EMPLOYMENT TRIBUNALS

Claimant:	**Miss Y McKeon**
Respondents:	**(1) Pascal Solutions Limited**
	(2) Shezan Raza
Heard at:	**Birmingham** **On: 21 May 2021**
Before:	**Employment Judge Flood**
Appearance:	
For the Claimant:	**In person**
For the Respondent:	**Mr Singh (Counsel)**

This was a remote hearing which had been consented to by the parties. The form of remote hearing was V (by CVP video hearing). A face to face hearing was not held because no-one requested the same and all issues could be determined in a remote hearing. The documents that I was referred to were in an agreed bundle of documents running to 192 pages.

RESERVED JUDGMENT AND REASONS

1. The judgment of 14 December 2020 is revoked following a reconsideration of the decision under rule 72 of the Employment Tribunal Rules of Procedure 2013 ("ET Rules").
2. The claimant's complaints of unfair dismissal are dismissed because the claimant is not entitled to bring that claim as she was continuously employed for less than two years.
3. The claimant's complaints of unlawful deduction of wages in respect of wages and unpaid holiday pay are dismissed as having been presented out of time. These complaints presented after the expiry of the statutory time limit. That time limit cannot be extended because it was reasonably practicable for the claimant to present her claim within the time limit.
4. The claimant's complaints of sex discrimination (and age discrimination) are dismissed because they were presented after the expiry of the statutory time limit. It is not just and equitable to extend time to the date of presentation.
5. The proceedings against both respondents are accordingly dismissed.

REASONS

Background and relevant facts

1. This has become a complex case involving various issues going to the Tribunal's jurisdiction to hear the claims brought by the claimant. The complication appears to have initially stemmed from the fact that the claimant presented two claim forms which were very similar, one of which was subsequently dismissed in error. The issue was compounded once the claims were under way by problems in administration and (perhaps) a lack of understanding by both parties as to what was required to be done by them and what documents were to be produced. Neither party has been legally represented for much of the proceedings. Although the respondent has had legal assistance at the recent preliminary hearing from Mr Singh and at an earlier hearing from Mr Ahattak, it does not appear he has been assisted throughout. The claimant was not able to afford legal advice, although has been assisted by family members. In order to deal with the varied issues that had to be addressed, it was necessary for me to examine all the correspondence that had been submitted to the Tribunal throughout these proceedings by the parties. Whilst the parties had attempted to provide a bundle of documents containing relevant evidence at the various preliminary hearings, this was not always complete. I had before me at the most recent hearing a bundle of documents prepared by the parties running to 192 pages (page numbers mentioned below are references to page numbers in that bundle). However there still appeared to be missing documents and there were gaps in the chronology which could only be explained by undertaking a full examination of the Tribunal's files and the correspondence received to date.

2. It was agreed that the claimant started the period of employment that forms the basis of this claim with the respondent on 1 February 2018. She had worked for the respondent previously, from March 2015 to March 2017, at which time she left employment and went to work for an NHS trust. She then re-joined the respondent for a new period of employment in February 2018. It was agreed by all parties that the claimant's employment ended on 22 July 2019. I checked with the claimant whether she agreed that she did not have two years continuous employment with the respondent and she confirmed that this was correct. The claim forms did not contain any suggestion that the claimant was making any claim for automatically unfair dismissal on the grounds of having made a protected disclosure or a similar matter which would not require two year's continuous service.

3. The claimant acknowledged that her claim for discrimination related to matters that occurred during her employment with the respondent. She agreed that the last possible date when an act of discrimination took place was 22 July 2019 (the date her employment ended). As the claimant's employment terminated then, any unpaid wages and holiday pay became payable to her on that date. This was clearly also the effective date of termination of employment for the purposes of any unfair dismissal claim.

4. Given that 22 July 2019 was the key date, in order to bring any of the complaints now made to the Employment Tribunal in time, the claimant would need to have

contacted ACAS and commenced compulsory early conciliation ("EC") by 21 October 2019. It has been assumed in all discussions taking place to date that the claimant first contacted ACAS on 28 October 2019. The ACAS EC certificate that is contained at page 188 in the hearing bundle for the hearing today with reference number R591061/19/28 naming Pascal Solutions as prospective respondent ("EC Certificate 2") indicates that the date of receipt by ACAS of the EC notification was 28 October 2019. So ACAS EC was started 7 days out of time in respect of any against Pascal Solutions. However on examination of the files and the correspondence received by the Tribunal it became clear that the claimant contacted ACAS earlier than this on 16 October 2019. I have seen a copy of an ACAS EC certificate with reference number R586143/19/58 ("EC Certificate 1") naming Shezan Raza as prospective respondent showing a date of receipt by ACAS of EC notification as 16 November 2019. Therefore in respect of any complaint to be made against Mr Raza, EC was commenced in time.

5. In respect of EC certificate 1, the date of issue of that EC certificate was 16 November 2019. The claimant therefore had a further month after that date to present her claim to the Tribunal against Shezan Raza in time i.e by 16 December 2019. In respect of EC certificate 2, the date of issue of that certificate was 19 November 2019, which allowed her one further month i.e until 19 December 2019 for her to present her claim against Pascal Solutions within time.

6. The original claim for case number 1300167/2020 ("Claim 1") was presented on 13 January 2020 (shown at pages 62-76). The claimant had identified the respondent as Shezan Raza (at box 2.1), albeit that she did go on to refer to Pascal Solutions in the address box at 2.2 and in the details of claim section at box 8.2 that she worked for Pascal Solutions and was employed by Shezan Raza. The ACAS EC certificate reference number named at box 2.3 was that of EC Certificate 2. The claimant indicated at section 8.1 of Claim 1 that she was bringing a complaint of unfair dismissal and ticked the section stating she was making "*another type of claim which the Employment Tribunal can deal with*" stating "*I was dismissed with no explanation or discussion*". Box 8.2 stated that the claimant said she had been subject to "*unfavourable treatment*" and that alleged behaviour of the respondent was "*cruel and degrading to me as a woman*".

7. The Tribunal accepted Claim Form 1 and served it on the respondent identified as Shezan Raza on 17 January 2020 (Notice of Claim and copy claim form at pages 59-76). The claim was referred to Employment Judge Dean who decided that it should be listed for an open preliminary hearing which was listed for 6 July 2020 to determine whether the complaint of unfair dismissal was brought in time. A notice of preliminary hearing was sent to the parties on 17 January 2020 (page 16-18). This notice contained various case management orders made by EJ Dean for the parties to prepare for that preliminary hearing which included the production of a relevant bundle of documents and witness statements. These orders made it clear that no witness would be permitted to give evidence without leave of the tribunal, unless a witness statement had been prepared and exchanged.

8. The respondent presented a response to Claim 1 on 13 February 2020 (pages 77-87). This identified the respondent to the claims as Pascal Solutions t/a County Pharmacy. It disputed the claims factually and raised the issue that the claimant did not have sufficient qualifying service to bring an unfair dismissal complaint.

The respondent attached a document labelled GR1 which contained various pieces of evidence which the respondent said pertained to the claimant's employment including payslips, bank statements showing payments being made and a letter re pension entitlement dated 18 August 2017 (shown at pages 88-118).

9. The claimant presented another claim which became case number 1300273/20 ("Claim 2") on 20 January 2020 (page 28-42). Claim 2 identified the respondent as Shezan Raza (at box 2.1), albeit that she did go on to refer to Pascal Solutions in the address box at 2.2 and in the details of claim section at box 8.2 that she worked for Pascal Solutions and Shezan Raza. The ACAS EC certificate reference number named at box 2.3 was that of EC Certificate 2. The two claims were similar but not identical (on Claim 2 the claimant indicated that the date of an alleged incident involving cleaning the car park was 19 and not 11 July as she had indicated in Claim 1). Claim Form 2 also contained allegations of unfavourable treatment and of behaviour that was cruel and degrading to me as a woman. Claim Form 2 was referred to an Employment Judge and the Tribunal wrote to the claimant on 22 January 2020 (before accepting Claim 2) asking her which claims she intended to adopt. The claimant replied on 11 February 2020 by e mail (page 119) stating "*The ET1 claim form I want to go forward with is dated 20th of January. The date of the car park incident was wrong on the first ET1*".

10. The files were referred to me and a dismissal judgment for Claim 1 was issued on 14 February 2020 (page 122). This was done in error as it is now clear that the claimant did not say that she was withdrawing Claim 1 on 11 February 2020, but simply that she wished to go forward with Claim 2. The parties were notified of this dismissal on 14 February 2020 (page 120) in a letter which stated that the claimant had withdrawn her claim and the hearing scheduled to take place on 6 July 2020 would no longer take place. Claim 2 was then accepted by the Tribunal and served on the respondent, identified as Pascal Solutions on 22 May 2020 (notice of claim and copy of Claim 1 at pages 25-42). Claim 2 was listed for a preliminary hearing for the purposes of case management to take place on 27 May 2020.

11. The claimant then sent e mails to the Tribunal on 15 and 17 February 2020 complaining that she did not withdraw her claim (pages 123-125). A response was sent on 26 February 2020, stating that the Claim 1 had been dismissed but the Claim 2 had not and remained listed for 27 May 2020. This was converted to a telephone hearing and then postponed on 20 May 2020 during the pandemic response and relisted for 30 September 2020 for case management. In the meantime the respondent presented its response to Claim 2 on 17 June 2020 which was accepted.

12. The claim came before Employment Judge Self on 30 September 2020. The Case Management summary and orders sent to the parties after that hearing on 1 October 2020 were at pages 10 to 15. It was identified by EJ Self at that hearing that Claim 2 also contained reference to unpaid holiday pay, not receiving itemised pay statements and unfavourable treatment related to the protected characteristic of sex. The claimant suggested in that hearing that she also wanted to make a claim for age discrimination (at which point EJ Self that not being mentioned in the claim form would mean that the claimant would have to make an

application to amend her claim). EJ Self discussed the scope of the claimant's claims with her with the claimant indicating that she did not feel she had been paid the correct wages and holiday pay but could not be precise as to how much was outstanding. It was also explained to her that for the discrimination claims it would be necessary for her to list the acts other than her dismissal which she suggested were done because of her sex/age.

13. EJ Self was unable to deal with matters relating to the two claim forms and whether Claim 1 had been validly dismissed because the file for Claim 1 could not be found.

14. EJ Self discussed matters relating to the period of time the claimant had been employed with the parties and it became clear that the claimant had two separate periods of employment with the claimant, with a considerable gap in between when she was employed elsewhere. The claimant's second and latest period of employment started on February 2018 and ended on 22 July 2019. EJ Self explained that the claimant may not have sufficient length of employment to be able to make an unfair dismissal complaint and for that reason he was considering striking out that complaint. He gave her the opportunity to make written representations on this matter.

15. EJ Self then went on to discuss with the parties his view that the claimant appeared to have entered into early conciliation with ACAS more than three months after the date she had been dismissed on 22 July 2019. He indicated that this would mean that her claim had not been brought in time and that this would have to be addressed at a further hearing.

16. The matter was relisted for 11 December 2020 where the following preliminary issues (in summary) were to be determined:

16.4 Whether Claim 1 was withdrawn and then dismissed and the ramifications of that upon Claim 2;
16.5 Whether the claimant could claim unfair dismissal given her continuous service;
16.6 Whether the claimant could bring an age discrimination complaint (if she applied to amend her claim);
16.7 Whether the complaints or any of them had been presented in time and if not whether time should be extended

17. Various orders were made to prepare for that next preliminary hearing. The claimant was ordered (in summary) to:

17.4 Show cause why her unfair dismissal claim should not be struck out because of lack of continuous service by 8 October 2020;
17.5 Provide full particulars of each and every claim of discrimination by way of a numbered list and set out how much unpaid wages and holiday pay she said was owing by 15 October 2020;
17.6 Make any application to amend to add an age discrimination claim (explaining why it was being raised only at this stage) by 15 October 2020.

18. The parties were also ordered to provide documents they each held in relation to the dismissal of Claim 1 by 8 October 2020.

19. EJ Self ordered that an agreed bundle of all the relevant documents be prepared by the respondent by 6 November 2020. He also ordered that witness statements be exchanged by 30 November 2020. The order identified that the claimant's witness statement "*should explain why her claim was lodged outside of the statutory time limit and why it would be just and equitable to extend time to allow her to bring her discrimination claim and why it was not reasonably practicable to bring the wages and holiday claim (and unfair dismissal claim if still live). Additional evidence is subject to the permission of an Employment Judge."*

20. Following that hearing the following information was submitted by the parties:

20.4 On 2 October 2020 the respondent submitted the information it held about Claim 1 (page 170);

20.5 On 6 October 2020 the claimant sent an e mail to the Tribunal and the respondent (page 127-129) attaching a number of documents. This e mail disputed the fact that Claim 1 was withdrawn. She explained that Claim 2 had been submitted solely to correct a date as "*ACAS informed me to be accurate in every respect with regard to timelines"*. She also submitted information from HMRC supporting her complaint that she had 2 years continuous service. She also acknowledged that he had worked elsewhere between early 2017 and 2018 and did not have continuous employment with the respondent. At paragraph 4 of her e mail the claimant addresses the issue of why her claim should not be dismissed for being presented out of time. She contended that she had commenced EC in time and attached a copy of EC certificate 1 (showing initial notification to ACAS on 16 October 2019). That attachment was not shown in the bundle but was submitted to the respondent and the Tribunal by e mail on 6 October 2020.

20.6 On 14 October 2020 the claimant write to ask for more time to submit information with reference to loss of wages earnings, pensions etc stating that she had no wage slips and was currently trying to get representation. She also mentioned waiting for information to be supplied from HMRC;

20.7 On 3 November 2020 the respondent questioned whether the claimant had complied with the various orders of EJ Self;

20.8 On 3 November 2020 the claimant submitted by e mail a statement (dated 4 November 2020) running to three pages (pages 130-132). This set out a narrative description of events taking place during the claimant's employment. Other than reference to an incident on 11 July 2019 and the dismissal on 22 July 2019 it did not set out any dates when the events were alleged to have taken place. The claimant again asked for more time to provide information with regard to wages as she was awaiting information from HMRC and National Insurance. This statement did not address the issue of why the claim was lodged outside the statutory time limit, why it would be just and equitable to extend time to allow her to bring her discrimination claim and why it was not reasonably practicable to bring the wages and holiday claim (and unfair dismissal claim). The claimant did not submit an application to amend her claim to add a complaint of age discrimination.

21. The correspondence was referred to me as duty judge and as it was not clear whether the orders of EJ Self had been complied with, I asked the parties by a

letter sent on 1 December 2020 to confirm whether all orders had been complied with and whether the parties were ready for the hearing on 11 December 2020. The respondent replied on 4 December 2020 (page 167) stating its view that the claimant had failed to comply with the orders in that she had not adequately particularised her discrimination claim; had not made any application to amend; had not provided details of her wages claim and that she had not provided an explanation as to why her claims were brought out of time. The respondent also indicated that he was nonetheless happy for the hearing on 11 December 2020 to go ahead. The claimant replied on 4 December 2020 (page 166) stating she felt she had sent all information other than in relation to a Schedule of Loss as was still awaiting information from HMRC and National Insurance case workers. She also confirmed she was happy for the hearing to go ahead. Both parties complained about not being copied in to correspondence being sent to the Tribunal by the other party (page 169).

22. The parties were again asked by the Tribunal on 9 December 2020 whether they had complied with EJ Self's orders and if not why not (page 164-165). The Tribunal forwarded all the correspondence submitted in recent days to the parties and reminded them of their obligation to copy each other in. The hearing was also converted to a CVP video hearing.

23. The claimant e mailed on 9 December 2020 (page 164) confirming that she was still unable to provide details on her wages claim. She said that she did have witness statements but these had not been sent to the respondent as the witnesses wished to remain anonymous (but would be sent to the Tribunal prior to the 11 December hearing). She again requested that the hearing go ahead.

24. Employment Judge Meichen saw the file and correspondence on duty on 10 December 2020 and informed the parties that day that they "*must ensure that all the evidence they wish to rely on is contained in a single PDF bundle sent by e mail to the Tribunal and the other side. Similarly, all statements must be sent by e mail to both the Tribunal and the other side."* On 10 December 2020 the claimant sent an e mail to the Tribunal enclosing copies of three statements provided by individuals who said they were former members of staff of the respondent. These statements were generally supportive of the claimant and made other allegations of wrongdoing against the respondent. They did not deal or address in any way the particular allegations made nor did they address anything that happened after the claimant's employment had terminated leading up to her commencing early conciliation or presenting her claims to the Tribunal.

25. On 11 December 2020, the respondent sent in a pdf bundle for the hearing to be held that day. It included the three witness statements submitted by the claimant. It also included a witness statement from Mr Raza dealing with the events alleged in the claims. It also included information provided by the respondent's accountants regarding the dates of employment of the claimant and other matters relating to the payroll. The hearing listed for 11 December 2020 came before Employment Judge Meichen. The Case Management summary and orders sent to the parties after that hearing on 15 December 2020 were at pages 4 to 9 of the Bundle. The main issue under discussion was the status of Claim 1 and its effect on whether Claim 2 could be pursued. EJ Meichen made reference to Rule 52 of the Employment Tribunal Rules of Procedure and whether that prevented the

claimant from commencing Claim 2 once a judgment dismissing Claim 1 had been issued. Again the file could not be located so the issue around the first claim being dismissed could not be dealt with. Employment Judge Meichen suggested that it may be necessary for a reconsideration of my decision to dismiss Claim 1 to take place and that had to be done by me. He also made the point that the claimant's e mail of 15 February 2020 may have been an application to reconsider. The claimant confirmed she did want to have the decision to dismiss Claim 1 reconsidered. EJ Meichen determined that this matter had to be determined before any of the additional matters as to jurisdiction. The claim was then relisted for 14 April 2021 for an open preliminary hearing to determine the issues set out above. EJ Meichen made reference to the delays and deficiencies there had been in complying with EJ Self's orders. He noted that although a pdf bundle had been prepared as he had instructed on 10 December, it was not an agreed bundle. He made further orders to ensure that the case was better prepared for the next hearing and made it clear to the parties that these must be complied with. The claimant was required to submit her application for reconsideration and any supporting documents within 14 days and the respondent to reply within a further 14 days.

26. On 29 December 2020, the claimant sent by e mail a document to the Tribunal setting out her submissions on why the judgment dismissing Claim 1 on 14 February 2020 should be reconsidered and revoked. This email was copied to the respondent. This attached an appendix of 48 pages with an index and numbered pages. Neither this e mail or the attachment was in the Bundle before me today but I have retrieved it from the Tribunal files and reviewed this in detail. It included copies of the following documents:

26.4 an e mail from ACAS on 16 November 2019 to the claimant enclosing EC Certificate 1. This e mail contained the usual wording in communications from ACAS which is as follows:
"*Here is your Certificate which is evidence that you notified Acas before making a tribunal application.*
Please keep this safe as you will need to quote the reference number in full (including the last 2 numbers) if you fill in a tribunal application.
Acas cannot advise you about when a tribunal claim should be submitted. It is your responsibility to ensure that any tribunal claim is submitted on time.";

26.5 a letter from the Pensions Ombudsman dated 18 November 2019 in response to a complaint about the respondent's failure to put the claimant into a qualifying workplace pension scheme. This advised the claimant that a complaint could only be considered by the pensions ombudsman if she had submitted a formal complaint first to the respondent and setting out how this should be done;

26.6 a formal grievance addressed to the respondent dated 28 November 2019 which referenced similar incidents and was in similar format to the information provided in both claim forms (together with certificate of posting showing that this was sent on 2 December 2019); and

26.7 a letter to the respondent dated 27 December 2019 raising a formal complaint in writing relating to the pensions dispute (together with certificate of posting showing that this was posted on the same date)

27. The respondent sent in a written skeleton argument on 11 January 2021 (pages

19-22 of the Bundle)

28. In the meantime the missing file was retrieved following an extensive search by the Tribunal administration and many of the above matters have come to light. It was my view that it was in the interests of justice that the judgment of 14 February 2020 be reconsidered. I informed the parties by a letter sent from the Tribunal on 8 April 2021 that I would consider this matter at this preliminary hearing and would go on to consider the other issues identified by Employment Judges Self and Meichen at the previous preliminary hearings.

29. At the outset of the hearing Mr Singh for the respondent confirmed that the respondent did not object to the reconsideration of my decision to dismiss claim number 1300167/2020 as it understood that there had been an issue of miscommunication at the relevant time and the dismissal judgment had been issued in error. I confirmed that it was my understanding that the claimant had never intended to withdraw her first claim when submitting the second but simply to correct a date in the claim form. Accordingly I determined that it was in the interests of justice that my decision to dismiss claim number 1300167/2020 dated 14 February 2020 be revoked and the claim be reinstated. This dealt with the issues listed at paragraphs 33 & 34 below.

30. The issues that were to be determined are set out below.

31. No oral evidence was given and neither party requested that this take place. I asked the claimant to explain why her claim had not been presented in time. The claimant was insistent that she had presented her claim in time and had been told by ACAS that she was in time. She told me that she had a very difficult time following the termination of her employment as she struggled to find a job and had difficulties claiming universal credit when she needed to due to issues arising from the claimant keeping her on the payroll at HMRC. I asked her in particular to consider the period after EC certificate 2 had been issued on 19 November 2019 and until Claim 1 was presented on 13 January 2020. She told me she was not sure of the reason why she delayed in presenting her claim. She mentioned that the Christmas and New Year period fell during that time. She also told me her son had been ill during this time and that he had also become ill with Covid 19 (although it was not clear whether this happened in early 2020 or early 2021).

32. Reference was made by both parties to the extensive evidence that had been submitted previously in support of the issues by both parties. I determined that I needed to review all the Tribunal files in detail before deciding the issues in dispute and I adjourned the hearing for a reserved decision to be made.

The Issues

33. Whether the judgment dated 14 February 2020 issued in the first claim (1300167/2020) should be reconsidered and revoked.

34. If the judgment is not revoked whether the second claim (1300273/2020) should

be permitted to proceed applying Rule 52 and/or res judicata/abuse of process principles.

35. Whether the claimant is able to pursue a claim for unfair dismissal on account of her continuous service or whether an exception applies.

36. Whether the claims or any of them have been lodged in time and whether or not time should be extended so as to allow those claims to be pursued subject to the relevant statutory tests.

37. Any further identification of the issues that is necessary.

38. Time tabling to a final hearing on any claims that can be pursued following the above issued being determined.

The relevant law

39. The relevant sections of the ERA relating to the unfair dismissal complaint are as follows:

> **94. The right**
> (1) An employee has the right not to be unfairly dismissed by his employer.
>
> **108 Qualifying period of employment.**
>
> (1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.
>
> (2) If an employee is dismissed by reason of any such requirement or recommendation as is referred to in section 64(2), subsection (1) has effect in relation to that dismissal as if for the words "two years" there were substituted the words " one month ".
>
> (3) Subsection (1) does not apply if— [*various statutory provisions relating to the ability to make a claim for "automatic" unfair dismissal for various prohibited reasons then follow*]

40. On the complaint of unlawful deduction from wages, the relevant legal provisions I have considered are set out at regulation section **23 (2) of the ERA and/or regulation 30 of the WTR** and state that time can only be extended where the tribunal:

> *"is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months"*
>
> [and was presented to the tribunal*]*
>
> *"within such further period as the tribunal considers reasonable"*

41. **Section 207B of the ERA** deals with the extension of time limits to facilitate conciliation before institution of proceedings and 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").F2...*
>
> *(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.]"

42. The authorities are clear that the power to disapply the statutory time limit is very restricted. The statutory test is one of practicability. It is not satisfied just because it was reasonable not to do what could be done as per **Bodha (Vishnudut) v Hampshire Area Health Authority [1982] ICR 200**.

43. There has to be some impediment, which reasonably prevents or interferes with the ability of the claimant to present in time as stated by the Court of Appeal in the case of **Walls Meat v Khan 1979 ICR 52**.

44. **Section 123 of the EQA**, which specifies time limits for bringing employment discrimination claims, provides so far as relevant that:
"(*1) … proceedings on a complaint … may not be brought after the end of—*

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable."

45. **Section 40B of the EQA** deals with the extension of time limits to facilitate conciliation before institution of proceedings and provides:

(1)This section applies where a time limit is set by section 123(1)(a) or 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 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 the time limit set by section 123(1)(a) or 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 exercisable in relation to that time limit as extended by this section.

46. The language used ("*such other period as the employment tribunal thinks just and equitable*") gives the employment tribunal the widest possible discretion.

47. **Section 33(3) of the Limitation Act 1980** (power to extend time in personal injury actions) specified a number of factors that a court is required to consider when balancing the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

48. In **British Coal Corporation v Keeble [1997] IRLR 336**, it was held that the Tribunal's power to extend time was similarly as broad under the 'just and equitable' formula. However, it is unnecessary for a tribunal to go through the above list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion' (**Southwark London Borough v Afolabi [2003] IRLR 220**).

49. The Court of Appeal in **Robertson and Bexley Community Centre (trading as Leisure Link) 2003 IRLR 434CA** made it clear that there is no presumption that time should be extended to validate an out of time claim unless the Claimant can justify the failure to issue the claim in time. The Tribunal cannot hear a claim unless the Claimant convinces the Tribunal that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.

50. In case of **Abertawe Bro Morgannwg University v Morgan [2018] EWCA Civ 640** the Court of Appeal however stated that the "*such other period as the employment tribunal thinks just and equitable*" extension indicates that Parliament chose to give the tribunal the widest possible discretion. Although there is no prescribed list of factors for the tribunal to consider, "*factors which are almost always relevant to consider are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent"*. There is no requirement that the tribunal had to be satisfied that there was a good reason for the delay

before it could conclude that it was just and equitable to extend time in the claimant's favour.

51. **Adedeji v University Hospital Birmingham NHS Foundation Trust [2021] EWCA Civ 23, [2021] ICR D5** the Court of Appeal stated that "*The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) [Equality Act] 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."*

Conclusion

Submissions

52. Given the concessions referred to above, the only matter on which the parties made submissions on related to whether the claims had been presented in time and if not, whether that time limit should be extended by application of the statutory tests referred to above. The claimant submitted that her claim had not been presented out of time and if it was asks for an extension of time on just and equitable grounds. She explained the many difficulties she had whilst working at the respondent meant she did not have the required information to give further details of her claim in particularly as regards wages and holiday pay. She contended that she was not provided with a written contract of employment and had no payslips. She referred to the witness statement she had already submitted and asked me to consider this. She explained that since leaving the respondent she had struggled to find employment and had three separate jobs and had difficulties in meeting financial commitments and had to rely on family and friends for support and food banks. She explained that the Covid 19 pandemic had caused many problems for her, her son having contracted the illness and having been at home in her care for 3 months and that she had to take 6 weeks off work to help him. She said that the issues around delay since she had submitted her claim had added to her stress levels. She said that the respondent had not provided her with a reference and that the difficulties around her pay and HMRC meant she was unable to claim universal credit

53. Mr Singh for the respondent submitted that the critical date I needed to considered in determining whether the claims had been presented out of time was 22 July 2019 as this was the last date of employment and so the last date that any discrimination could have taken place and the date of dismissal. He also submitted that even if there were any wages or holiday pay outstanding (which the respondent disputed) that these would have become payable to the claimant on 22 July 2019 when her employment terminated. The fact that payments were made to the claimant after this date he submits does not change when the sums became payable. He therefore submits that ACAS early conciliation needed to have been started by 21 October 2019 and it was not commenced until 28 October 2019. He refers to the period after the ACAS EC certificate was issued on 19 November 2019 and that there was then a delay until 13 January 2020 when the claim was submitted that the claimant could not explain. He submitted that there was no sufficient evidence to suggest that the statutory tests for extending time had been met. On reasonably practicability he suggests no evidence has been presented to show that the claim could not have been presented earlier. He notes that the claimant was liaising with ACAS around this

time and if this was possible, it was also possible for her to have presented her claim on time. On the discrimination claims, he submits that it is still not clear 15 months after proceedings had begun what these relate to and that they have evolved over time

54. For completeness I have looked at each of the issues identified above and set out by conclusions on each below.

Should the judgment dated 14 February 2020 issued in Claim 1 (1300167/2020) be reconsidered and revoked?

55. Given what is set out at paragraphs 10, 11 and 29 above, I determined that that it was in the interests of justice to reconsider by judgment of 14 February 2020 dismissing Claim 1 upon withdrawal. The claimant did not withdraw Claim 1 and the judgment dismissing Claim 1 was therefore revoked.

If the judgment is not revoked should Claim 2 (1300273/2020) be permitted to proceed applying Rule 52 and/or res judicata/abuse of process principles?

56. As the judgment was revoked, I did not need to consider this issue further.

Is the claimant able to pursue a claim for unfair dismissal on account of her continuous service ?.

57. I refer to the agreed facts and the concession made by the claimant at paragraphs 2, 14 and 20.5 above. The claimant was employed between 1 February 2018 and 22 July 2019 which is a period of less than 2 years. Section 108 of the ERA requires a claimant to have not less than two years' service to make an unfair dismissal complaint. The claim form does not disclose any information which suggests that any of the circumstances set out in subsections (2) and (3) of section 108 of the ERA apply. The claimant has not provided any further information to suggest that this is the case. Therefore she is not entitled to bring a complaint of unfair dismissal and her complaint is dismissed.

Have the claims or any of them have been lodged in time and should time be extended so as to allow those claims to be pursued subject to the relevant statutory tests?

58. There are various sub issues to be considered depending on the claim brought by the claimant but two issues need to be determined first, namely:

Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination / the last act complained of / the date of payment of the wages from which the deduction was made?

59. I refer to paragraphs 4-9 above. The claimant commenced EC in respect of Claim 1 in time. She did not commence EC in respect of Claim 2 in time as it was 7 days late. In respect of Claim 1 presented on 13 January 2020, taking into account time spent on early conciliation, this should have been presented against Shezan Raza by 16 December 2019, so this claim was presented 4 weeks late. Claim 2 presented on 20 January 2020 was presented 5 weeks late (in so far as it is a claim against Shezan Raza) and just under 5 weeks late (in so far as it is a claim against Pascal Solutions). Neither Claim 1 or Claim 2 was made to the Tribunal within three months (plus early conciliation) of the act to which the

complaints relate so on their face they are both presented out of time. I must then go on to consider whether time should be extended and I remind myself that the test is different for a complaint of unlawful deduction of wages and a discrimination complaint so I must dealt with these separately as follows:

As the unlawful deduction of wages and breach of contract complaints were not presented within the statutory time limit, was it reasonably practicable for the claim to be made to the Tribunal within that time limit?

60. The claimant effectively has the burden of proof in showing that it was not reasonably practicable for her claim to have been presented in time.

61. I accept that the claimant was having an exceptionally difficult time after her employment with the respondent terminated. The circumstances she referred to which I set out at paragraph 31 and 52 above cannot have been easy for her to deal with. However I am not able to go so far as to say it was not reasonably practicable for the claimant to commence early conciliation and issue her claim in time. Around the time that the claimant was considering instituting a claim, she was attending and dealing with other matters relating to her former employment. She had been in contact with ACAS from 16 November at least and I note that the issue of submitting a Tribunal claim was flagged up to the claimant at this point (see paragraph 26.4). She had written to the Pensions Ombudsman and had a reply by 18 November 2019 (see paragraph 26.5). She had submitted a formal grievance to her employer on 2 December 2019 (paragraph 26.6) and a complaint about her pension on 27 December 2019 (paragraph 26.7). She was taking positive steps to try and further her various complaints. It appears to me that it should also have been possible for the claimant to during this period present her claim form to the Tribunal. Around the time her claim should have been submitted things were not easy for the claimant and issuing her complaint in the Tribunal was perhaps not at the top of her list of priorities. However this is not sufficient to meet the test of being some impediment, which reasonably prevents or interferes with the ability of the claimant to present in time. The jurisdiction of the Employment Tribunal is strictly defined by legislation and can only hear claims that satisfy all the legal tests for such claims to be brought including time limits. Claims such as breach of contract and unlawful deduction of wages have a particularly strict time limit with limited room for manoeuvre. Therefore I conclude that it was reasonably practicable for the claim to have been submitted in time.

62. As I have concluded it was reasonably practicable for the claim to be made to the Tribunal within the time limit, I do not need to go on to consider whether the claim made within a reasonable period thereafter. The complaints of unlawful deduction of wages (for unpaid wages and holiday pay) and breach of contract are therefore dismissed

As the discrimination complaints were not presented within the statutory time limit, were they made within a further period that the Tribunal thinks is just and equitable?

63. I have considered factors set out above in the relevant case law. I reminded myself that the exercise of the discretion is the exception rather than the rule, although I do have a wide discretion. I take particular note of the directions given by the Court of Appeal in the **Abertawe Bro Morgannwg University v Morgan** and the more recent **Adedeji v University Hospital Birmingham NHS Foundation Trust** case above.

64. The length of the delay in issuing proceedings here is 5 weeks which is not inconsiderable although I note that the Christmas and New Year holiday period fell within that 5 weeks.

65. The reason for the delay is addressed at paragraph 61 above and many of the same factors apply to the just and equitable discretion. I am very sympathetic to the difficulties that the claimant was having during this time. This cannot have been easy and undoubtedly had an impact. However, the claimant was involved in carrying out the various steps outlined during difficult period so was managing to carry out tasks that she felt were necessary to enforce her rights. The claimant went on to submit two Tribunal claims in January and was aware from her discussions with ACAS of (1) the importance of submitting her claim on time (see paragraph 26.4 above) and also (2) the importance of accuracy with regard to timelines (see paragraph 20.5 above). I fail to see why the claimant was despite this not able to ensure her claim was submitted in good time.

66. I also note that it was only at the preliminary hearing before me that the claimant has really explained some of the factors that may have caused the delay. She has been aware for some time that there was an issue about her claims being in time but has not addressed this in any substantive manner. This was first flagged when Claim 1 was presented (see paragraph 7 above). It was also discussed at the first preliminary hearing before EJ Self (see paragraph 15). The Orders made by EJ Self at that hearing required the claimant to provide a witness statement explaining why her claim was out of time and why it was not reasonably practicable to bring such claims/it was just and equitable for time to be extended (see paragraph 19). The information provided by the claimant addressed the point about early conciliation having been started sooner but did not further explain the later delays (see paragraph 20.5). The claimant's witness statement drafted at this time did not address the issue of time limits at all (see paragraph 20.8). The detailed information submitted by the claimant after the hearing before EJ Meichen on 29 December 2020 did not address the reasons for delay (see paragraph 26.4).

67. I have gone on to consider the balance of prejudice. The claimant will clearly be prejudiced by not being able to pursue her claim as given the decisions made already, it will being an end to proceedings entirely. The claimant makes serious allegations about the behaviour of the respondent which she will not be able to pursue in the Tribunal. However the respondent is prejudiced by having to deal with claims raised after the limitation period for such claims to be brought had expired. I also take into account that it is still not clear what the precise nature of the discrimination claims are. The claimant clearly complaints about unfavourable treatment on the grounds of sex in her claim forms (see paragraphs 6 & 9) although not identifying a complaint of sex discrimination as such. This was discussed at the first preliminary hearing and the claimant raised for the first time she also wanted to complain of age discrimination (see paragraph 12). There was no mention of this in either claim form. The claimant was informed of the need to make an amendment application if she wished to pursue age discrimination and that she needed to list in detail what the acts of discrimination were said to be (paragraph 12). The orders made by EJ Self required the claimant to provide full particulars of her discrimination complaints and made an amendment application by 15 October 2020 (see paragraph 17.5 and 17.6). No such amendment application was made and although some further detail was provided about the sex discrimination allegations, this was lacking in dates and did not identify why

these matters were said to be less favourable treatment on the grounds of sex (see paragraph 20.8). The claimant submitted written statements from former employees of the respondent some of which made similar allegations, although these statements did not shed any light on what the claimant says took place in her case (see paragraph 24). Even at this late stage it is not clear what the discrimination complaints are. The claimant has referred to several incidents but I am concerned that she does not seem to identify (and it is not clear from the claim form) how these relate to or are less favourable treatment on the grounds of the claimant's sex (as opposed to allegations of bullying behaviour per se). Further identification of the issues would be required. At this point coming up to 2 years after the events in question, the respondent will be prejudiced in having to deal with any new allegations that may arise, some of which may not be able to be sustained as allegations of sex discrimination.

68. It is clear from the case law that it is not a question of the Tribunal being able to exercise jurisdiction just because it would be kind. There must be something raised by the claimant which convinces me that it is just and equitable to do so. Considering all the matters raised above, I am not able to conclude that this has been done. It is unfortunate that this means the claimant will now not be able to pursue these claims. However, time limits are an important element of litigation and go to the tribunal's jurisdiction. They are not simply procedural matters that can be disregarded lightly. Having considered all the factors above in particular the length of the delay and reasons for it and looking at the balance of prejudice, I conclude that the discrimination complaints have not been presented within "such other period as the employment tribunal thinks just and equitable" in this particular case and so they are also dismissed.

69. Any further identification of the issues and timetabling is not necessary. The proceedings brought by the claimant under Claim 1 and Claim 2 are dismissed.

Signed by: Employment Judge Flood

Signed on: 27 May 2021