EMPLOYMENT TRIBUNALS

Claimant: Mrs S Steinhauser (First Claimant)
Mrs A Dzwigala (Second Claimant)

Respondent: **London Borough of Ealing Council**

Heard at: **London Central** **On:** **29 July 2024**

Before: EJ Joyce

Representation
Claimant: In-Person
Respondent: Mr C Moore (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that the First and Second Claimants' claims are time-barred and are dismissed.

REASONS

Hearing, Procedure and Evidence

1. The public preliminary hearing took place on 29 July 2024. There was a bundle of approximately 450 pages. Both the First Claimant and Second Claimant gave evidence. Mr Nelson gave evidence on behalf of the Respondent. Both parties made oral closing submissions. I informed the parties that I reserved judgment.

2. Both the First and Second Claimants seek to bring claims of unauthorised deduction from wages, unpaid holiday pay discrimination due to pregnancy/maternity. Their claims for unpaid notice pay were dismissed upon withdrawal at the hearing on 22 June 2023.

Issues

3. As helpfully set out in the Case Management Order of 22 June 2024, I had to determine the following issues:

   "(1) whether all or any part of the Claimants' Claims have been brought in time and / or whether the Tribunal should exercise any discretion to extend time (unless the Judge at the preliminary hearing decides that it is in the

interests of justice to leave these points for determination to the final hearing); and / or

(2) whether all, or any part of, the Claimants' Claims should be struck out as having no reasonable prospect of success on the basis of being out of time; and / or

(3) whether all, or any part of, the Claimants' Claims has little reasonable prospect of success on the basis of being out of time, and so should be subject to an Order that a deposit is payable by the Claimants as a condition of continuing the Claims."

4. Counsel for the Respondent clarified at the start of the hearing that R's primary position was that the Tribunal lacked jurisdiction under Rule 53 (1)(b) of the Rules of Procedure and that even if the Tribunal did determine that it should exercise its discretion to extend time, the claims should be struck out as having no reasonable prospect of success on the basis of being out of time, or in the alternative that they ought to be made the subject of a deposit order.

Facts

5. The First Claimant, was employed under a contract of employment with the Respondent at Castlebar Primary School (a community special school for which the Respondent is the local education) from 30 March 2009. This employment was as a permanent Teaching Assistant from 1 September 2011 until her resignation with effect from 13 September 2020. This included periods of maternity leave between 20 April 2015 and 28 March 2016 and between 4 September 2019 and 15 June 2020.

6. The Second Claimant was employed under a contract of employment with the Respondent at Castlebar Primary School from 7 January 2014. This employment was as a permanent Teaching Assistant from 1 September 2014 until her resignation with effect from 31 August 2019. This included periods of maternity leave between 9 November 2015 and September 2016 and between 29 October 2018 and 18 July 2019.

7. Upon return from maternity leave in June 2020, the First Claimant enquired regarding her entitlement to annual leave, accrued during maternity leave, which could be taken at the end of her period of maternity leave. She did so with the assistance of the teachers' union, UNISON.

8. The First Claimant also asked the Second Claimant whether she had been advised of any additional annual leave entitlements while she had been on maternity leave, and this is what alerted the Second Claimant to the possibility that she had not received leave to which she may have been entitled.

9. By the time of the First Claimant's resignation in September 2020, the matter had not been resolved. Her employment terminated on 13 September 2020 and her final salary payment would have been received on 25 September 2020. She accepted in oral evidence that by September 2020, she knew about the time limits for filing a claim.

10. The First Claimant filed an early conciliation notice with ACAS on 8 September 2020 and the certificate was issued by ACAS on 8 October 2020.

11. At no time did the Second Claimant file an early conciliation notice, nor did ACAS issue a certificate in relation to her claim.

12. The First Claimant's evidence was that in November 2020, she approached DM Maxpol Limited which was a company providing legal advice on various legal matters, including employment law, to the Polish speaking community. A service agreement was signed by the First Claimant on or about 11 November 2020 [360]. It was not signed by a representative of DM Maxpol or by the Second Claimant.

13. The First Claimant stated that she split the costs set out in the invoice in the bundle with the Second Claimant [363]. The Second Claimant confirmed that while she had regular meetings with a representative of DM Maxpol, she had not signed the services agreement. At no time did DM Maxpol tell the Second Claimant that her claim might be out of time.

14. An ET1 claim form dated 19 November 2020 was provided by the First Claimant and included in the bundle [2]. The First Claimant stated that it had been sent to her by post by DM Maxpol after they had told her and the Second Claimant that they had filed claims on behalf of both of them. DM Maxpol had also sent a copy of the ET1 to the Second Claimant.

15. The claim form did not have a tribunal office named on it (top right hand corner) nor did it have a claim number on it. As to the issue of whether the claim had ever actually been filed with the Tribunal, both the First Claimant and Second Claimant stated that they honestly believed it had been as this is what DM Maxpol had told them at the time, and in subsequent meetings with DM Maxpol which took place every 6-8 weeks by video or phone call, until DM Maxpol's dissolution in June 2022. I find as a matter of fact, based on the absence of a tribunal office name or claim number that this claim was never in fact filed with the Tribunal.

16. The First Claimant stated that a representative of DM Maxpol told her and the Second Claimant that nothing had been received from the Tribunal following the alleged filing of their claim on 19 November 2020. The First Claimant and a representative from DM Maxpol were meeting online every 6-8 weeks until the dissolution of DM Maxpol in June 2022. The representative told both Claimants to wait to hear from the Tribunal. This was the last information that the representative gave them prior to dissolution of DM Maxpol.

17. The First Claimant decided, (it was unclear from the evidence exactly when), that if she did not hear anything from the Tribunal by the end of 2022, she would take steps to file a claim in January 2023. She then proceeded to file a claim on 16 February 2023 [23].

18. Counsel for the Respondent highlighted that there was no documentary evidence in support of the First Claimant's statement that she had paid DM Maxpol for the legal services outlined in the invoice. However, it was not suggested to either Claimant that they were being untruthful. Similarly, the First Claimant said that due to an oversight she had not included a covering email from DM Maxpol with their invoice of 11 November 2020 in the bundle.

While Counsel for the respondent noted the absence of that email, it was again (quite rightly) not suggested that the First Claimant was being untruthful.

19. In terms of credibility, I found both the First and Second Claimants to be credible in their accounts. They were clear and consistent as to what they recalled and also accepted the limitations on what they could remember. Neither could say that DM Maxpol had in fact filed the claim in November 2020, but they believed that this was what had happened because this is what DM Maxpol told them.

20. On 20 January 2023, the First Claimant commenced ACAS early conciliation in respect of the same unauthorised deduction from wages claim referenced above. ACAS issued the early conciliation certificate on 23 January 2023.

21. The First Claimant submitted an ET1 claim on 16 February 2023. The ET1 was submitted with a completed Multiple Claim Form so as to also begin proceedings on behalf of the Second Claimant. The Second Claimant also seeks to rely on the same ACAS certificate as issued in respect of the First Claimant.

Law

Employment Rights Act Claim

22. Section 111 (2) of the Employment Rights Act 1996 ("ERA") provides:

> **Subject to the following provisions of this section, an [F1employment tribunal] shall not consider a complaint under this section unless it is presented to the tribunal—**
>
> **(a)before the end of the period of three months beginning with the effective date of termination, or**
>
> **(b)within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.**

23. From **Porter v Bandridge Ltd[1978] ICR 943, CA, paragraph 948D** I derive the principle that the onus of proving that presentation in time was not reasonably practicable rests on the claimant.

24. In **Palmer and Sanders v Southend on Sea [1984] IRLR 119** (*Sanders*) provides further instruction on how to construe the "reasonably practicable" test:

> **To this end the Tribunal should consider: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.**

25. As to the receipt of erroneous legal advice as a basis for claiming that it was not reasonably practicable to file a claim in time, the general rule is set out in **Dedman v British Building and Engineering Appliances Ltd [1974]**

ICR 53, CA ("*Dedman*") which provides that If a solicitor mistakes the time limit then the claimant's action is against them for professional negligence, but it will not mean that it was not reasonably practicable to file the claim in time.

26. From the authority of **Wall's Meat v Khan [1978] IRLR 499**, I recall the following:

44. The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike The impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him."

27. Lord Phillips MR in **Marks & Spencer Plc v Williams-Ryan [2005] ICR 1293** at paragraph 24 of that Judgment affirmed the principle from *Dedman* was a binding proposition of law, namely that:

if an employee takes advice about his or her rights and is given incorrect or inadequate advice, the employee cannot rely upon that fact to excuse a failure to make a complaint to the Employment Tribunal in due time. The fault on the part of the adviser is attributed to the employee.

28. In **Northamptonshire County Council v Entwhistle [2010] IRLR 740**, ("*Entwhistle*") the relevant facts were that the employer wrote to the claimant confirming his dismissal and, wrongly, informed him he had 3 months from date of the receipt of the outcome of his appeal against dismissal to file a claim with the Employment Tribunal. The claimant's solicitor did not check. The EAT (overturning the ET's decision) held that it was reasonably practicable to file the claim in time as the solicitor should not have relied on the employer's calculation of the time limit.

29. In arriving at its conclusions, the EAT again confirmed the *Dedman* principle but stated it might theoretically be possible for a claimant to successfully argue that it was not reasonably practicable to file a claim in time despite the involvement of a solicitor - for example where the claimant and/or the solicitor had been misled by the employer on a factual matter such as the date of dismissal.

Equality Act Claim

30. S.123 of the Equality Act 2010 provides:

(1) proceedings on a complaint within section 120 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.

31. The claimant bears the burden of persuading the Tribunal that it is just and equitable in all of the circumstances to extend time. The Tribunal's discretion is broad. (**Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA; Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 ICR D5, CA**).

32. From **British Coal Corporation v Keeble [1997] IRLR 336**, (Keeble) I note that the EAT stated that a tribunal may consider numerous factors in applying the just and equitable test including prejudice to the parties, the length of the delay and the excuse put forward for that delay.

33. **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434 CA**, provides that when employment tribunals consider exercising the discretion under what is now S.123(1)(b) EA: "there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule". However, I note that the Court of Appeal cast doubt on the "exceptional" use of the discretion in **Chief Constable of Lincolnshire v Caston [2010] IRLR 327** where Sedley LJ stated that there is no principle of law which provides for how generously, or sparingly, the power to extend time is to be exercised.

34. While **Chohan v Derby Law Centre [2004] IRLR 685** provides, *inter alia*, that there is no requirement to go through the check list provided under the Limitation Act 1980, failure to consider a significant factor will be an error of law. In this regard the tribunal shall consider the prejudice which each party would suffer as the result of the decision to be made and in addition have regard to all the circumstance of the case, including:

    (i) The length of and reasons for the delay;
    (ii) The extent to which the cogency of the evidence is likely to be affected by the delay;
    (iii) The extent to which the party being claimed against had cooperated with any requests for information;
    (iv) The promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and
    (v) The steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

35. However, in **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] ICR D5**, the Court of Appeal stated that while the above factors (Keeble factors) were useful they should not be applied as a rigid checklist which would defeat the purpose of having what was a broad discretion: "*the best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) was to assess all the factors in the particular case which it considered relevant to whether it was just and equitable to extend time, including in particular the length of and the reasons*

for the delay. If it checked those factors against the list in Keeble, well and good; but his Lordship would not recommend taking it as the framework for its thinking".

36. In **Virdi v Commissioner of Police of the Metropolis [2007] IRLR 24** the EAT held that the fault of a solicitor is a "highly material" factor in concluding whether to extend time limits or not on a just and equitable basis in cases of discrimination.

37. The authority of **E v X UKEAT/0079/20/RN** provides that it is appropriate to determine time limits in a claim for discrimination as a preliminary issue under Rule 53 (1)(b) where the issue is whether to grant a just and equitable extension under s.123 of the Equality Act 2010.

Conclusions

First Claimant

Unauthorised Deduction of wages/holiday pay claims

38. The First Claimant had until 24 December 2020 (that is 3 months from the date of her final salary payment of 25 September 2020) to bring a claim to the Tribunal. Having requested early conciliation on 8 September 2020 and the early conciliation certificate having been issued on 8 October 2020, this period was extended until 23 January 2021.

39. As held above in the Facts section of this judgment, the claim purported to have been filed with the Tribunal by the First Claimant's solicitors on 19 November 2020, was not in fact filed. Had it been filed, it would have been within time.

40. I accept that the First Claimant believed that her solicitors had filed her claim in November 2020. However, applying the *Dedman* principle, I conclude that any negligence or otherwise on the part of her solicitors does not mean that it was not reasonably practicable for the First Claimant to file her claim. I also note, applying *Entwhistle*, that this is not a case in which it is alleged that there was any factual error on the part of the Respondent such that the First Claimant did not file her claim in time. In these circumstances, while I appreciate that the First Claimant will consider this to be a rather harsh outcome, any action that she has lies against her solicitors in negligence.

41. Additionally, I have taken account of the fact that even when she had not heard any information from the Tribunal, and her solicitors' firm had dissolved in June 2022, she waited until the end of 2022 to take any further action. This resulted in her filing a claim on 16 February 2023, after a second ACAS certificate had been issued on 23 January 2023.

42. This represents a delay of over 6 months before the Claimant took any action on pursuing her claim, and a further approximately 24 days for her to file her claim after the ACAS certificated had been issued. No reason was advanced for these delays. As such, even if I had concluded that it was not reasonably practicable for her to file her claim in time, I would have found

that it was not filed "within such further period as the tribunal considers reasonable".

Pregnancy/Maternity Discrimination Claim

43. As to her discrimination on grounds of maternity claim, I considered the *Keeble* factors as follows. As to the length of and reasons for the delay, as noted above the delay between the time limit expiring, on 23 January 2021 and June 2022 (when DM Maxpol stopped representing her and she could have been expected to follow up with the Tribunal) was attributable to the apparently negligent action/inaction of her solicitors in not filing her claim either on time, or at all.

44. I have had regard to the principle in *Virdi*, which provides that in considering whether to grant a Just and Equitable extension, the failure/negligence of a solicitor is a "highly material" factor.

45. However, the difficulty for the First Claimant is that even after her solicitors ceased acting for her in June 2022 (when they went into dissolution) she decided to wait until the end of 2022 to take any action. It was only on 20 January 2023, some 6 months later, that she filed an ACAS early conciliation notice and then, after receiving the ACAS certificate on 23 January 2023, waited a further 24 days before filing her ET1 on 16 February 2023.

46. The First Claimant did not provide any adequate reasons for the delay from June 2022 to January 2023 in pursuing her claim. Having known that her solicitors had gone into liquidation in June 2022, she could have reasonably been expected to contact the Tribunal to enquire as to her claim and inform the Tribunal that she was no longer being represented by her solicitors. She did not do so.

47. The extent to which the cogency of the evidence is likely to be affected by the delay: This is a factor which weighs against granting the request for an extension of time on a just and equitable basis. Per the evidence of Mr Nelson, as of 31 August 2023, the School Business Manager at the time of the relevant events is no longer employed by the Respondent.

48. These events regarding the First Claimant date back, at the latest, to June 2020. That is almost 3 years before the First Claimant filed her ET1 in February 2023, and is now almost 4 years since then. The likelihood of memories having faded is significant.

49. The extent to which the party being claimed against had cooperated with any requests for information. While the First Claimant suggests that the Respondent did not provide her with relevant emails prior to Tribunal proceedings [witness statement p. 3], in my view she had sufficient information with which to seek to file a claim. This is evidenced by the fact that she sought early conciliation in September 2020 and then sought to file a claim with the Tribunal in November 2020.

50. The promptness with which the claimant acted once he or she knew of the

facts giving rise to the cause of action. I conclude that the First Claimant did act promptly in pursuing her claim initially. The difficulty is that she did not, in my view, make any reasonable enquiries after her solicitors ceased acting for her in June 2022. Had she done so, she would have been alerted to the fact that the claim from November 2020 had not been filed. As stated above, she waited until 20 January 2023 to request early conciliation from ACAS. Even upon receiving the ACAS certificate on 23 January 2023, she waited over 3 weeks before filing the ET1 on 16 February 2023.

51. The steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action: This is not in issue. The First Claimant did seek professional legal advice. The quality of the representation that she received subsequently does not negate that fact.

52. Having considered the above, I remind myself of the need to not slavishly follow the *Keeble* factors as a checklist. I take account of the relevant matters in the First Claimant's favour as set out above.

53. However, I conclude that the length of the delay was significant. I consider that the reasons for that delay were, up until June 2022, due solely to the apparent negligent actions of the First Claimant's representatives. However, from June 2022 onwards, I take the view that the First Claimant did not provide any adequate reason as to why she did not take a more proactive approach. Her evidence was that she simply decided to wait until the end of 2022. I also consider the cogency of the evidence is affected by the departure of the School Business Manager and would likely be affected by memories having faded given the length of the delay. In all the circumstances, I do not consider that it is just and equitable to extend time.

Second Claimant

Unauthorised Deduction of wages/holiday pay claims

54. As noted in the facts, the Second Claimant's employment terminated on 31 August 2019.

55. She had until 30 November 2019 to file any claim. The Second Claimant accepted that she did not file an ACAS early conciliation notice. The ET1 claim of 19 November 2020 (over a year later, and unfiled) included the Second Claimant on an attached multiple form.

56. The Second Claimant's explanation for her not having sought to file a claim sooner is that she did not become aware of her rights until June 2020 when she spoke with the First Claimant. It is apparent from the Second Claimant's own evidence that she relied heavily on the First Claimant in bringing her claim, and that she

57. The difficulty is that the Second Claimant does not appear to have made any reasonable enquiries prior to June 2020 as to her rights. She did not, for example, seek to obtain any advice from her union or from a legal representative as to her rights. Even when the First Claimant told her about her potential rights in June 2020, she did not issue early conciliation proceedings (early conciliation was commenced solely by the First Claimant

in September 2020). On this basis, I do not consider that it was not reasonably practicable for the Second Claimant to file her claim within time.

58. As to the claim filed on 16 February 2023, the position is the same. While the Second Claimant also seeks to rely on the apparent negligence of DM Maxpol, by the time DM Maxpol was engaged, her claim (as above) was already significantly out of time. As such, I do not consider that any negligence by DM Maxpol makes it so that it was not reasonably practicable for her to file her claim in time. In any event, due to the *Dedman* principle, if she did have any cause of action it would be against those representing her.

Pregnancy/Maternity Discrimination Claim

59. I again considered the *Keeble* factors. The length of the delay here is from November 2019 to 16 February 2023, a period of 3.5 years.

60. In terms of the reasons for the delay, I have taken account of the fact that from November 2020 onwards, the Second Claimant believed that DM Maxpol had filed a claim on her behalf along with the First Claimant. However, I do not consider that she undertook any reasonable enquiries between her date of termination on 31 August 2019 and November 2020, (when she believed that DM Maxpol had filed her claim). As noted above, she only became aware of a potential claim because the First Claimant told her of her potential rights in June 2020. Yet, she did not issue an early conciliation request.

61. Even leaving this substantial period of time aside, she also took no action from June 2022 upon the dissolution of her solicitors to enquire as to the status of her purported claim with the Tribunal. It would have been reasonably expected for her to make such enquiries.

62. The extent to which the cogency of the evidence is likely to be affected by the delay. This is a factor which weighs against granting the request for an extension of time on a just and equitable basis. Per the evidence of Mr Nelson, as of 31 August 2023, the School Business Manager at the time of the relevant events is no longer employed by the Respondent. Moreover, the facts relating to the Second Claimant's claim date back at the latest to July 2019, now over 5 years ago. Again, the likelihood of memories having faded is significant.

63. As to the extent to which the party being claimed against had cooperated with any requests for information, while it is suggested that the Respondent did not provide relevant emails prior to Tribunal proceedings [witness statement p. 3], in my view this did not have any impact upon the ability of the Second Claimant to file a claim in a timely manner. As noted above, the Second Claimant did not make reasonable enquiries as to her rights, of which she only became aware upon the First Claimant informing her in June 2020.

64. The promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action. I conclude that the Second Claimant did not act promptly in that, rather than seek to file a claim as soon after

June 2020 (when the First Claimant spoke with her as to her rights) she waited for the First Claimant to pursue a claim, first through ACAS proceedings (solely issued by the First Claimant) in September 2020 and then the unfiled claim in November 2020. Furthermore, she did not take any steps, even taking account of her solicitors' failure to file the claim in November 2020, to enquire as to the matter with the Tribunal from June 2022 onwards when her solicitors' firm dissolved.

65. The steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action. As above, the taking of legal advice was a matter led by the First Claimant in November 2020, some 4 months after the Second Claimant became aware of the possibility of taking legal action in June 2020.

66. Again, considering all of the above, I remind myself that the test is one of 'just and equitable'. In particular, the reasons provided above as to the length of and reasons for the delay in addition to the cogency of the evidence lead me to conclude that it would not be just or equitable in these circumstances to grant an extension of time.

67. In light of the above, I find that both the First and Second Claimants' claims are time barred. Having made this finding I do not find it necessary to consider the issue of strike out or deposit order.

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Employment Judge **M Joyce**

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Date: 23 December 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

3 January 2025

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FOR THE TRIBUNAL OFFICE