EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Ms L Mondal		Mr R K Jain

Heard at: London Central (in public, in person) **On**: 3 and 4 May 2023

Before: Employment Judge Stout (sitting alone)

Representations
For the claimant: Mr D Hallström (Free Representation Unit)
For the respondent: Ms J Duane (counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimant's claims were presented outside the time limit in s 23 of the Employment Rights Act 1996 and reg 30 of the Working Time Regulations 1998. The Tribunal does not therefore have jurisdiction to consider her substantive claims.

All claims are dismissed.

REASONS

Introduction

1. Ms Mondal (the Claimant) was employed as a domestic worker in the family of Mr R K Jain (the Respondent) on an Overseas Domestic Worker Visa ("ODW visa"). Both parties are in agreement that she worked for the family in India previously, including for a number of years in India specifically as a carer for the Respondent's mother, Mrs R Jain. These proceedings, however,

are concerned with two of her periods of employment in the UK, being 10 January to 31 August 2021 ("the 2021 period") and 7 May 2022 to 26 August 2022 ("the 2022 period"), the 2022 period being purportedly pursuant to a contract in which the Respondent is identified as the Claimant's employer, although he maintains that his mother (Mrs Jain) was properly the Claimant's employer. Mrs Jain was identified by the Claimant as a second respondent on the claim form, but the claim against her was not accepted by the Tribunal as her name did not appear as a prospective respondent on the ACAS Certificate.

2. The Claimant's claim in respect of the 2022 period was included in her claim which was received by the Tribunal on 13 December 2022 following a period of ACAS Early Conciliation between 8 and 12 December 2022 and was thus on the face of it submitted outside the three-month time limit in s 23 and 111 of the Employment Rights Act 1996 ("ERA 1996") and reg 30 of the Working Time Regulations 1998 ("WTR 1998") that were applicable to the wages, unfair dismissal and holiday pay claims that she had included in that claim. The Claimant's claim in respect of the 2021 period was added by way of an amendment application submitted on 21 February 2023 and permitted by Employment Judge J S Burns ("EJ Burns") at a Case Management Hearing on 3 April 2023. By that same application, the Claimant withdrew her unfair dismissal claim, so that the claims that remained were identified by EJ Burns to be as follows:

    a. Unauthorised deduction of wages – failure to pay minimum wage;
    b. Holiday pay under WTR 1998, regs 13 to 16;
    c. Failure to provide rest breaks under WTR 1998, regs 10, 11 and 12;
    d. Breach of s 1 ERA 1996 (failure to provide employment particulars);
    e. Breach of s 8 ERA 1996 (failure to provide itemised pay statement).

3. EJ Burns also decided that the question of whether the claims were brought out of time was also to be determined at this final hearing, along with the identity of the Claimant's employer because *"the findings of fact about the Claimant's employment and life conditions in the UK and the circumstances up to and after 26 August 2022, which can be fully explored at trial, will assist in deciding the time points"*.

4. This final hearing was listed for two days, and a Bengali interpreter was booked for the Claimant. Unfortunately, the interpreter booked was a Sylheti interpreter, but the Claimant speaks Kolkata Bengali as her first language, and also Hindi as a second language, but not Sylheti. It was thus not possible to have the Claimant's evidence on Day 1 and a Hindi interpreter was booked for Day 2 (the Claimant agreeing that a Hindi interpreter would be appropriate in the absence of any Kolkata Bengali interpreters being on the Tribunal's list of approved interpreters – Kolkata Bengali being a very particular dialect).

5. The parties had between them also submitted 10 witness statements, 7 of which they wanted to give oral evidence, and there had been late disclosure by the Claimant and a late witness statement from the Claimant, and other

preliminary issues, which between them meant that Day 1 was fully taken up with those issues and Tribunal reading.

6. In those circumstances, I accepted the joint invitation of the parties to reconsider EJ Burns' prior case management decision that the time limit point should not be addressed as a preliminary issue. Circumstances had changed significantly subsequent to him making that decision in that we now had only one day of hearing left, which was insufficient to determine the substantive claims, but sufficient to hear the evidence on the time limit point. It was also apparent to me, having read the parties' witness statements, that the time limit point could properly be separated from the substantive issues, whereas I can understand why it did not appear so to EJ Burns considering the matter on the pleadings.

7. We therefore proceeded to deal only with the question of whether the claims had been brought in time.

8. I reserved judgment at the end of the hearing. I deeply regret that there has then been such a delay in promulgating this judgment. This is in significant part because I identified during writing up that Kalayaan had provided a client care letter to the Claimant that I had not seen and considered I should. I invited the parties to supply it and make further written submissions on it. This process delayed preparation of the judgment because my instructions were not initially communicated to the parties by the Tribunal administration and, by the time the error was identified, considerable time had passed. The parties' responses were not conveyed to me immediately either and, by the time they were, I was unfortunately unable to find the time to complete the judgment until now. For all this delay, I apologise to both parties.

The evidence and hearing

9. A bundle had been prepared for the substantive hearing. I made clear to the parties that for the purposes of the time limit point I would only read the pages that they took me to in the course of the hearing and not the whole bundle.

10. For the purposes of the time limits issue, the Claimant submitted witness statements for the following witnesses, who were cross-examined by Ms Duane:

    a. The Claimant – Her statement had been prepared for her in English by Dr Bose and her other legal advisers, Dr Bose had then translated the statement to her in Hindi and she confirmed on oath that she had been content that what Dr Bose had said the statement contained;

    b. Ms A Mohsin – a solicitor employed one day per week as an Immigration Solicitor at Kalayaan and three days per week at the Southwark Law Centre;

    c. Dr S Bose – a solicitor at Work Rights Centre.

11. I received witness statements from the following witnesses for the Respondent, who were cross-examined by Mr Hallström:

    a. Mrs A Agarwal – the Respondent's wife, who has a BSBA from the University or North Carolina and an MIA from Columbia in Economic and Political Development with an emphasis on Poverty Alleviation;

    b. Ms M Esposito – Mrs Arpana's assistant who works in the Respondent's home approximately four hours per day.

12. I also read the Respondent's other witness statements, submitted for the purposes of the final hearing, but I have given no weight to them in relation to the time limits issue as they were not relied on by the Respondent for that purpose and witnesses were not tendered for cross-examination. I have taken them into account merely by way of background, and in order to understand the outline of the dispute between the parties on the substantive issues. These witness statements were:

    a. The Respondent – a UK citizen, resident since 1964 who runs a watches and jewellery business on New Bond Street and is also in partnership with his mother in a jewellery business in India;

    b. Mrs M D Jain – the Respondent's mother, UK citizen, resident since 1964, but since 2011 has spent more time in India who runs a jewellery business in India in partnership with the Respondent;

    c. Mrs M K Sethia – sister of the Respondent;

    d. Mr P Shah – Manager in the Respondent's jewellery business, based in Mumbai, India;

    e. Mamata KC – part-time worker for the Respondent and his wife from 2013 to 2020.

13. The Claimant elected to remain outside the room other than when giving evidence. An application for special measures while she gave evidence had been refused by EJ Burns at the previous case management hearing and no renewed application was made. The Claimant was represented by Mr Hallström, a caseworker from the Free Representation Unit (FRU), and a trainee solicitor was assisting him and Dr Bose was also present. I made clear that if Mr Hallström needed time to take instructions from the Claimant at any point, he should ask, but otherwise I was satisfied that a fair hearing could be conducted like that and it was a matter for the Claimant if she chose to remain outside and let her representatives and supporters act for her in the hearing room.

14. I should also record that I raised at the start of the hearing that although it would make no difference at all to the way I would approach the case, I have had some connections with FRU that I felt it appropriate to inform the parties

about in the interests of transparency. I informed them that I have in recent years raised money for FRU through sponsorship for sporting events (Swim Serpentine in 2018, London Marathon in 2022 and Ride London this year). I was also, over twenty years ago, for about a year a member of FRU's management committee and as a young advocate I assisted some clients on a pro bono basis through FRU. I have also made donations to FRU over the years. I paid for my own places in all the sporting events. I have not met Mr Hallstrom before.

15. The representatives confirmed on behalf of their clients that there was no objection to my dealing with the case, and Ms Duane confirmed that she had explained to her clients that in consenting to go ahead, they would have waived their rights to raise this as an objection later.

The facts

16. The facts that I have found to be material to my conclusions are as follows. If I do not mention a particular fact in this judgment, it does not mean I have not taken it into account. All my findings of fact are made on the balance of probabilities. In setting out my findings of fact below I have also in places recorded the evidence of the parties on certain issues and noted where there are disputes which I have not needed to resolve for the purposes of deciding the time point that is before me at this hearing.

Background

17. The Claimant was born in Bengal and is an Indian national.

18. Since she was around 20 years' old the Claimant has worked as a domestic worker, including for a number of years for relatives of the Respondent in India.

19. In either 2015 (Mrs Jain's date) or 2017 (the Claimant's date) she was employed by the Respondent's mother, Mrs Jain as a carer, cook and personal assistant ("aya"). Mrs Jain was elderly and frail, having just had a knee operation. The Claimant cared for her and cooked her food and food for guests if she was entertaining.

20. The Claimant is married and has two children of her own. Her family live in Bengal. Her sister and her husband live there too. The Claimant divides the money she earns from domestic work between her sister, her mother and the money she puts in her joint bank account with her husband. Her family are financially dependent on her. The Claimant has also acquired land in India, which she uses for business purposes.

21. There are disputes between the parties as to the Claimant's working hours and conditions both in India and the UK. It is not necessary for me to resolve most of these issues in order to consider the time point. There is agreement

on some aspects, however, so I record here that it is agreed that when employed by Mrs Jain in India in 2017 the Claimant lived in the family home in Mumbai and worked seven days per week, and that when Mrs Jain's family came to visit (including the Respondent) the Claimant would cook for the family. The Claimant says she was paid about £150 per month in Indian rupees during this time.

22. In May 2018 Mrs Jain came to London to visit the Respondent and his family. The Claimant travelled with Mrs Jain. The Jains arranged her Overseas Domestic Worker (ODW) visa. The Claimant signed papers to obtain the visa but did not know what she was signing. Her case is that it was agreed she would be paid the 30,000 rupees (equivalent to about £300 per month) in the UK.

23. While in the UK the Respondent took care of the Claimant's passport. There is a dispute between the parties as to whether this was at the Claimant's request or not, and as to whether or not the Respondent was reluctant and/or procrastinated when the Claimant asked for it back shortly before she left the Respondent's employment. I do not have to resolve that dispute for present purposes. There is no dispute that the Respondent did in fact give the Claimant her passport back before she left the household on 26 August 2022.

24. At that time the Claimant was the family's only live-in domestic worker, although someone else came into help care for Mr Jain's children some hours three days per week. She made food for all the family, including the children and continued to work 6.30am to 10/10.30pm with a break at 3-4pm.

25. On 14 August 2018 the Claimant returned to Mumbai and continued to work for Mrs Jain.

26. In March 2019 the Claimant stopped working for the family. Her case is that she did so because she was unhappy with her pay and conditions and told the Respondent this. The Respondent denies this was the reason or that the Claimant raised her unhappiness with him, but there is no dispute that the Claimant ceased working for Mrs Jain at least from 2019 to 2020 and that Mrs Jain travelled to the UK without the Claimant in 2020 for an extended stay. The Claimant's evidence is that in May 2019 she started working for another family, but lost her job in November 2020 as a result of the pandemic.

27. In September 2020 Mrs Jain visited the Respondent and his family in London. While she was here she was diagnosed with cancer. She was asymptomatic at point of diagnosis but the treatment for the cancer caused her health to deteriorate rapidly.

28. On 24 December 2020 the family managed to get a new full-time live-in helper and Mrs Sethia (the Respondent's sister) suggested asking the Claimant to come and take care of Mrs Jain because the Claimant was (in Ms Agarwal's words *"a good cook and also my mother in law trusted her"*. Mrs Sethia called the Claimant and told her that Mrs Jain was very ill and asked her to come to London to care for Mrs Jain. The Claimant's evidence

is that she was initially resistant because of the pay and working conditions, but that Mrs Sethia pleaded that she would pay her as well if need be and the Claimant agreed as she had no other work at that time and she genuinely cared about Mrs Jain who she thought of as like her own mother. I make no findings about the Claimant's reasons for agreeing to return to come to the UK to look after Mrs Jain, but I note that it is agreed by Mrs Sethia that she did promise to pay the Claimant *"extra on the side"* for her work in the UK. The Claimant's evidence is that she was offered 50,000 rupees (equivalent to £500 per month) to work in London in the Respondent's house, and that she was assured she would principally be looking after Mrs Jain.

29. The Respondent and Mr Shah arranged the Claimant's ODW visa. The Claimant went to a visa interview in Mumbai. The Respondent paid for her visa and travel to the UK. While in the UK, the family arranged for the Claimant to be registered with a GP.

30. The Claimant arrived in London on 10 January 2021 and found that Mrs Jain had bowel cancer and was very ill and her care needs had increased a lot. She felt it was a very different job to the one she was expecting. There is a dispute about exactly how much work the Claimant was expected to do and for whom, but there is no dispute that the Claimant worked seven days a week (Ms Agarwal confirmed that at this hearing) and that her working day began about 7am when she prepared food for Mrs Jain and helped her with personal care, that the Claimant was the cook for the whole household (i.e., for much of the time, the Respondent, Ms Agarwal, the children, Mrs Jain, Mrs Sethia, two other domestic workers, as well as herself, in addition to any other guests they may have), that she cooked multiple Indian dishes for both lunch and dinner, served the food to the family, that she did the shopping (with the family credit card), was responsible for cleaning Mrs Jain's room, did ironing and that she had to be around to put Mrs Jain to bed at c 10.30pm. There is a dispute, which I do not need to resolve, about whether and, if so, how much the Claimant had to tend to Mrs Jain's needs during the night.

31. There was another maid in the house called Doma at that time. She could not cook but helped with other things around the house. She worked 7.30am to 8.30-9pm and had Sundays off. For a period the Claimant and Doma slept in single beds in the study (a room 9'3" x 6'11"). Later, the Claimant was required to sleep in a smaller room upstairs next to Mrs Jain's room, which also contained the laundry machines and boiler. This was so that she could better meet Mrs Jain's care needs.

32. When not working the Claimant was free to do as she liked, and would use her smartphone to call friends and family and access social media. The family had internet which the Claimant was able to use. She was free to leave the house, but evidently did not do so very often or for very long as on the day she left there was a panic when she had not been seen for three hours.

33. There was not, so far as I am aware on the evidence presented to me at this hearing, any written contract between the parties covering the 2021 period of employment in the UK, but I note from the Respondent's witness statement

(paragraph 55) that the Respondent's position appears to be that she should have been paid for a 40-hour week at the national minimum wage and that even on the Respondent's calculations she was underpaid by £4,644.84 in relation to that period. When it was put to the Claimant that she knew in 2021 that she was not being paid the national minimum wage, the Claimant denied this, saying that she first learned of this from Kalayaan. I accept her evidence. There is no evidence before me that the Claimant was aware of the national minimum wage or aware that she had been underpaid by this amount at any time prior to her meeting with Kalayaan in October 2022 (the facts of which I return to below). I note that Mrs Jain's evidence (paragraph 11 of her statement) is that *"In India there are no real employment laws to obey"* and it was not suggested otherwise at this hearing. There was, I find, no reason for the Claimant to be 'on notice' that in the UK there are employment rights such as the national minimum wage.

34. The Claimant's visa was due to expire on 30 May 2021, but flights to India were cancelled because of Covid. Mrs Jain made efforts to arrange a visa extension for her, including arranging for two of the Respondent's office employees (a driver and a Hindi speaker) to take her to the Home Office in Croydon in an unsuccessful attempt to resolve this issue.

35. On 31 August 2021 the Claimant accompanied Mrs Jain to Mumbai and then to Dubai. She says it was agreed that she would be paid 40,000 rupees (£400) per month while in Dubai for six months.

36. In early 2022 Mrs Jain's cancer returned. The Respondent and his sister worked with an agent to obtain a ODW visa for the Claimant again so that she could come to London with Mrs Jain while she received more treatment.

37. On 26 April 2022 the Claimant went to the Respondent's Mumbai office and signed papers in connection with the visa application. She was told by the Respondent's manager where to sign. She did not know that one of the documents she had signed was an employment contract. I accept the Claimant's evidence on this point because I broadly accept her evidence about her poor command of English and I also accept her evidence about when she was told about the content of the contract by Kalayaan (see below). She then went for her visa appointment in Mumbai.

38. The employment contract that she and the Respondent signed provides that the Respondent is her employer and that she is employed by him as House Maid to work at his house and to cook, clean and take personal care of Mrs Jain. The contract mentions the other members of the Respondent's family living at the address, but does not mention the other member of domestic staff who Ms Agarwal accepted was then residing at the property (Anita). The contract provides for a salary of £18,137.60 per annum and states that the Claimant's hours of work are 40 hours per week, 8.30am to 6.30pm Monday to Friday with a daily paid lunch break of 1 hour. She was to be entitled to overtime payments at a pro rata hourly rate, to 20 days paid holiday (8 days less than her statutory entitlement) and no contractual sick pay. The contract thus appears to be based on the National Minimum Wage rate for 2020/2021

(£18,136.60 / 52 / 40 = £8.72). It does not provide for any deduction for accommodation costs.

39. The Claimant was, I find, unaware of the contents of the contract as a result of her lack of knowledge of English (see below) until she was told by Ms Mohsin at Kalayaan what it said on 19 October 2022. The Respondent has also sought to deny elements of the contract, including denying that he was the Claimant's employer, maintaining that Mrs Jain was her employer throughout. I am not deciding who was the Claimant's employer as part of this hearing.

40. The Claimant's evidence was that the Respondent orally promised her that she would be paid 70,000 rupees (£700) per month going forward. This is disputed by the Respondent.

41. There is, however, no dispute that between 7 May 2022 and 26 August 2022 (15 weeks and 6 days) the Claimant was actually paid the equivalent of £2,025.72 in Indian rupees (i.e. about £126.61 per week). The Respondent's pleaded case (and Counterschedule of Loss) is prepared on the basis that the Claimant's salary should have been £19,760 per annum, i.e. the national minimum wage of £9.50 for a 40-hour, 5-day working week and that her net weekly pay should have been £335.76 per week, less the accommodation offset of £60.90 per week (thus totalling nearly £4,397.76 for the 2022 period). I note that the Respondent's Schedule of Loss makes no allowance for any overtime payment to the Claimant, despite the overtime provisions in the contract.

42. The Respondent's pleaded case is that the rest of the Claimant's contracted salary was held back at her request so that her husband would not be able to access it as he would be able to access the salary paid into her Indian bank account in Indian rupees. This part of the Respondent's case is strongly disputed by the Claimant and the Respondent did not, for the purposes of this hearing on time limits, seek to rely on it. Mr Hallström nonetheless observed as part of his closing submissions that, if this was really the Respondent's case, then the Claimant's claim would not be out of time because there would still be a further payment of salary to be made which would, if the Respondent failed to pay the Claimant at a rate equivalent to the national minimum wage, constitute the last in a series of deductions. I do not have to decide whether the Claimant is right about this, however, as the Claimant does not invite me to. Her case is that the Respondent's assertion that her salary was held back to be paid on request does not accord with reality. I observe, in any event, that the Respondent has not yet made the final promised payment, so it cannot form part of any 'series' with which I am concerned in these proceedings. The contractual position as between the parties will remain to be resolved outwith these proceedings.

43. On 7 May 2022 the Claimant returned to London. Her working conditions and hours of work remained much the same as in 2021.

44. The Claimant was ill during 2022 for about a week and was paid during that time. Under the terms of the written contract she was not entitled to sick pay, but the Respondent's case is that the payment was made out of generosity and not by mistake.

45. In May 2022 there was one other domestic worker residing in the Respondent's house, Anita. Ms Agarwal confirmed in oral evidence that Anita was paid £500 per week in cash. The Claimant was, I find, not aware of this initially. She had, she accepted in oral evidence, had conversations with both Doma and Anita in which she had heard them talk about this sort of figure, but her oral evidence was that she did not believe they were really paid this sort of amount. I accept the Claimant's evidence about her state of knowledge of Doma and Anita's pay at this stage because I find it plausible that the Claimant would find it incredible that they could be paid so many times more than her for doing essentially the same sort of work (indeed, potentially less work, or less onerous work, as they were allowed Sundays off and not responsible for cooking for the whole family or carrying out intimate personal care tasks for anyone). I also find it plausible that it was when the Claimant was in August 2022 shown by Anita the evidence that she was being paid £500 per week that the Claimant became upset enough about the way the family was treating her to want to leave. I should also record here that the Claimant suggested that Ms Agarwal took steps to prevent the other domestic workers talking to the Claimant about her pay. Ms Agarwal denied this and I accept her evidence as it is evident that the Claimant did have opportunities to speak to the other domestic workers and that those discussions occasionally touched on pay.

46. Ms Esposito started working for the Respondent's family on 6 May 2022 and is employed as Ms Arpana's assistant working in the house between about 11am and 3.30pm, sometimes longer, such as 9.30am to 4.30pm depending on what there is to do. She is still in their employment. She used to speak to the Claimant in English (Ms Esposito's first language is Spanish and she does not speak Hindi). Ms Esposito gave evidence that she had lengthy conversations with the Claimant in English about her life in India and how she had been with the Jain family *"for over 20 years"*, that they talked about hair styles and that the Claimant asked her about her visa status (Ms Esposito has EU Pre-Settled Visa status) and asked her if she knew anyone who could help her with extending her visa. Ms Esposito went out of her way in cross-examination to make clear that she had never seen the Claimant mistreated by the Jain family and that she saw the Claimant as being happy, and that her body language did not suggest that she felt she was being taken advantage of. I broadly accept Ms Esposito's evidence. In particular, I accept that the Claimant appeared happy and well-treated by the family because for the most part she was well-treated by the family in terms of day-to-day interactions, and support for her when she was ill or experiencing other practical difficulties (such as with her visa or passport). She had also been with the family for a long time and, up to a point, there were family-like ties between the Claimant and family members, particularly Mrs Jain who she viewed as a mother figure.

47. However, it does not follow that there were not tensions building over pay and working conditions that Ms Esposito would not have noticed being there for only a few hours each day. I also consider that Ms Esposito was over-stating the Claimant's competence in English in order to assist her still current employer, who she genuinely believes has been 'wronged' by the Claimant leaving without notice and bringing a claim against the family. Ms Esposito was, however, unaware of how little the Claimant was being paid, or of the significant disparity between her pay and Anita's, and was only in the house in the middle of each day so did not see the full extent of the Claimant's work or working hours.

48. The Respondent has advanced a case that the Claimant had for a number of years been focused on obtaining the right to stay in the UK. Many of its witness statements contained evidence to that effect, and Ms Esposito and Ms Agarwal confirmed that evidence orally. Ms Agarwal's evidence was that in May 2021 when the Claimant's return flight to India was cancelled with the result that she would overstay her leave, she was extremely anxious because she was aware that unlawfully overstaying may jeopardise the possibility of her obtaining further leave to remain in the future. Ms Agarwal also gave evidence that in May 2022 the Claimant 'kept telling her' that she did not think she would have to go back to India as this was the 10th visit or 10th year she had come and she considered she would qualify for a long-term visa. Ms Agarwal advised her to return to India and re-apply as she considered that Overseas Domestic Visas were difficult to extend. The Claimant then told Ms Agarwal that she had met a man in Southall who knew a good solicitor who could help. I accept all this evidence.

49. The Respondent's argument, as I understand it, is that the Claimant's motive in leaving the Respondent's family and going to Kalayaan for advice and obtaining a Reasonable Grounds decision is to enable her to extend her stay in the United Kingdom and, if possible, to obtain a right to remain indefinitely. I accept the Respondent's case in that respect. The Claimant has, I find, been keen to find a way to remain in the UK, but there is nothing wrong with that. Her concern about avoiding overstaying her visa both in 2021 and 2022 makes it clear that she is keen to find a way to remain in the UK lawfully. There is nothing wrong with someone seeking by lawful means to find a way of remaining in the UK if that is what they want to do.

50. I do not accept the further element of the Respondent's case in this respect, which is that the Claimant is to be disbelieved and/or regarded as disingenuous and as having left their home and approached Kalayaan for assistance and made up allegations against the family as a way of securing the right to remain in the UK. The evidence as to what the Claimant did after leaving the Respondent's employment (finding her way to a hostel and then into further employment that also bore the hallmarks of being exploitative, as well as the length of time it took her to find Kalayaan despite her evident concern about her visa expiry on 2 November 2022) all indicates that this was a resignation and departure in desperation rather than anything calculated. Moreover, the core elements of her claim (that she was paid far below the minimum wage and far below other members of the respondent's staff and

not in accordance with her contract, that she worked 7 days per week, that she cooked for the whole family and thus did not only work for Mrs Jain, that she was for some time required to sleep in a very small, windowless room, and was not given itemised payslips, or paid holiday) all seem to be agreed, and all those elements provide plausible reasons why the Claimant came to feel as she now describes, i.e. as having been taken advantage of by the family who, essentially, continued to treat her in the UK as they had done in India where there are (on the Respondent's own evidence) no employment laws to protect employees from that sort of treatment.

51. I further find that the evidence of what the Claimant said about her wish to obtain a visa and what she did after leaving the Respondent's employment also points strongly towards the conclusion that the Claimant was genuinely unaware of her legal rights and genuinely unable to research those rights herself. The evidence the Respondent has given about her efforts to find out about her visa options indicates that even on that topic that was close to her heart and where she was clearly aware that the expiry date was approaching and she needed to do find a solution before then to avoid unlawfully overstaying, she proceeded by 'asking around'. She was not able (whether through lack of knowledge of what and where to look, and/or because of her language difficulties) simply to look this sort of thing up on Google in the way that most people in the UK can now be expected to do. She found the solicitor Priti Patel by word of mouth, and when Ms Patel suggested Kalaayan the Claimant did not initially understand what she meant or how to find them.

52. The Claimant's evidence, which has not been challenged in the context of this hearing on the time point, is that in July 2022 Anita was angry because she had not been paid properly. The Claimant was told by Anita that she was supposed to be paid £550 per week but had been given £300 by the Respondent and told there was no more cash. The Claimant complained to Mrs Jain about her pay, but Mrs Jain thought she was joking about leaving and said she should 'go out through the window'. The discovery about Anita's rate of pay, which I accept the Claimant made at this point for the reasons set out above, was the 'last straw' for the Claimant and she determined to leave. The Claimant believes that Anita left at this point too, but the Respondent's case is that Anita was given holiday while Ms Agarwal and the children went to America and Mrs Jain explains (paragraph 41) that it was thought that the Claimant could manage the cooking and housekeeping required for her and the Respondent.

53. I do not have to resolve the dispute about whether Anita had left or was on holiday for the purposes of the time point. What matters is that she was out of the house and during that time the Claimant made preparations to leave. A friend advised her to ask for her passport and visa. The Claimant did and the Respondent gave it to her. There is, as I have already noted, a dispute about how willingly the Respondent gave up the Claimant's passport, which I do not need to resolve for the purposes of the time point.

54. On 26 August the Claimant made a lot of extra food for the family, took her papers and a change of clothes, told Mrs Jain she was going to get some

food and left the house. She broke the mobile phone she was using at the time to prevent the family from contacting her.

55. The Respondent's family were very worried about her and thought she might have been kidnapped as a result of a press report about a kidnapping that day.

56. The person helping her escape took her to a hostel by taxi. She sold some jewellery to pay for the hostel. She was told her visa did not allow her to work for other people, but found work with an Indian family who paid her in cash, £500 per week and gave her payslips. She tried to find a lawyer who was Indian as she could not speak English. She was concerned that her visa was due to expire on 2 November 2022.

57. Someone gave her the name of a lawyer called Priti Patel in Knightsbridge. The Claimant called her in September. She said she could not help, but suggested she speak to Kalayaan. The Claimant did not know what this was and 'Mrs Patel was not helping'. The Claimant started looking for another lawyer, but then managed to find out about Kalayaan and called them in mid October.

Kalayaan's involvement

58. Kalayaan is a small London-based charity, established in 1987, founded to advocate for the rights of migrant domestic workers in the UK, to give them advice and support to help them access their rights. It has seven members of staff, some of whom are full-time and some of whom are part-time. It advertises itself as providing advice and support with immigration rights and employment rights. It is regulated by the OISC to give immigration advice to level 3. It refers individuals with more complex issues to other organisations. It is a designated first responder for the National Referral Mechanism (NRM) for identifying victims of trafficking and modern slavery to the Single Competent Authority ("SCA"). It also states on its website that it gives *"basic employment advice"* and will refer clients on where necessary. Ms Mohsin's evidence was that Kalayaan only deals with *"a handful of employment issues every year"* and that *"colleagues of mine with employment law experience generally work on identifying issues that can be passed over to solicitors' firms and other charities"*. Ms Mohsin herself is a solicitor with 15 years' experience in immigration. She is not an employment lawyer. There is a barrister employed by Kalayaan who specialises in employment law.

59. The Claimant had her first meeting with Ms Mohsin at Kalayaan on 17 October 2022. Ms Mohsin spoke Urdu with the Claimant and communication was imperfect. The Claimant told Ms Mohsin at this first meeting that she had run away from her employer, her visa was about to expire, she had no money so was working for another employer and she asked if they could help.

60. For subsequent meetings, a Hindi interpreter was booked. There were two long meetings on 19 and 20 October 2022. Ms Mohsin explained that she

would complete an NRM referral, that the application needed to be submitted by 25 October 2022 at the latest and that if a "Reasonable Grounds" decision was given, the Claimant's visa would be extended and she would become eligible for some support. Ms Mohsin went through Kalayaan's standard questions with the Claimant. During the course of these meetings, the Claimant provided Ms Mohsin with the contract that had been signed on 26 April 2022 by her and the Respondent, and told Ms Mohsin that she had not been paid what was in the contract. The Claimant's evidence was that Ms Mohsin asked her if she would like to get this money back. This particular point is not reflected in Ms Mohsin's meeting notes, but Ms Mohsin did accept in oral evidence that she understood that the Claimant had left the Respondent's family, was working for new employers and that she had been paid at a rate far below the national minimum wage. It is also apparent from the notes that the Claimant told Ms Mohsin that she had been in the UK working on previous occasions, including in 2018 and 2021 as well as 2022. However, Ms Mohsin did not ask when exactly the Claimant had left the Respondent's employment. She was concentrating on making the NRM referral for the Claimant and helping her out of what she perceived to be a situation of exploitation.

61. At a further meeting on 24 October 2022 the Claimant's statement for the NRM referral was read back to her and she confirmed it. The NRM referral was duly made on 25 October 2022.

62. On 31 October 2022 Kalayaan was informed that a "Reasonable Grounds" decision had been issued by the UK's SCA under the NRM. A "Reasonable Grounds" decision means that the SCA accepts there are reasonable grounds to consider that the Claimant is a victim of modern slavery or trafficking. As such, the Claimant became entitled to support from the Salvation Army pending a decision (known as a "Conclusive Grounds" decision) as to whether or not she is in fact a victim of modern slavery or trafficking. I emphasise that a "Reasonable Grounds" decision does not mean that the Claimant has been accepted by the SCA to be a victim of modern slavery or trafficking, and I do not regard her as such for the purposes of these proceedings.

63. On 1 November 2022 (p 200AH) Ms Mohsin had a further short telephone call with the Claimant without an interpreter at which she informed her of the Reasonable Grounds decision. Her notes record that the Claimant then asked her about tax and who had to pay it. Ms Mohsin explained that the employer is supposed to deduct tax. The Claimant said her new employer had deducted £700 from her salary which they said was tax and that if that was right, it was 'not worth her working'. Ms Mohsin noted *"when we speak with interp, will go through next steps and her employment rights"*.

64. On 2 November 2022 Ms Mohsin and the Claimant spoke with an interpreter and Ms Mohsin explained again about the implications of the "Reasonable Grounds" decision in terms of her having the right to continue working as an overseas domestic worker and access support, including a safe house if needed. Ms Mohsin noted that on the Claimant's payslip from her new

employer £500 was being deducted to be given to the person who helped her escape from the Respondent's family. Ms Mohsin noted also that the *"Pension deduction seems a bit odd"*. She also records that the Claimant *"should also get advice re money owed to her"* and that the Claimant was *"happy to do this"*. She told the Claimant to *"obtain her bank statements in India, re payments while she was working in the UK".* Ms Mohsin noted that the Claimant also had the *"paper visa application and contract"*. The police had also been in contact, as Ms Mohsin noted was standard with NRM referrals. Ms Mohsin indicated she would help the Claimant with obtaining a bank account and National Insurance number.

65. On 3 November 2022 emails (pp 200AM-AN) indicate that Ms Mohsin and someone from Hestia were concerned about whether the Claimant was being exploited by her new employer. I find their concerns in this respect to be reasonable as the tax deduction referred to was considerably higher than it should have been and the £500 per month being paid to an agent was likewise a very high figure.

66. On 7 November 2022 the Claimant sent in her bank statements from India.

67. On 9 November 2022 Ms Mohsin arranged an appointment for the Claimant to open a bank account.

68. On 9 November 2022 the notes record that Ms Mohsin provided the Claimant with a client care letter and consent form. There were further queries about the new employer. The client care letter was dated 31 October 2022 (although I find based on the notes that it was not given to the Claimant until 9 November 2022). It states that Kalayaan is a registered charity and organisation regulated by the Solicitors Regulations Authority (SRA). It confirms that the Claimant on 17 October 2022 instructed Kalayaan to act *"in connection with immigration/trafficking matter"*. The letter explained about the NRM. In a paragraph dealing with what happens if a positive Reasonable Grounds decision is made, the letter states:

> If a positive Reasonable Grounds decision is made, a victim is given 45 days in order to recover and reflect on their experiences. This time is given so that victims can seek advice and support and make informed decisions on what they want to do (for example pursue a criminal or employment case against their employer or return home). At this stage a victim is entitled to:
>
> - Safe and suitable accommodation
> - Access to free legal representation (if eligible) for immigration and employment cases

69. On 14 November 2022 the Claimant informed Ms Mohsin that her employers were going to be away for 15 days and had said they would not pay her, but she had been told she could work for one of their friends while they were away. The Claimant was not happy about that and decided to give notice, but was worried about where she would stay. Ms Mohsin started exploring the safehouse option for the Claimant. She referred the Claimant to Ms Hirst to look into her employment rights, although Ms Hirst is not legally trained.

70. On 20 November 2022 the Claimant had an appointment with Ms Hirst at Kalaayan. They made the National Insurance number application and Ms Hirst noted that the Claimant *"wanted advice on previous and current employment situations"* (p 200AS). Ms Hirst took a copy of the 26 April 2022 employment contract.

71. Ms Hirst referred the Claimant's case to North Kensington Law Centre ("NKLC") for employment law advice. It is unclear when this referral was made.

72. Mr Mills of NKLC advised by email on 2 December (p 254) that her claim was probably already out of time, depending on when she was normally paid, but that she needed to contact ACAS and issue a claim to protect the Claimant's position. He noted that unpaid wages could still be recovered in the County Court if the Claimant was out of time to claim in Tribunal.

73. Ms Hirst was off sick with 'flu and picked up Mr Mills' email on 8 December 2022 (p 248). She had been told by Ms Mohsin (p 253) that the Claimant got her August salary early on 23/24 August 2022 and that normally she would have received her August pay on 3 or 4 September, but often it was not paid on time. She acknowledged that the Claimant was probably now 'out of time' to claim.

74. On 7 December 2022 the Claimant moved into a safe house arranged for her by Kalayaan. The Claimant remains in the safe house and is currently receiving £65 per week in support from the Home Office.

75. As soon as the Claimant was in a safe house, Kalayaan contacted ACAS for her on 8 December 2022, naming only the Respondent as employer. The ACAS Certificate was issued on 12 December 2022. They opted not to take advantage of the Early Conciliation Services but just to have the certificate issued within 5 working days (p 258).

<u>Commencement of proceedings</u>

76. On 13 December 2022 Ms Hirst completed the ET1 claim form for the Claimant and submitted it to the Tribunal. This is not help that Kalayaan normally provides as they do not assist with litigation of employment matters generally.

77. Kalayaan then looked for an organisation to whom the Claimant's employment case could be referred. On 27 January 2023 Kalayaan referred the Claimant's case to the Work Rights Centre and it was allocated to Dr Bose shortly afterwards, documents following on 31 January 2023. WRC came on record with the Tribunal on 6 February 2023. The first client interview was 8 February 2023.

78. On 10 February 2023, the Claimant raised with Dr Bose the prior period of work between 10 January 2021 and 31 August 2022. Dr Bose sought to

pursue this additional matter through ACAS and when unsuccessful submitted an application to amend on 21 February 2023.

79. In her original ET1 claim received on 13 December 2022, following a period of ACAS Early Conciliation between 8 and 12 December 2022, the Claimant stated that her employment started on 7 May 2022 and ended on 26 August 2022. She claimed unfair dismissal, notice pay, holiday pay and failure to pay National Minimum Wage (NMW). The Claimant's representative named on the ET1 was Ms Hirst of Kalayaan. The ET1 stated that the Claimant came to the UK on an ODW visa on 7 May 2022. It stated that the Claimant had a contract with the Respondent under which she was to be paid a gross salary of £18,137.60 per year but that she had in fact been paid 50,000 rupees a month to her bank account in India, that she worked from 7am to 10.30/11pm with a 1 hour break each day and was on call during the night, waking 3-4 times in the night. She worked 7 days per week, took no holiday and received no holiday pay. The ET1 stated that she was *"illiterate and cannot read in English"* and was *"in the process of seeking legal advice"* so did not yet have a Schedule of Loss.

80. The Claimant named Mrs R Jain as a second respondent on the claim form, but had not obtained an ACAS Early Conciliation certificate in respect of her, so that claim was rejected. The Respondent and Mrs R Jain nonetheless both submitted responses to the claim. Their position was that Mrs R Jain was the Claimant's employer and that the claims were out of time and should be struck out on either or both bases. They stated that the Claimant had been employed in India by Mrs R Jain under Indian law and that the UK employment contract was created solely for the purposes of obtaining the visa and incorrectly named the Respondent as employer. They stated that they had treated the Claimant well and as part of the family, that working hours/days were flexible and that the Claimant was not needed all the time throughout the day, particularly between 3pm and 5pm when Mrs R Jain would sleep. The Claimant's salary was being held for her to be paid on request as she did not want her husband to know how much she earned (he has access to the bank account into which the Indian rupees were paid). The family was shocked when the Claimant left without notice on 26 August 2022.

81. On 21 February 2023 the Claimant applied to amend her claim on the basis of new particulars prepared by the Work Rights Centre, to whom the Claimant had been referred by Kalayaan for legal advice. These particulars withdrew the claims for constructive unfair dismissal and notice pay, added an additional prior period of employment in the UK commencing on 10 January 2021 and ending on 31 August 2021. In these particulars, it is asserted that when the Claimant first came to the UK the family had another domestic worker working for the family, but she left and the Claimant was left to do all the work for the whole family which included the Respondent, his wife, their two children and his mother. The Claimant lived in the utility room on a mattress on the floor with the boiler and laundry machines. The amended particulars added claims for failure to provide a statement of employment particulars and itemised payslips in breach of ss 1 and 8 ERA 1996. It asserted that she was paid the equivalent of £1,967.78 for the period 10

January 2021 to 31 August 2021 and £2,025.72 for the period 7 May 2022 to 26 August 2022. It asserted she was not paid regularly in rupees either.

82. The Respondent resisted the amendment application but at a case management hearing on 4 April 2023 Employment J S Burns allowed the Claimant's amendment application and dismissed on withdrawal the notice pay and unfair dismissal claims.

83. The claims were identified as being claims against the Respondent only for:

    a. Unauthorised deduction of wages – failure to pay minimum wage;
    b. Holiday pay under WTR 1998, regs 13 to 16;
    c. Failure to provide rest breaks under WTR 1998, regs 10, 11 and 12;
    d. Breach of s 1 ERA 1996 (failure to provide employment particulars);
    e. Breach of s 8 ERA 1996 (failure to provide itemised pay statement).

84. The question of whether the claims were brought out of time is also to be determined at this final hearing, along with the identity of the Claimant's employer.

<u>The Claimant's knowledge of English</u>

85. The Claimant speaks Bengali (Kolkata dialect) as her 'mother tongue'. From living and working in Mumbai for a number of years, she has learned to speak Hindi. She went to school for three years in Bengal and can read and write in her mother tongue.

86. The Claimant's ET1 (prepared by Ms Hirst of Kalayaan) stated that the Claimant was *"illiterate and cannot read in English"*. The Claimant in her witness statement stated that *"From living and working in England, I have picked up some English words. I can roughly understand what people say when they speak English, but I cannot speak it myself"*. In oral evidence, the Claimant accepted that she could speak some English, that she tended to speak to the Respondent's children in English because they do not speak Hindi and that she could communicate in English about simple household matters. She also agreed that she recognises the 26 letters of the English alphabet, and that the Respondent's mother's sister in law taught her how to write her name in English, but she could not write her address in English. She was cross-examined about the contract that she signed with the Respondent on 26 April 2022 (p 138). She explained that she would not have known where to sign on the document if she had not been shown where by the Respondent's manager. Her signature was written in block capitals, directly below where someone else had printed her name in block capitals.

87. The Respondent disputes what the Claimant says about her command of English. Ms Esposito gives evidence of having had long conversations with the Claimant while in the Respondent's home about her visa, domestic issues and hair styles. Ms Agarwal's evidence was to similar effect. She also

produced evidence of WhatsApp communications with the Claimant, which included her giving the Claimant a short instruction in English in December 2021 about making the Respondent's tea and bringing it inside, the Claimant forwarding her an apparently English language advertisement for an Indian hair product, the Claimant sending her a short "Happy Holi" greeting in February 2022 and lots of voice messages, which Ms Agarwal accepted were all in Hindi.

88. Ms Agarwal also gave evidence about an occasion when the Claimant was worried about her passport not having been returned by the Home Office and Mrs Jain arranged for two of the Respondent's office employees (one to drive and one Hindi speaking) to take the Claimant to the Croydon office to see if they could get the passport. She also gave evidence of another occasion when the Claimant was dropped off at the wrong street by a taxi and she was so worried that she would not be able to find her way back that she went out looking for her, only to find her at home when she got back, having managed to find her way by stating her address to people and being directed.

89. Having considered the evidence, and observed the Claimant in Tribunal, I find that the Claimant's command of English is very poor. I accept that it is overstating the position to say that she 'cannot' speak English, because she evidently knows enough words to be able to communicate about simple matters in a domestic environment. However, I have seen nothing that causes me to doubt her evidence that she cannot hold a more complex conversation in English. Those who advised her at Kalaayan were unable to communicate with her successfully in English. Ms Mohsin spoke Hindi with her initially and then a translator was used. There was nothing to indicate in Tribunal that she was able to understand any of the English used beyond very basic greetings and instructions (generally accompanied by hand signals). The WhatsApp messages show that she could read some very basic English words, but most of the communication by WhatsApp that has been produced (specifically with the intention of demonstrating the Claimant's demand of English) was in fact done by voice messages in Hindi, which as that does not appear to be the main language of the house (the children do not speak it) strongly suggests that for the most part the family did not expect the Claimant to understand English. Mrs Jain even arranged for a Hindi speaker to accompany the Claimant to the passport office on the occasion that Ms Agarwal mentions and it was clear that Ms Agarwal's concern about the Claimant when she was dropped off in the wrong place by a taxi was at least in part because she expected her to have grave difficulty reading street signs or communicating with anyone in English in order to find her own way home. Finally, I accept the Claimant's evidence that she cannot write much more than her name in English.

Conclusions

Time limits

The law

90. Under s 23(2)-(4) ERA 1996 there is a primary time limit of three months beginning with the date of the payment of wage from which the deduction was made, or the last in a series of deductions. Under reg 30(2)(a) of the Working Time Regulations 1998 (WTR 1998) there is a three-month time limit that runs from the date when it is alleged the exercise of the right should have been permitted or a payment made. By virtue of s 23(4) / reg 30(2)(b) where the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within the primary time limit, a claim will fall within the Tribunal's jurisdiction if it was presented within such further period as the Tribunal considers reasonable. These provisions are subject to the extensions of time permitted by the ACAS Early Conciliation provisions, i.e. by virtue of s 207B of the ERA 1996 and/or reg 30B WTR 1998, any period of ACAS Early Conciliation is to be ignored when computing the primary time limit, and if the primary time limit would have expired during the ACAS Early Conciliation period, it expires instead one month after the end of that period.

91. This is the same test as applies in unfair dismissal cases. The tribunal must first consider whether it was reasonably feasible to present the claim in time: *Palmer v Southend-on-Sea Borough Council* [1984] 1 WLR 1129. The burden is on the employee, but the legislation is to be given a liberal interpretation in favour of the employee: *Marks & Spencer plc v Williams-Ryan* [2005] EWCA Civ 470, [2005] ICR 1283, approved most recently by the CA in *Lowri Beck Services Ltd v Brophy* [2019] EWCA Civ 2490 at [12] per Underhill LJ giving the judgment of the Court.

92. If the tribunal finds it was not reasonably practicable to present the claim in time, then the tribunal should consider whether the claim has been brought within a reasonable further period, having regard to the reasons for the delay and all the circumstances: *Marley (UK) Ltd v Anderson* [1996] IRLR 163, CA.

93. It is not reasonably practicable for an employee to bring a complaint until they have (or could reasonably be expected to have acquired) knowledge of the facts giving grounds to apply to the tribunal, and knowledge of the right to make a claim: *Machine Tool Industry Research Association v Simpson* [1988] IRLR 212. However, once an employee has knowledge of the relevant facts, they can be expected to take reasonable steps to obtain advice: *Paczkowski v Sieradzka* [2017] ICR 62 at [23].

94. If a claimant engages solicitors to act for him or her in presenting a claim, it will normally be presumed that it was reasonably practicable to present the claim in time and no extension will be granted. As Lord Denning MR put it in *Dedman v British Building and Engineering Appliances Ltd* [1974] ICR 53, CA: *"If a man engages skilled advisers to act for him — and they mistake the*

time limit and present [the claim] too late — he is out. His remedy is against them." This rule is commonly referred to as the 'Dedman principle'.

95. In *Northamptonshire County Council v Entwhistle* [2010] IRLR 740, where Mr Justice Underhill, then President of the EAT, reviewed the authorities and confirmed (at [5]) that the *Dedman* principle is a principle of law that applies where an employee has consulted a skilled adviser and the employee is 'fixed' with the advice given and cannot rely on it to excuse their failure to present a claim in time. In *Entwhistle* Underhill J emphasised, however, that the question of reasonable practicability remains a question of fact for the Tribunal, and that the reasonableness requirement applies to the adviser too so that if the adviser's wrong advice was reasonable in the circumstances (eg because the employer had misled as to a key fact about the date of termination of employment or similar) then the employee *can* rely on the reasonable (but wrong) advice to excuse failure to present within the time limits: see [9]. More recently, in *Paczkowski* (ibid) Eady J has emphasised that where the adviser reasonably fails to give the correct advice because the employee has unreasonably failed to give them the full information, the 'not reasonably practicable' test will not be satisfied: see [27].

96. More recently, in *B.L.I.S.S. Residential Care Ltd v Fellows* [2023] EAT 8, HHJ Tayler held that a Tribunal had erred in law in finding that it had not been reasonably practicable for a claimant to present their claim in time where the solicitor instructed had, through inexperience, made three errors in submitting the claim form to the Tribunal. HHJ Tayler emphasised that inexperience was no excuse and did not render the *Dedman* principle inapplicable:

> 30. The fundamental errors were in failing to properly calculate the primary time limit in the first place and in not reading and complying with the Presidential direction. There was nothing in the circumstances of this case that meant that the failure to do so was reasonable even in the case of a recently qualified solicitor submitting a claim to the employment tribunal for the first time. All practitioners must submit their first claim form. They can be expected to take especial care in doing so. A client is entitled to expect that of a legal advisor. One necessarily has some sympathy for someone who makes a mistake at the start of their career. However, before accepting instructions to act in an employment tribunal claim, a solicitor should know how to calculate the time limit for the submission of a claim and how it is to be submitted. A new solicitor might not be expected to know the finer points of employment law, but any professional adviser should know those basic points.
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> 31. The fact that this was the first time Miss Rolls had filed a claim in the Employment Tribunal is not a factor that could properly be held to render it reasonable for her to be unaware of the time limit or of how the claim form was to be submitted. The Coronavirus pandemic did not prevent her making herself aware of the time limit or the permitted methods of submission. The information is easily available on the internet.

97. In this case, Mr Hällstrom for the Claimant has also referred me to *Lyons v Fox Williams LLP* [2018] EWCA Civ 2347 by way of reminder that in considering whether advice by a solicitor is reasonable (negligent) or not, the scope of the solicitor's retainer is important. At [31] in that case, the principles

set out by Jackson LJ in the Court of Appeal in *Minkin v Landsberg* [2015] EWCA Civ 1152 are quoted with approval and are as follows:

> (i) A solicitor's contractual duty is to carry out the tasks which the client has instructed and the solicitor has agreed to undertake.
> (ii) It is implicit in the solicitor's retainer that he/she will proffer advice which is reasonably incidental to the work that he/she is carrying out.
> (iii) In determining what advice is reasonably incidental, it is necessary to have regard to all the circumstances of the case, including the character and experience of the client.
> (iv) In relation to (iii), it is not possible to give definitive guidance, but one can give fairly bland illustrations. An experienced businessman will not wish to pay for being told that which he/she already knows. An impoverished client will not wish to pay for advice which he/she cannot afford. An inexperienced client will expect to be warned of risks which are (or should be) apparent to the solicitor but not to the client.
> (v) The solicitor and client may, by agreement, limit the duties which would otherwise form part of the solicitor's retainer. As a matter of good practice the solicitor should confirm such agreement in writing. If the solicitor does not do so, the court may not accept that any such restriction was agreed".

98. There are also a number of authorities considering the extent to which the *Dedman* principle may be applied to advisers who are not solicitors. In *Riley v Tesco Stores Ltd* [1980] ICR 323 the Court of Appeal accepted that an Employment Tribunal had not erred in law in extending the *Dedman* principle to advice given by a Citizens Advice Bureau (CAB), but in *Marks and Spencer v Williams-Ryan* the Court of Appeal held that a Tribunal had not erred in deciding that it had not been reasonably practicable for an employee to bring her claim in time where she had consulted a CAB and advice received from the CAB partly explained why she had not brought the claim in time. The Court of Appeal held at [32]:

> There is no binding authority which extends the principle in *Dedman [1974] ICR 53* to a situation where advice is given by a Citizens Advice Bureau. I would hesitate to say that an employee can never pray in aid the fact that he was misled by advice from someone at a Citizens Advice Bureau. It seems to me that this may well depend on who it was who gave the advice and in what circumstances. Certainly, the mere fact of seeking advice from a Citizens Advice Bureau cannot, as a matter of law, rule out the possibility of demonstrating that it was not reasonably practicable to make a timely application to an employment tribunal.

99. In *Ashcroft v Haberdashers' Aske's Boys' School* [2008] ICR 613, Burton J (as he then was) gave further guidance about the range of cases in which the *Dedman* principle will apply as follows:

> 13. The line of authority is not dependent on the advice being given by a solicitor. It happens that in *Dedman v British Building & Engineering Appliances Ltd* [1974] ICR 53 the advice was by a solicitor, and that Lord Denning MR referred, at p 61 f , to the solicitor in question as a "skilled adviser". But it is quite plain that the principle which lies behind the Dedman line of authorities is not dependent on the adviser in question being a solicitor, indeed it is not even dependent on his being skilled: see *Riley v Tesco Stores Ltd* [1980] ICR 323 , 330, because in the event it is almost always likely to be the case that where an extension of time needs to be sought because of reliance on advice by an adviser, the advice may well turn out to have been wrong advice, and hence very often unskilled. Indeed one of the reasons for the line of authority has been given as being the proposition that the claimant who

> is thereby denied relief can sue the adviser for lack of that very skill. However it is not simply that Lord Denning MR referred to the solicitor as being an adviser, such that it was by reference to the latter capacity in my judgment that he was reaching his decision, not by reference to his status as a solicitor, but this can be illustrated by other cases. In *London International College Ltd v Sen* [1993] IRLR 333 , para 15, there is reference in Sir Thomas Bingham MR's judgment to "a solicitor or a trade union official or similar adviser". There is reference by Lord Denning MR in Dedman's case [1974] ICR 53 to a trade association as skilled advisers; and in two cases, one of them being *Riley v Tesco Stores Ltd* and the other a recent decision of this Employment Appeal Tribunal, per Lady Smith, *Royal Bank of Scotland plc v Theobald* (unreported) 10 January 2007, to advice from a representative of the Citizens Advice Bureau. It is quite plain that the authorities dealing with when it can be said to be not reasonably practicable to bring the claim in time, where a claimant was relying upon advice given by an adviser, are not limited to advice from a solicitor. It has only to be said that nowadays there is a positive plethora of employment consultants who are not solicitors but who plainly are, or at any rate hold themselves out as, skilled advisers in this field. The claimant believed that Mr Cole was a solicitor. He held himself out as a solicitor, he did in fact practise in the employment field, he did in fact give advice in the employment field and in my judgment must be regarded as having been equivalent to an employment law consultant if, as now appears, he was simply an LLB but not a qualified solicitor.

100. There are however a number of cases where the *Dedman* principle has not been applied in cases involving advice from potentially skilled advisers.

101. *DHL Supply Chain Ltd v Fazackerley* (UKEAT/0019/18/JOJ) concerned a case of bad advice by Acas. There, the claimant was dismissed on 15 March 2017 but his appeal was not heard until 22 June. Shortly after being told that his appeal had not been successful, the claimant took advice and brought proceedings on 19 July. The claimant explained that he had contacted Acas some days after his dismissal and was advised that before considering any form of action such as tribunal proceedings he should first exhaust the internal appeal process. He did not seek any further advice and the employment judge found that it was reasonable for him to approach the matter on the basis of Acas' advice. The EAT observed that if the claimant had simply awaited the outcome of an appeal, this would not have been enough. However, the Acas advice, while limited in scope, was relied upon and 'tipped the balance'. The EAT declined to find that the judge's decision had been perverse. In *Fazackerly* HHJ Martyn Barklem said this at paragraph 17:

> I find that there was no error of law in holding as the Employment Judge did that the ACAS advice was something that rendered it not reasonably practicable to bring his claim within the primary time limit. Once the advice had been given, the Claimant simply did not take matters further. It seems to me that a different Judge might have taken a different view but as Mr Justice Underhill said in *Charman*, the Judge's finding is unassailable unless it is perverse. Perversity engages a high hurdle, which has not nearly been reached in this case. Although the facts of this case are at a considerable remove from *Charman*, the principle that having been given certain information a Claimant deferred investigating further is broadly applicable.

102. In *Remploy Ltd v Brain* (UKEAT/0465/10), following her dismissal, the claimant received informal advice from a solicitor whom she met in a café

over a cup of coffee that she should follow the employer's internal appeal procedures before submitting a tribunal claim. After the time limit expired, but before the final stages of the internal procedures were completed, she was told about the limitation period for unfair dismissal claims by a former colleague. The claimant then presented her claim, which was almost two-and-a-half months late. Despite the delay, the employment judge accepted jurisdiction on the basis that, it being 'highly unlikely' that the claimant would have any remedy against the solicitor, it was not unreasonable for her to have acted on the informal advice. Thus, it was not reasonably practicable for her to have presented her claim in time and, once she had been made aware of the time limit for submitting a claim, she had acted promptly. On appeal, the EAT refused to interfere with the decision, regarding it as essentially a matter of fact for the tribunal.

Conclusions

103. In this case, the parties have proceeded on the agreed basis that the primary three-month time limit for the Claimant's claims in respect of the 2022 period (7 May 2022 to 26 August 2022) expired on 25 November 2022. As that was prior to the commencement of ACAS Early Conciliation between 8 and 12 December 2022, there can be no extension for that Early Conciliation period. The claim was received on 13 December 2022. The primary time limit for the claim in respect of the 2021 period (10 January to 31 August 2021) expired on 30 November 2021, but the claim was added by way of amendment following an application made on 21 February 2023 and thus is deemed to have been brought on that date (applying the principles explained in *Galilee v Comr of Police of the Metropolis* [2018] ICR 634 at [109(a)] and *Reuters v Cole* (UKEAT/0258/17/BA) at [31]).

104. I consider first whether it was reasonably practicable for the Claimant to bring her 2022 claim by 25 November 2022 within the primary limitation period, applying the case law I have set out above, and taking into account my findings of fact and observations about the parties' cases already set out above.

105. I am satisfied that the Claimant herself was, given her limited knowledge of English, her background and experience, reasonably ignorant of her employment rights and that she did all that she could reasonably be expected to do to find out about her employment rights by getting herself to Kalayaan on 17 October 2022. That was well within the primary limitation period. From that point on she was, I find, entirely in Kalayaan's hands. On the material I have seen, I am satisfied that the Claimant answered all the questions she was asked by Ms Mohsin reasonably, that she did not withhold any material information for which she was asked, that she attended all appointments she was asked to attend and that the timing and progress of both her NRM application and consideration of her employment matters was dictated by the availability of Ms Mohsin and the services of the Kalayaan interpreter(s).

106. In saying that the Claimant had in my judgment done all she could reasonably be expected to do to find out about her employment rights by going to Kalayaan, I am mindful that she herself was principally concerned with her immigration status, and that Ms Mohsin regarded herself as initially being instructed to deal with the Claimant's immigration issue, and the NRM referral and that this was reflected in the client care letter eventually issued to the Claimant on 9 November 2022 (albeit dated 31 October 2022) which stated that the Claimant had instructed Kalayaan/Ms Mohsin to deal with her immigration/trafficking matter. However, Kalayaan advertises itself as giving basic employment law advice and it is clear that as a matter of fact Ms Mohsin regarded the giving of basic employment law advice as being reasonably incidental to advising and assisting the Claimant with the NRM referral because as soon as the Reasonable Grounds decision had been obtained on 31 October 2022, Ms Mohsin in her telephone conversation with the Claimant on 1 November 2022 told her that in the next meeting with the interpreter she would *"go through next steps and her employment rights"*.

107. That next meeting with the interpreter took place the very next day (2 November 2022). At this meeting, Ms Mohsin asked the Claimant about matters connected with her employment rights, including identifying that she was owed money and wished to take action to obtain it. She also, of course, went on to refer the Claimant on to Ms Hirst, a Kalaayan colleague who, although not a solicitor, was regarded by Ms Mohsin as being more knowledgeable than her about employment issues and who ultimately of course did take responsibility for completing the ET1 form on the Claimant's behalf on 13 December 2022 (after having sought advice from Mr Mills of NKLC).

108. In other words, I find that although Ms Mohsin is not herself experienced in employment law, she did as a matter of fact regard the provision of basic employment law advice to the Claimant as being reasonably incidental to the scope of her instructions – and rightly so, in my judgment, given that that is what Kalayaan advertises itself as providing.

109. Given what happened, there can therefore be no criticism at all of the Claimant for not realising that she could potentially have sought employment advice elsewhere from a more specialist organisation. Given my findings about her limited command of English and impediments to using Google, it is highly unlikely that the Claimant read Kalayaan's website, but she would reasonably have understood from her sessions with Ms Mohsin that Ms Mohsin/Kalaayan were also going to support and advise her in relation to her employment rights. In those circumstances, and particularly given the difficulties that she had experienced finding someone to advise her prior to finding Kalayaan, she acted reasonably in trusting Kalayaan to advise her in relation to her employment rights as well as her immigration issue.

110. As Ms Mohsin was a solicitor who had, as I find, accepted responsibility (on behalf of Kalayaan, an SRA-regulated organisation) for providing the Claimant with basic employment law advice, I do not see how in the light of the authorities I could conclude otherwise than that the *Dedman* principle

applies to her advice and actions. I also have no difficulty in concluding that the *Dedman* principle also applies to the advice and actions of Ms Hirst. She is not a solicitor, but she was identified by Ms Mohsin as the person within Kalayaan to whom to refer the Claimant for advice on employment law issues. And, in any event, Kalayaan does also employ a more experienced employment lawyer to whom the Claimant could in principle have been referred, and it seems to me that in this particular case I should take Kalayaan as a whole organisation in deciding whether the *Dedman* principle applies. It advertises itself as an organisation with a specific mission to provide immigration and basic employment law advice to people in the Claimant's position and it has individuals employed on an ongoing basis to fulfil that mission and who are apparently able to, and do, work 'as a team' where appropriate as Ms Hirst and Ms Mohsin did in this case. In this respect, Kalayaan is not like some other organisations that provide free advice which are essentially an umbrella organisation for the provision of advice by various volunteers whose skills and experience may be highly variable and where it might therefore be more relevant to consider, on an individual basis, whether they were 'skilled advisers' to whom the *Dedman* principle applied.

111. The next question is then whether Kalayaan's failure to advise the Claimant about time limits and assist her in putting her claim in on time was reasonable or not. Ms Mohsin was not aware of Tribunal time limits or how they would apply in the Claimant's case, and nor did she in fact know when the Claimant's employment had ceased. I appreciate that there can be complexities as to the application of time limits in unlawful deduction from wages cases, but they have no material bearing in here. What is in issue is the basic point that Employment Tribunal time limits generally require action within three months of the end of employment (or other allegedly unlawful event). The *B.L.I.S.S.* case makes clear that inexperience is no excuse for a solicitor, but in any event in my judgment an organisation such as Kalayaan that advertises itself as providing basic employment law advice needs to make sure that all advisors working for it are aware that the norm is that (subject to any extension of time for ACAS Early Conciliation) Employment Tribunal time limits are three months (less one day) from the end of employment (or other allegedly unlawful event), so that if a client comes in with an employment law issue, action is taken to ensure that basic employment law advice is given within that three month period, or the client referred to someone who can give advice within that period. Had that basic point been appreciated by Ms Mohsin, no doubt she would have asked the Claimant to be specific about the date that she left her employment in the very first interview. It was in my judgment unreasonable for her not to have asked that simple question and turned her mind to time limits accordingly.

112. In saying that, I do not criticise Ms Mohsin for first concentrating on the NRM referral, as that was undoubtedly the more urgent matter, but it was unreasonable that she did not even turn her mind to Employment Tribunal time limits from the outset so that she could ensure that the Claimant did not lose any rights she had to make a claim as a result of delay by Kalayaan. The failure to advise became even more unreasonable after the NRM referral had been made on 25 October 2022. At that point there was still a month to go

until the expiry of the primary time limit for the 2022 period of the Claimant's claim. That was ample time to advise and assist the Claimant or refer her on for more specialist advice as necessary and appropriate. I appreciate that Ms Mohsin was also concerned about the Claimant's new employers and with finding a safe house for the Claimant, but I find that this was not the reason why she failed to advise the Claimant earlier about her employment claim. It is clear from my findings of fact above that, as soon as Ms Hirst had on 8 December 2022 picked up the email from Mr Mills with the advice about time limits, she was able to contact ACAS that same day and then to submit the ET1 the day after she received the certificate from ACAS. These were not complex or time-consuming steps. Had Ms Mohsin and Ms Hirst not been unreasonably ignorant of the time limit, those steps could obviously have been taken sooner, notwithstanding the other concerns about the Claimant's situation that Kalayaan was addressing.

113. It follows that it would have been reasonably practicable for the Claimant to bring the 2022 claim within the primary time limit and accordingly that claim is out of time.

114. I find that the same goes for the claim in respect of the 2021 period. Although it would not have been reasonably practicable for that claim to have been brought within its primary time limit (because the Claimant was reasonably ignorant at the time not just of her rights but of the facts that gave rise to the claim, i.e. that she was paid less than others), the same principles apply to deciding whether it was brought within a reasonable period thereafter. Given that the Claimant had told Ms Mohsin that she had been employed by the Respondent in the UK previously in her very first interview, it seems to me inevitably to follow that if reasonable advice had been given by Kalayaan the Claimant's claim in respect of the 2021 period could also have been brought within the primary time limit that applied to the 2022 claim. In those circumstances, that claim too is out of time.

Overall conclusion

115. For these reasons, I conclude that the Tribunal does not have jurisdiction to hear the Claimant's claims under the ERA 1996 or the WTR 1998. This decision does not, of course, affect any right she may have to bring any claims that she may have in respect of the sums owed to her by way of breach of contract or otherwise in the civil courts.

Employment Judge Stout

14 July 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

14/07/2023

FOR THE TRIBUNAL OFFICE