Acas for advice.



40. The Claimant said in evidence that she did not know about Employment Tribunals other than that they existed until she looked it up in July. She said she did not know what Employment Tribunals did but had just seen general references in the media to cases going to Employment Tribunals. She said she became aware of the existence of Acas when she looked on the internet in July and it was the same week that she rang Acas. She said she looked them up and they said what to do step by step and they said to ring them as the first port of call. The Claimant also says in her written evidence that on 22 July after her shift she did some research online about what her options were, and she found she needed to contact Acas so spent the time between shifts arranging what she could to fill out relevant forms. She does not give an actual date for when she first telephoned Acas but to the best I can surmise would have been around 22 July 2023.

41. The Claimant says she was told by Acas that the time had essentially passed. My understanding is that she was still given the option of early conciliation with the potential to resolve the dispute, and she was told something along the lines that ultimately a Judge could decide whether to accept her claim. I accept the Claimant was not given the option of entering and closing early conciliation the same day which would have allowed the Claimant to start a tribunal claim straight away. If she had done so the claim would still have been out of time, but less so than in comparison to where the Claimant ended up. But I accept the Claimant's understanding was that she had to go through early conciliation before she could bring a tribunal claim and she did not understand it would actually make her worse off in terms of time passing.

42. The Claimant says that on 26 July after discussions with family and peers seeking advice, she decided to make the application for early conciliation, filing in the online form. She says she had spent time between shifts arranging what she could to fill out relevant forms and that she struggled to do any paperwork, respond to emails or gather/attach evidence but with help from her husband (who had his own health issues) she was able to take it to Acas. In oral evidence when asked about the delay between 18 and 26 July she said she may also have had a sickness bug which had a domino effect on her health and the need to avoid cardiac seizures. She said she slept a lot at that time just getting up for necessities such as eating and drinking. She said she did not see the GP and she self-certified from work.

43. There was then a delay in the early conciliation process. On 31 July 2023 Acas emailed the Claimant to say her case was currently awaiting allocation to a conciliator.

44. On 8 August 2023 an Acas conciliator emailed the Claimant noting the Claimant had said she preferred contact by email only but asking if it was possible to speak. The Claimant replied offering dates she was available to speak on 16, 17 or 18 August.

45. On 18 August 2023 the Acas conciliator emailed the Claimant saying he had been trying to contact her to discuss the claim and asking the Claimant to call him. The Claimant also emailed the conciliator with details of individuals to contact at the Respondent. Acas emailed the Respondent that day notifying the

Respondent that they had received an early conciliation notification for the Claimant. But that was also the date Acas early conciliation came to an end and the early conciliation certificate was issued. To the best I can figure out, the early conciliation period had timed out without the process really having started. It appears the conciliator told the Claimant that he would issue the certificate but also said he would separately continue to conciliate. The Claimant says in her ET1 *"I receive a call from Acas they advise they will continue conciliation and provide a certificate so I can start the tribunal process. They ask me to gather as much evidence as possible and send me some helpful links on next steps."*

46. The Claimant was sent information about how to submit an Employment Tribunal claim. The email says *"Make sure you submit your claim on time. You have at least one month from the date you receive this certificate, if you notified Acas of the dispute within your time limit. If you're concerned you might be out of time, make your claim as soon as possible. The employment judge will decide whether to accept it. If you have any questions about time limits, contact the Acas helpline."* The Claimant said she had already had a discussion with Acas in their first phone call, who had explained the claim was out of time, about the 3 month time limit and that a Judge could decide if it was reasonable or not; so the email was saying what was already her understanding.

47. On 19 August 2023 the Claimant started completing an ET1 claim form, with her partial draft saved on the online system. She was sent an email headed *"Employment tribunal: complete your claim"* saying: *"You've started a claim to an employment tribunal. To return to your claim you'll need your claim number (above), and memorable word... You'll receive a confirmation email once you've submitted your claim."* The Claimant was asked about this in evidence and why she had not fully completed and submitted the draft ET1 claim form. The Claimant could not now clearly remember what had happened and gave some possibilities as best as she was able. She said the form asked some information she did not have, such as things like the compensation sought, and to go into detail, and to attach evidence. She said she was back and forth with Acas about what to do. She said she was also trying to get documents from the Respondent. She said it was also possible that she had thought she had done it and classed it as submitted or had started it and then overlooked that she had not completed it. She said she was also working and recovering in between work shifts which would have played a part. She said some shift cycles were 4-7 days and involved her staying at work during that time, and with that and recovery time, it is also possible she was completing the paperwork the quickest that she could. She also said it is possible she thought early conciliation was ongoing with the possibility of settlement.

48. On 21 August the Acas conciliator emailed the Claimant to say he had now had an initial conversation with the Respondent and asked the Claimant for some information. The Claimant responded on 22 August apologising for not getting back sooner, saying her shift was a bit hectic. She send Acas a timeline of events and said she would send over screenshots and emails when she had organised them. She sent a schedule of loss. The Claimant had a further email from the Acas conciliator saying he had been trying to get hold of her to discuss the claim. The Claimant replied that evening saying "no missed calls again" and asking if the conciliator had updated her phone number.

49. On 23 August the Claimant sent a subject access request to the Respondent.

50. On 25 August the Claimant sent an updated schedule of loss to Acas. She received an out of office reply. The Respondent also asked Acas for an update about what the Claimant was seeking.

51. On 29 August Acas contacted the Respondent with details of the Claimant's claim.

52. On 12 September Acas chased the Respondent and the Claimant was later told that the Respondent had rejected an offer and no longer wished to engage in conciliation at that stage.

53. On 5 October 2023 the Claimant then submitted her fully completed ET1 claim form which was processed by the Tribunal and acknowledged on 17 October 2023. The Claimant was asked about the delay between 12 September and 5 October. She said she could only assume it was because she was working 7 day shifts and sleeping away in the children's home she was working in. She said she had to give the job up as it was having too big an effect on her health so she could only assume the delay was health related.

54. The Claimant said that once conciliation broke down she tried to do some research online but there was a lot of jargon. She said she tried the CAB but could not get an appointment and also tried the GMB without success.

## **Discussion and Conclusions**

### **Constructive Unfair Dismissal**

55. The effective date of termination was 10 March 2023 when the Claimant's notice expired following her resignation. The primary period of limitation for her constructive unfair dismissal claim was 9 June 2023. She the Claimant did not enter Acas early conciliation until 26 July 2023 some 6 ½ weeks beyond the primary limitation date. She did not actually present her ET1 claim form until 5 October 2023 some 4 months late.

56. The question for me is whether it was reasonably practicable for the Claimant to have started her unfair dismissal claim within the primary limitation period – i.e. whether it was reasonably practicable to commence Acas early conciliation by 9 June 2023.

57. I accept that the Claimant did not know the detail of employment law rights that can be put before an Employment Tribunal, or about constructive unfair dismissal, or that there were time limits for bringing claims, or that they had to first go via Acas at that time. I accept she had nothing beyond a vague awareness as to the existence of Employment Tribunals.

58. Somewhat unusually given that the Claimant was a union member and had been receiving some advice from the GMB I also accept that the Claimant had not been told by the GMB about constructive unfair dismissal or the time

limits that applied. I also cannot be satisfied that the Claimant actually definitely told the GMB that she had resigned or that she sought advice about the legal consequences of resigning and her rights arising. There are no emails between the Claimant and the GMB about her resigning, which very much contrasts with the earlier emails where she had been very specifically asking for advice about her rights over, for example, the dispute about whether the person she complained about should be suspended.

59. It seems likely, as the Claimant said in evidence, that she had some contact with the GMB when she withdrew from her grievance appeal. But I accept that at that point in time the Claimant was closing down and withdrawing from general engagement in life beyond the minimum required and I think it likely in those circumstances the Claimant was probably communicating to the GMB that she was not going to proceed with anything. In those very particular circumstances, I do not consider this is the type of case in which I can say the GMB as professional advisors were at fault in not proffering out advice about time limits. If there was such fault it would of course ordinarily have to be borne by the Claimant.

60. But in the latter part of July 2023, following the incident in her new workplace, the Claimant was able to go online and do some research, and learn about the need to contact Acas and make that contact. Further on down the line she was able to complete her ET1 claim form identifying the claims she wanted to bring that included constructive unfair dismissal, and setting out the background to what she wanted to complain about. The Claimant is clearly an intelligent and considered individual; I could see that when she gave evidence. Which begs the question as to whether if she could do that in July, it was reasonably practicable for her to have done so prior to 9 June 2023. The Claimant's main argument here is about her health and associated stressors at that time. The Claimant has serious chronic health conditions. But this is a case in which I do not have medical evidence about the Claimant's health at the particular time and specifically medical evidence supporting the Claimant's alleged inability at the time to be able to do some research about her employment rights and in turn learn about time limits and about Acas. Claimants do sometimes produce that kind of medical evidence in support of their arguments about reasonable practicability. Medical evidence is not however an absolute requirement; I have the Claimant's own evidence before me. But it does mean that I need to carefully assess the evidence.

61. I acknowledge the Claimant's point that her health conditions are her life long lived experience for her to speak to. I also acknowledge her point that she has become an expert in managing her own condition to try to maintain her health and minimise flare ups and that to do something may come at a cost in terms of needing recovery time or not being able to do something else. I further acknowledge her point that sometimes the daily difficulties and sacrifices that someone with a chronic health condition faces or makes are not always very visible to others. But it is nonetheless relevant to also look at what the Claimant was able to do over the period of time in question.

62. At the time the Claimant resigned on 10 February 2023 she had some 9 days earlier been able to send the Respondent a timeline document with 35 attachments in support of her grievance. On the day she actually resigned she

lodged her second grievance and was in contact with the GMB. On 15 February 2023 the Claimant sent the Respondent further documents. I appreciate the Claimant's health condition, and also her worries and caring responsibilities for her child, and also the stress the Claimant was under. I do accept that she was juggling multiple demands and making decisions about what she could or could not do. But bearing in mind the Claimant's ability at that time to engage in detail about her grievances, I do consider she was reasonably capable at that point in time of having done some research or sought some advice about her employment law rights and in turn information about time limits relating to her resignation.

63. When the Claimant's grandmother became very unwell and the Claimant was also carrying the weight of her child's ill health I do accept, notwithstanding the lack of medical evidence, that there was probably a period in around 17 to 24 February in which the Claimant was not in a position to seek advice/take action and she had some time away visiting her grandmother and spending time with her husband and child. But by 24 February 2023 the Claimant was about to seek advice from the GMB about her grievance outcome and appeal and on 26 and 27 February deal with the email from HR about whether she wanted to rescind her resignation which was then refused by HR. The Claimant herself said she had a clearer frame of mind at that time, and I do consider it was reasonably practicable for her to take some advice or do some research at that time.

64. Following the Claimant's grandmother's passing and around the time of her grandmother's funeral, and with the Claimant facing family difficulties, I do accept (again notwithstanding the lack of medical evidence in support) that the Claimant likely suffered a down turn in her health and her ability to cope. In particular having been someone who had been proactively engaging in the grievance process it is telling that she suddenly withdrew from the grievance appeal meeting due to take place on 16 March and did not pursue a grievance appeal when her second grievance was turned down on 17 March. The Claimant had ongoing concerns too for her child and I accept that for a period she was doing the bare minimum to keep going one day at a time and that there was a period where she could not have reasonably sought advice or undertaken research.

65. However, I also do consider that did not remain the position at the time that the primary limitation period expired. Whilst I appreciate the Claimant says she was expert in managing her own condition and also that she really would not see her GP unless it was absolutely necessary (having spent so much of her time in earlier years in medicalised settings), I do believe that if she really had long term ill health and an inability to work it would have led to, for example, having to see her GP. Moreover, towards the end of May 2023 the Claimant was well enough to apply for work, successfully attend an interview and then start new employment either then or in early June 2023. I do consider that in the latter part of May and early June 2023 the Claimant would have been well enough to seek advice or undertake some research. That is an important period because it is the period that is the run up to the primary limitation date on 9 June. I note the Claimant's argument to have done so would have caused so much stress she would not be able to work. But I do not ultimately accept that. The Claimant had in the past been able to juggle work and running her grievance/seeking advice from the GMB. Moreover, and again I intend no disrespect to the Claimant and

her own lived experience and her juggling of priorities to maintain her health, the Claimant is an intelligent person and it involved some relatively straightforward steps of undertaking some internet research and making a phone call to Acas. I suspect that in truth the Claimant was simply not thinking about things like legal action; she had at the time moved on. But that is not a reason to say it was not reasonably practicable to seek some advice or do some research and in turn learn about tribunal time limits and start early conciliation.

66. So in short I do not find that the Claimant was incapacitated by ill health throughout the entire period in question that it was not reasonably practicable for her to comply with the time limit. In particular that was not the case in late May and early June 2023 (as well as other times). Further, whilst I accept the Claimant was ignorant of the time limit, I do not find that makes it not reasonably practicable to present a claim in time. I consider the Claimant ought reasonably, at the times she was not so incapacitated, to have made enquiries about her employment law rights and in turn about the time limits that apply. She could have pushed the GMB, or she could have undertaken some research which would most likely have led her to the Acas helpline.

67. It was reasonably practicable for the Claimant to bring her constructive unfair dismissal claim in time and that complaint is therefore dismissed.

### **The Discrimination Complaints**

68. The test here is different: I am assessing whether it is just and equitable to allow the Claimant a longer period of time to present her discrimination complaints that run up to and include her decision to resign.

69. Whilst not egregious, the length of the delay as against a 3 month primary time limit is not a short delay. The Claimant entered Acas early conciliation some 6 weeks late and the actual presentation of the claim form (bearing in mind early conciliation could not actually extend time because the time limit had already passed) was some 4 months late.

70. In terms of the reasons for the delay, there was initially the impact of health and family difficulties. There was also the Claimant's lack of knowledge and lack of enquiries to gain knowledge as already discussed above in respect of the unfair dismissal complaint, where I found it would have been reasonable for the Claimant to take some steps to gain some knowledge about things which on the face of it were very significant to the Claimant. That lack of knowledge was ongoing as June went on, and into July. The catalyst for the Claimant to do some research and then gain some knowledge was the incident in her new workplace on 18 July 2023. The Claimant then learned she was out of time for the pre-resignation complaints on or around 22 July 2023.

71. There was a 4 day delay in starting early conciliation, and I do not consider I have sufficient evidence before me to say that was down to a vomiting bug and I think it is more likely the Claimant was considering her options.

72. What then happened in the early conciliation period appears to be unfortunate but does not appear to have been the Claimant's fault. As I have

already said I do not think she was given the option of simply closing down early conciliation, getting a certificate, and then starting the tribunal claim, which would have in fact minimised delay. Instead, I think it is likely the Claimant was following the advice given to go through early conciliation and if that did not then resolve the dispute go to the tribunal (and seek the extension of time). The early conciliation period was then not as effective as would have been hoped due to the delays in appointing a conciliator. It meant that by the time the conciliator got involved the conciliation period was at an end and the certificate needed to be issued. So there is reason for the delay in the period 26 July to 18 August.

73. I then struggle with the delay between 18 August and 5 October 2023; a fairly significant period of just under 7 weeks. The Claimant had the email very clearly telling her if she was concerned her claim was out of time (and she knew it was out of time) she had to make her tribunal claim as soon as possible. The Claimant clearly appreciated this because she started filling in her ET1 claim form the very next day on 19 August; but she did not then actually finalise it and submit it. There is no clear good reason for this. Conciliation was ongoing and the Respondent was engaged in it until 12 September, but the Claimant in her own ET1 acknowledges that Acas had said on the 18 August that they would provide a certificate and the Claimant could start the tribunal whilst they carried on conciliating at the same time. So the Claimant knew it was important to get the tribunal claim lodged even if conciliation was ongoing. I struggle with the notion that the Claimant thought starting drafting the ET1 claim form was sufficient without finalising it: the email says she needed to complete the claim/submit the claim when she would receive a notification email.

74. The ET1 claim form does not require pieces of evidence to be attached. It asks for various pieces of factual information, for the type of claim to be identified, for details of the claim to be provided with dates of events, and details of compensation or remedy sought. I appreciate someone in the Claimant's shoes might want to have a think about some of these things, or get some further advice from Acas, or need a bit of time to write the timeline (albeit she had already done one for the grievance and Acas) but, particularly in the face of knowing time was of the essence, it does not explain a delay until 5 October.

75. There is also the Claimant's health and juggling work commitments whilst maintaining her health. But again I am not convinced that was a bar to get the ET1 completed and lodged. The Claimant was during this time engaging with Acas and sending them documents and information. I consider on the evidence before me the Claimant would have been capable of submitting the claim form much earlier. There is also then further delay between conciliation ending completely on 12 September and the claim being presented on 5 October which also appears to have no real good reason.

76. On the question of relative prejudice, if I do not extend time the Claimant will not be able to bring the various discrimination complaints she seeks to bring as set out in her claim form and in EJ Ryan's case management order, including her constructive discriminatory dismissal complaint. On the other hand, she would not be left with no claim to bring, as she would have her post termination victimisation claim that is within time (and possibly her wages claim albeit it strikes me that will have time limit difficulties similar to the unfair dismissal claim). But I do accept the Claimant's point that she would be left with the small, end

part of what it is she wants to complain about as being discriminatory and not the real heart of her complaint that she says caused her to resign. The compensation she is likely to recover will be different; the post termination victimisation claim that is likely to be about injury to feelings for one event, whereas the discrimination complaints span multiple allegations and culminate in an alleged constructive discriminatory dismissal with financial losses.

77. From the Respondent's perspective if I extend time then the Respondent faces prejudice because they have to defend multiple discrimination complaints they would not otherwise have to face because they would lose the benefit of their time limit defence.

78. If time is extended the Respondent will also have to defend multiple complaints dating back some time, back to at their earliest January 2022 which is some 21 months before the claim was started and which relate to complaints about things like oral conversations. So there is the potential for the cogency of some evidence to be affected by the passage of time with memories fading. I appreciate in that regard that the constructive discriminatory dismissal claim would also bring those events into play and that complaint in one sense has less of a delay (March 2023 to October 2023) but even from that perspective the extension of time would still open up those more historic matters that would otherwise benefit from the limitation defence. That said I also do acknowledge that it seems likely that some of these matters will already have been investigated through the two grievance procedures (I do not have copies of the grievance outcomes to be any more definitive) and there will be documentary records for some of the complaints.

79. Mr Brockley also told me that the Respondent will also suffer prejudice as the care sector has a high turn over of staff. That said he also said there were two witnesses who can be deployed to give evidence if there is a final hearing before March 2025. I do not know the exact reasoning behind this, but we are in the fortunate position in Wales that if the parties can get the case ready, we are likely to be able to list it in late 2024 or early 2025. There is no suggestion that I have been given that otherwise crucial witnesses or key documents would be completely unavailable.

80. There is also prejudice to the Respondent in terms of the length of hearing and having to face a significantly enhanced case. On a rough estimate a final hearing of all the complaints may involve a 5 to 10 day hearing. It is likely that the post termination victimisation complaint (and the wages complaint if relevant) would need a final hearing of up to 3 days because it would be focused on what happened on 18 July 2023 and whether it was victimisation for an earlier claimed protected act of the grievance. The earlier events complained about would form part of the context or background but would not be specific allegations of discrimination to be assessed. The Claimant here said that the wider background and context was very important as the victimisation claim would not have context without the earlier events and that they are bound up together as to what happened on 18 July and why. I acknowledge her point, but it remains my view that the evidence before the Tribunal as to that background and context is going to involve significantly less tribunal time than having to hear all the evidence and formally determine all of the earlier discrimination complaints.



81. I do also acknowledge that for a substantial part of the delay period the Claimant was engaged in conciliation and that there is a public interest in encouraging the resolution of disputes before the need for litigation. But there is also a public interest in complying with time limits and the difficulty I have in the Claimant's particular situation is that she was clearly told that once the certificate was issued conciliation could continue alongside getting the tribunal claim lodged.

82. So the above are, in my judgment, the key factors. I have every sympathy with the Claimant from a human perspective about her health, her wish to be a positive role model for her child, and her family difficulties. But I do not ultimately find on balance that it would be just and equitable to extend time up to the date the Claimant presented her claim form. One particular concern is the delay and the lack of promptness in presenting the claim form particularly after 18 August 2023. Whilst I acknowledge there is limited forensic prejudice to the Respondent, they do suffer prejudice in terms of having to defend otherwise out of time claims some of which date back to January 2022, and in having to meet a far more expansive and expensive final hearing compared to the final hearing for the victimisation claim. I acknowledge the prejudicial impact this has on the Claimant, albeit she can continue with the post termination victimisation complaint which is indeed the event that ultimately drove the Claimant to do some research and seek some advice and pursue a claim.

83. In conclusion, it is not just and equitable to extend time for the pre-resignation discrimination complaints and the discriminatory constructive dismissal complaint and those complaints are dismissed.

84. The Claimant's post termination victimisation complaint continues, and a case management hearing will be listed to get that complaint ready for final hearing. The Claimant's unauthorised deduction from wages claim also continues as it was not listed for this time limit hearing. The Claimant does however need to consider that wages complaint seriously and attend the next case management hearing ready to discuss what the complaint is and why she is pursuing it. It strikes me that if it is about wages prior to the Claimant's resignation (where the 3 month primary time limit will run from the date it is said the wages should have been paid) on the face of it, the complaint is likely to have time limit difficulties similar to the unfair dismissal claim.

Employment Judge R Harfield

Date 17 July 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 22 July 2024

FOR EMPLOYMENT TRIBUNALS Mr N Roche

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