Case No: 2214571.23

EMPLOYMENT TRIBUNALS

Claimant: Mr Derek Scott

Respondent: Moorfields Eye Hospital NHS Foundation Trust

Heard at: **London Central** **On:** **20 June 2024**

Before: EJ Joyce

Representation
Claimant: In-Person
Respondent: Miss S Bowen (Counsel)

RESERVED JUDGMENT

The Judgment of the Tribunal is that the claimant's claims are time-barred and are dismissed.

REASONS

Hearing, Procedure and Evidence

1. The public preliminary hearing took place on 15 April 2024 and went part-heard. The hearing resumed, and was completed, on 20 June 2024. There was a bundle of approximately 418 pages, a second bundle numbered from 419 to 586 pages and an additional smaller bundle of 20 pages. The respondent submitted a skeleton argument and some authorities. The claimant, Ms Wyse and Ms Trodd gave evidence. References to bundle page numbers are included below in square brackets.

Issues

2. The claimant issued the following claims: PIDS (including three protected disclosures and 3 discreet allegations of detriment), direct race discrimination (including six discreet allegations) and harassment on grounds of race (one allegation). The issue before me was one of time limits.

3. The issue [412] in relation to the complaint of PIDS was whether or not under s.111 Employment Rights Act 1996 (ERA) it was not reasonably

practicable for the claimant to file his claim within time. In the alternative, the respondent contended that the claim ought to be struck out on the basis that it had no reasonable prospect of success.

4. As to the claims of race discrimination and harassment related to race under the Equality Act 2010 (EQA) the issue was whether or not it was just and equitable per section 123 EQA to extend the time limits in relation to both claims. In the alternative, the respondent contended that the claims should be struck out on the basis that they did not have any reasonable prospects of success.

5. Per the Case Management Order (CMO) of Judge Lewis, it was agreed that the following matters were background evidence and were not elements of any of the claimant's claims upon which the Tribunal had to reach a decision: (i) the alleged subsequent failure to rectify the position regarding the claimant not having a valid job description CMO para. 38 (b) [416]; (ii) items 1-5, 8-10, 17-18 within the chronology CMO para. 39 [417]; (iii) items 19-21 in the chronology, which were allegations of bullying but were not related to whistleblowing or race discrimination CMO para. 40 [417]; (iv) Items 22-26 in the chronology which related to the grievance and grievance appeal, which the claimant did not allege were due to whistleblowing or race discrimination; (v) item 14 in the chronology, which was an alleged breach of GDPR and thus not within the jurisdiction of the Tribunal; and (vi) section 8.1 of the claim form is a reference to loss of earnings, it is not a separate head of claim. Rather, it would amount to compensation if the demotion was found to be race discrimination CMO para. 43 [417].

Facts

6. The claimant began working for the respondent in 1996. In 2001 following a successful application for a Band 6 position (Health Records and Overseas Patients Managers Role), he tried without success to obtain a position at the Band 7 level.

7. Following a restructuring exercise in 2014, within the outpatients and health records departments, the claimant's team increased from 11 staff to 52 staff. His position remained at the Band 6 level.

8. In July 2016, allegations of threatening behaviour were made by members of the claimant's team against another colleague, Mr Satir. Mr Satir made counter-allegations of bullying and harassment against the claimant. The claimant requested updates from Mr Jarrold (Deputy Director of HR) on the investigative process between October 2016 and February 2017, but did not receive any information. The alleged delay in the investigation into Mr Satir is the subject of the first protected disclosure.

9. Over the course of 2016 and 2017, the claimant exchanged various emails with Mr Willis, HR Manager, in which he raised a variety of matters that were of concern to him, including allocation of overtime and work duties.

10. In August 2016, the claimant attended a meeting with his managers, Ms Middleton and Mr Jarrold.

11. In October 2016, a female colleague of the claimant, Ms Dominique, approached him complaining that she was being bullied by a band 5 level employee, Ms Sisupala. The claimant's position was that he had been prevented from intervening to resolve the bullying allegations. This is the subject of protected disclosure 2**.** In around February 2017, Ms Dominique took a week of sick leave and, regrettably, she died. The alleged endangerment of Ms Dominique's health and safety is the subject of protected disclosure 3.

12. I did not find it necessary for the limited purposes of this preliminary hearing to resolve these issues factually.

13. Subsequent to Ms Dominique's death, the Chief Executive Officer, Mr Probert and the claimant had a meeting on 1 March 2017. The claimant was not altogether satisfied with Mr Probert's actions after the meeting but accepted that some of the points he had raised had been addressed. At about this time, the investigation report into the allegations against Mr Satir from July 2016 (Report) was made available to the claimant.

14. The Report contained comments which were critical of the claimant. The author of the Report was Ms F Miah. The claimant doubted this was the case, instead claiming that Ms P Murphy, General Manager, had authored the report in bad faith. I did not find it necessary to make a finding on this factual dispute for the purposes of this hearing. The claimant maintains that the negative comments about him amount to alleged detriment number 1 in relation to his PIDS claim.

15. On 28 April 2017, the respondent notified the claimant that he was to be the subject of an investigation concerning allegations made by a Mr S Miah which centred on allegations of abusive and discriminatory behaviour [153]. On a date unknown, the allegations were dismissed.

16. In July 2017, Ms P Murphy was leaving the respondent and provided a handover to Mr S Briggs the Deputy Chief Operating Officer [171]. The claimant maintains that it was an unfair handover as it was highly critical of him. The claimant relies on this handover as alleged detriment number 2 regarding his PIDS claim. Ms Murphy remains employed at the NHS in Barking, Havering and Redbridge University Hospital Trust.

17. On 7 September 2017, Mr Satir ceased working for the respondent.

18. According to the claimant, in October 2017 he was spoken to in an abusive manner by a Mr P Santos and as a result he filed a complaint against Mr Santos. No action was taken against Mr Santos. In a subsequent grievance filed by the claimant in 2022, he queried how his complaint against Mr Santos had been managed when compared with the manner in which Mr Miah's complaint against him had been addressed. He was informed that no documents relating to the allegations by Mr Miah could be located and as such that a comparison between the two complaints could not be made. The claimant relies on this incident as alleged detriment number 3 regarding his PIDS claim. Mr Santos remained employed by the respondent.

19. In approximately 2018, the claimant joined an organisation called 'Bemore' which was for BAME members of staff. 'Bemore' was comprised of a group of staff members the purpose of which was to discuss matters of equality and diversity. It was not connected to the HR department.

20. In May 2018, Mr J Quinn, Chief Operating Officer, verbally reprimanded the claimant for not taking work trolleys to another building. I found, on the evidence before me that this did not have any material impact upon the claimant's decision to bring a claim to the Tribunal.

21. In 2018, (the exact date is unknown) the respondent announced that there would be a further restructuring of the health records department. At around this time Ms Moore began working on the restructuring as project manager. While the claimant and her worked well together initially, the claimant maintains that after pointing out flaws with the proposed restructuring he received treatment which he describes as discriminatory on grounds of his race, victimising and defamatory of his character.

22. In August 2018, Mr Jarrold left the employment of the respondent.

23. Around this time, the claimant raised concerns about the restructuring with members of management. He was of the view that management's plan would not be successful.

24. In November 2018, Mr Briggs left the employment of the respondent.

25. In April 2019, the respondent advertised the new role of Band 7 Health Records and Outpatients Service Manager. The claimant's contention is that this role was similar to the role he occupied at that time. He further contends that he was not informed about the new role, and that this was deliberate as a pre-cursor to side-lining him within the department. He relies on the advertisement of the above new role as an incident of alleged less favourable treatment on grounds of race.

26. The claimant was not selected for the role and was retained at the Band 6 Level. He states that he did not receive a revised job description and alleges that this was less favourable treatment on grounds of race.

27. In April 2019, during a face-to-face meeting, Ms Moore informed the claimant that she had told the Deputy Chief Operating Officer, Ms J McCole, that the claimant was aggressive and that she did not want to be left alone with him. The claimant relies on this as an example of alleged less favourable treatment on grounds of race. He also, in the alternative, relies on this incident in support of his claim of harassment. This is the last alleged incident of less favourable treatment on grounds of race.

28. The claimant made a complaint to HR about Ms Moore, as he considered her above claim that he had been aggressive towards her to be a racist one. HR offered mediation to which the claimant agreed. Ms Moore then left the department in July 2020 and the claimant considered the mediation was no longer feasible and so it did not proceed.

29. From this point onwards, the claimant alleges that he was isolated from the rest of his colleagues within his team. He suggests that he was blocked from being paid overtime, which was in contrast to how his colleagues at both Band 5 and Band 7 levels were treated.

30. At some point over the summer of 2019, Mr Miah ceased working for the respondent.

31. On 2 August 2020, Mr Willis left the respondent's employment.

32. On or about the beginning of July 2021, a booking centre role, at the band 7 level, was advertised and the claimant applied. He did not receive a response. In January 2022, the claimant learned that the booking centre role was still unfilled. He submitted his application a second time, by forwarding his first application by email, but did not receive a reply. The role was advertised again in September 2022 with the comment "previous applicants need not apply".

33. Mr Probert left the employment of the respondent in August 2021 following which the atmosphere had, by the claimant's own admission in evidence, improved in the workplace. About this time, the claimant was speaking with senior management but, per his evidence to the Tribunal, he decided that he did not wish to bring a claim to the Tribunal at that point.

34. The claimant first spoke to ACAS in March 2022. ACAS advised the claimant to first bring a grievance and that he may still be able to bring a claim following the grievance. Per the claimant's oral evidence, he was told that he "might" still be "in time" to bring a claim because he still did not have a job description for his role. As such, I found that by March 2022, the claimant was on notice as to the time limits for bringing a claim to the Tribunal.

35. Throughout this time, the claimant was in receipt of trade union support. He had a brief discussion with his trade union representative about bringing a claim of some kind against the respondent, but it was not a discussion about bringing a claim to the Tribunal.

36. The claimant alleges that during 2022 (exact date unknown), Mr J Quinn, had threatened staff members with disciplinary action for 'speaking up' about work related concerns. In evidence, the claimant accepted that Mr Quinn had not make any direct specific threat to him. Rather, the claimant had been told by other staff members (unknown) on two separate occasions that Mr Quinn discouraged speaking up about work related concerns.

37. The claimant filed a grievance in July 2022. In the grievance, he raised the issue of his application to the booking centre role. At some point in 2022, attempts were made by the grievance investigating officer Mr Percival to contact Ms Moore. He was unable to make contact with her.

38. On 19 December 2022, the respondent verbally provided the claimant with the outcome of his grievance.

39. The claimant appealed the outcome of the grievance he had filed in July 2022. The appeal was heard on 23 July 2023. On 4 August 2023, the respondent sent an appeal outcome to the claimant. The appeal outcome underlined that there was poor managerial decision making which had affected the claimant, as well as others in his department.

40. A further investigation into the reasons why the claimant had not been shortlisted for the booking centre role was carried out and it concluded in August 2023. The claimant was informed that the reasons for his application

not being shortlisted were that the hiring manager had not realised it was the claimant applying and that on the second occasion, the hiring manager did not see his email.

41. On 15 September 2023, the claimant filed his claims before this Tribunal.

42. The claimant provided the following reasons for not having brought his claim earlier:

    A: He did not believe he could safely raise concerns with the following persons/entities:

    (i) Human Resources (HR): the claimant alleges that he was the subject of negative treatment and "retribution" from HR after raising concerns with Mr Probert, Mr Willis and Mr Jarrold with help from Ms Murphy. He therefore did not feel safe in raising concerns with the HR department;
    (ii) Freedom to Speak Up Service (FTSU): He did not feel safe raising concerns with the FTSU due to the negative comments about him in the Report;
    (iii) Senior Management: the claimant was of the view that Ms Murphy had written the Report which contained negative comments about him. The claimant noted that she had provided a handover to Mr Briggs which was negative about him. He referred to the above mentioned alleged threats by Mr Quinn;

    B: He was not advised of the applicable time limits: he had a union representative when he filed his grievance claim but he was not advised of tribunal time limits. He only became aware of the time limits when he spoke with ACAS. He considered that he was still being subject to negative treatment and so his claim would still be in time.

43. As to the balance of hardship, the claimant submitted that the respondent "has been dealing with [his] concerns for the last 7/8 years and [is] fully aware and familiar with [his] concerns and treatment". He contends that he has provided the respondent with copies of all of the evidence that he relies on and as such the respondent is in a position to defend the claim.

44. The list of individuals referenced in the claimant's particulars of claim who had left the respondent in recent years is contained at page 418 of the Bundle. Ms Trodd explained in her witness statement, that the usual way of checking an individual's leaving date is through the Electronic Staff Record ("ESR"), but this has only been in operation since November 2018.

45. The ESR does not include staff members 'engaged on bank'. These are staff who are engaged on an ad hoc basis through an entity called Bank Partners and they are not paid or engaged directly by the respondent.

Law

46. 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.

47. S. 123 of the Equality Act provides:

(1)Subject to section 140B 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.

(2)Proceedings may not be brought in reliance on section 121(1) after the end of—
(a)the period of 6 months starting with the date of the act to which the proceedings relate, or
(b)such other period as the employment tribunal thinks just and equitable.

(3)For the purposes of this section—
(a)conduct extending over a period is to be treated as done at the end of the period;
(b)failure to do something is to be treated as occurring when the person in question decided on it.

(4)In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a)when P does an act inconsistent with doing it, or
(b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Just and Equitable

48. The EAT reviewed the principal authorities relating to continuing acts in **Moore Stephens LLP and others v Parr UKEAT/0238/20/OO** (paras 26-38). It held that the Employment Tribunal should not take too literal an approach to the question of what amounts to a continuing act by focusing on whether the concepts of "policy, rule, scheme, regime or practice" arise on the facts of the particular case, those are merely examples of when an act extends over a period per Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA (para 47-52).

49. 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**).

50. 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.

51. The respondent referred me to **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434 CA**, which 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.

52. 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.

53. 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".*

54. 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.

Reasonable Practicability

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

56. 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 including 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; (3) whether the employer had misrepresented any relevant matter to the employee; and (4) 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.

57. 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.

58. Further from *Dedman*, I noted the following passage by Lord Denning:

If in the circumstances the man knew or was put on enquiry as to his rights and as to the time limit then it was practicable for him to have presented his complaint within the [time limit] and he ought to have done so But if he did not know and there was nothing to put him on inquiry then it was not practicable and he should be excused.

59. From the authority of **Wall's Meat v Khan [1978] IRLR 499**, I derive 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."

60. 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.

61. 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.

62. 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.

Strike out

63. As to the application for strike out on grounds of no reasonable prospects of success, the Rules of Procedure provide:

> **Striking out**
>
> **37.**— (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
>
> (a) that it is scandalous or vexatious or has no reasonable prospect of success;

64. In *Eszias v North Glamorgan NHS Trust [2007] ICR 1126 [25-26]* ("Eszias") the Court of Appeal held that a claim ought not be struck out where the central facts are in dispute unless exceptional circumstances exist such as where contemporaneous documentation is inconsistent with facts asserted by one of the parties.

65. From *QDOS Consulting Ltd & Others v Swanson UKEAT/0495/11, ("Swanson")* I derive the principle that strike out should only occur in obvious and plain cases. Further, cases which include allegations of discrimination must be approached with particular caution.

Conclusions

The EQA and the "just and equitable" test

66. I found that the claim for race discrimination, and also harassment, should have been filed within 3 months less one day of the final alleged incident of such discrimination which the claimant states took place on 4 April 2019. As such the claim should have been presented by 3 July 2019.

67. The claimant did not dispute that his claims were significantly out of time but relied on the above explanations (see paragraphs 42-43) in support of his application for the time limits to be extended.

68. In determining whether to grant an extension of time, I took account of the circumstances of the matter as a whole. I considered that the delay was considerable. As to the race discrimination and harassment claims, this was approximately 4 years and 2 months late (the difference between 3 July 2019 and 15 September 2023)

69. As to the reasons for the delay, I did not accept that the claimant feeling "unsafe" in raising concerns or claims was a reason for him not bringing his claim earlier. In arriving at this conclusion, I took account of the fact that from 2016 onwards the claimant did not appear to feel unsafe in raising concerns with HR, and other members of management. This included putting his concerns on numerous issues and to a number of parties. For example, he wrote to Mr Willis as to the treatment of Ms Dominique on several occasions in 2016 and 2017. He also raised the issue of what he perceived to be as unfair distribution of overtime with Mr Willis. When he considered that Ms Moore had made a discriminatory comment to him in April 2019, he raised the matter with HR**.**

70. As to alleged threats by Mr Quinn, I considered (based on the claimant's own evidence) that any alleged threat had not been made directly to the claimant but that he had been told by a colleague about Mr Quinn's views. Moreover, even after these alleged threats had been communicated to him the claimant still raised concerns, such as, for example, filing his grievance in July 2022.

71. As to the advice he was receiving at about this time in 2017, the claimant acknowledged that he was being supported by his trade union. He maintains that he discussed his options with the trade union representative but that they did not discuss bringing a claim to the tribunal. I find this inherently unlikely. It seems to me that on balance, there would have been some discussion as to the merits of bringing a claim to this tribunal.

72. In any event, by the time the claimant spoke with ACAS in March 2022, he had in mind the possibility of bringing a claim to the tribunal. Furthermore, he was clearly on notice as to the issue of time limits. I rely on his admission that he was told by ACAS that he "might" still be able to bring a claim after filing his grievance (which he filed in July 2022) as alerting him to the very real possibility that should he wait until after the resolution of his grievance he may not be in a position to file a claim due to the expiry of time limits.

73. In light of the above, I also consider the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action. The facts giving rise to the claim for discrimination on grounds of race, and harassment, were known to him by April 2019.

74. Even if one considers that he was not aware of his right to bring a claim in in 2019, he was certainly aware of that right by the time he contacted ACAS in March 2022. Despite ACAS alerting him to the very real possibility of time limits expiring, he waited approximately a further almost 18 months (from March 2022 until he filed his claim in September 2023) before bringing his claim.

75. As to the cogency of the evidence, I consider it is likely to be affected in a material way by the delay. As detailed above in the Facts section of this Judgment, numerous potential witnesses have left the employment of the respondent.

76. In relation to both claims, Ms Moore, Mr Probert (as the CEO) and Mr Jarrold (as deputy director of HR), Mr Willis and Ms Murphy would have had relevant evidence to provide. The claimant does not dispute that their evidence is/would be of relevance. Indeed, the absence of witnesses was a difficulty encountered when investigating the claimant's grievance. Under a number of sections entitled "facts that could not be established", it was noted that the following witnesses could not be contacted: Ms Moore [500], Ms McCole [506], Mr Jarrold and Mr Willis [509], Ms Murphy and Mr Hardy [513-514].

77. Furthermore, I note that the grievance investigating officer referred to a lack of documentation in conducting an investigation into the claimant's grievance. This is referenced both in the statement of Ms Wyse and the grievance investigation report. In the latter, reference is made to the unavailability of documents regarding the complaint by Mr Miah against the claimant and, also, the claimant's complaint against Mr Santos.

78. As noted in the Facts section of this Judgment, all witnesses left the employment of the respondent some years ago. Mr Probert was the most recent departure and that was in August 2021. While in and of itself, this is not a bar to them appearing as witnesses it is a relevant factor because it goes to the prejudice occasioned on the respondent in attempting to call them as witnesses.

79. Moreover, the events referenced all occurred many years ago. In the event that the above witnesses could be contacted, they would now be asked to provide witness statements as to events that occurred as far back as 2019 (some 5 years ago). In my view the likelihood of memories of these witnesses having faded is considerable.

80. As to the extent to which the party being claimed against had cooperated with any requests for information, there is no suggestion that the respondent has been uncooperative. There was some discussion during the hearing about the respondent's retention policy and to what extent they complied with that policy, but there was no suggestion that the respondent had not complied with a request for documents, or that any alleged failure to provide documents contributed to delay in filing the claim.

81. As to the steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking action, he did not take any such steps. As noted above, he had advice from a trade union representative. He obtained some guidance from ACAS. However, he did not seek professional advice, even when he was clearly considering a claim in March 2022 (when he approached ACAS). As such, I do not consider that this is a case to which wrong advice by a legal professional is applicable. The failure to seek professional legal advice is a further factor which speaks against exercising my discretion in favour of the claimant.

82. I have considered all of the circumstances of the claim. This is a matter with a lengthy history dating back to 2016. The claimant raised numerous concerns with his managers and members of HR from 2016 onwards. He was, through the advice of a trade union representative, in a position to inform himself as to the applicable time limits for filing a claim to the tribunal.

He did not do so.

83. Even when he was put on notice of the potential difficulties with time limits by ACAS in March 2022, he did not file a claim for a further 18 months. By the time he had filed a claim, all key witnesses had left the respondent's employment years before. I appreciate that the claimant's claims are important to him and that they involve serious allegations. But that argument cuts both ways. The allegations are also serious for the respondent. It is in my view unjust to place them in a position whereby they have to respond to allegations that are now quite old, especially in circumstances where, as I have found, the claimant could have brought these claims in time.

84. For all of the above reasons I do not consider it to be just and equitable to extend the time limits.

The ERA Claims and the "reasonably practicable test"

85. I found that the time limits for the complaint of PIDS (including the three alleged detriments as above) expired 3 months less one day following the final alleged detriment which the claimant states took place on 11 October 2017. Therefore I concluded that the time limit expired for the PIDS claim on 10 January 2018.

86. In relation to the factors set out in *Palmer and Saunders* I concluded as follows:

87. As to the substantial cause of the claimant's failure to comply with the time limit, including whether there was any physical impediment preventing compliance, such as illness, or a postal strike there was in my view no issue which meant that the delay was outside the claimant's control. The claimant did not refer to any illness or other impediment. Rather, as noted above his reasons for not filing a claim sooner were (i) feeling unsafe to do so due to feared retribution from various aspects of management and (ii) not being advised as to the applicable time limits.

88. Consistent with my finding above, I did not consider that fear of some form of retaliation by the respondent would amount to it not being reasonably practicable for the claimant to file his claim in a timely manner. Without prejudice to this conclusion, nor was I of the view that fear was a substantial cause for the delay in filing his claim. This is because the claimant had regularly brought matters about which he was concerned, to the attention of members of management.

89. I consider that the substantial cause of the claimant's failure to comply with the time limit was, up until his enquiries with ACAS in March 2022, a combination of a wish to resolve his claims internally, and a failure to put himself on notice of his rights, including the applicable time limits. From March 2022 onwards, the claimant was clearly aware of his rights. He had approached ACAS with a view to filing a claim before the tribunal and was informed that he "might" still be able to following the conclusion of his grievance. As noted above, this meant that he was on notice of the existence of time limits and of the very real possibility that his claim might

be out of time. Despite being on notice of his rights he did not file his claim until September 2023.

90. Had the claimant made proper enquiries he could have been aware of his rights as early as 2017 when he began discussing matters with his trade union representative. As above, it is without doubt that he was aware of his rights from March 2022 onwards at the latest. There is no evidence, nor has it been submitted that the respondent had misrepresented any relevant matter to him such that it would provide a basis for concluding that it was not reasonably practicable for him to file his claim in a timely manner.

91. As to the advice received, whether the claimant had been advised by anyone, and the nature of any advice given, as noted above the claimant was in receipt of advice from his trade union representative. He did not seek out advice on how to bring a claim to the tribunal, including on time limits, nor did he enquire further as his rights.

92. Again, with regards to ACAS, while ACAS is not an advisory body, a representative advised the claimant to pursue an internal grievance and that he "might" be able to still bring a claim to the tribunal thereafter if he was subject to continuing behaviour. This advice put the claimant on clear notice as to the existence of time limits. Yet, even then he did not file a claim, waiting until September 2023 to do so. To reiterate, I do not consider that this was a case in which incorrect advice as such was given. Even if this had been the case, *Dedman* and *Entwhistle* make clear that in these circumstances any cause of action lies against those giving the impugned advice and does not mean that it was not reasonably practicable for the claimant to file a claim.

93. For these reasons, I conclude that the claimant has not shown that it was not reasonably practicable for him to bring his PIDS claim in time and as such his claim is time-barred.

Strike out on grounds of no reasonable prospect of success

94. Having concluded that all claims are time-barred, it is not strictly necessary for me to determine the alternative application for strike out. Nevertheless, for sake of completeness I conclude as follows.

95. I note from *Eszias* that strike out should only be granted in clear cases and where the facts are undisputed. This is not the case here – many disputes of fact exist. To list just a few, there is a factual dispute as to whether the claimant was prevented from raising health and safety concerns regarding Ms Dominique's treatment by management. There is also a factual dispute as to the basis upon which the claimant's application for the booking centre role was not considered by the respondent.

96. With regards to the claims of race discrimination and harassment under the Equality Act, as accepted by the respondent there is a particularly high bar to be met in order for strike out to be granted. This is apparent from the authority of *Swanson*.

97. As noted above, given the passage of time and the departure of witnesses from the respondent's employment, the respondent would be prejudiced by

the claim proceeding. However, this does not mean that the claimant's claim has no reasonable prospect of success. Rather, the passage of time makes it more difficult for the *respondent* to resist the claimant's claim.

98. In all of the circumstances, I cannot conclude that the claimant's claim has no reasonable prospects of success. As such, had I not concluded that the claim was time barred, I would have refused the respondent's application for strike out.

_____

Employment Judge **M Joyce**

_____4 November 2024_____
Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

8 November 2024
.....

.....
FOR THE TRIBUNAL OFFICE