EMPLOYMENT TRIBUNALS

Claimant: Mr M Zvaita

Respondent: Thames Water Utilities Limited

Heard at: **Watford (via CVP)** **On:** **31 July 2023**

Before: **Employment Judge Varnam**

Representation
Claimant: In person
Respondent: Mr R Mitchell, solicitor

RESERVED JUDGMENT

1. The Claimant's effective date of termination was 23 September 2022.

2. The claims of unfair dismissal and of race discrimination were accordingly brought outside the primary time limits specified in section 111 of the Employment Rights Act 1996 and in section 123 of the Equality Act 2010.

3. As regards the unfair dismissal claim:

   (1) The Claimant has not proved that it was not reasonably practicable for him to bring his unfair dismissal claim within the primary time limit.

   (2) The unfair dismissal claim is accordingly dismissed as being outside the jurisdiction of the Tribunal.

4. As regards the race discrimination claim:

   (1) The Claimant has proved that it would be just and equitable to extend time in respect of his race discrimination claim insofar as it relates to the allegation that his alleged constructive dismissal is said to have been an act of race discrimination.

   (2) Time for bringing a race discrimination claim in respect of the alleged constructive dismissal is extended to 24 February 2023.

(3) The claim of race discrimination in respect of the alleged constructive dismissal has accordingly been brought within this extended time limit and will proceed to final hearing.

(4) As regards the claims of race discrimination in respect of matters predating the alleged constructive dismissal: (i) time for bringing these claims is not extended on 'just and equitable grounds', but (ii) the question of whether these claims formed part of a course of conduct culminating in the alleged dismissal is left to be determined by the Tribunal at the final hearing. For that reason, the claims of race discrimination in relation to pre-dismissal conduct are not dismissed or struck out.

REASONS

Introduction

1. The Claimant, Mr Moses Zvaita, was employed by the Respondent as a dual skilled technician from 31 July 2017 until a date in September 2022. The precise date of termination of the Claimant's employment is one of the key questions that I must decide. On the Claimant's case, his employment ended on 30 September 2022, while on the Respondent's case his employment ended on 23 September 2022.

2. The Claimant commenced ACAS early conciliation on 28 December 2022. His early conciliation certificate was issued on 8 February 2023, and he issued his ET1 on 24 February 2023. As such, any claims arising prior to 29 September 2022 will be *prima facie* out of time.

3. The Claimant's ET1 identified claims of constructive unfair dismissal and race discrimination. There is still some debate as to the extent of the pleaded race discrimination claim, but, as set out below, I am satisfied that the Claimant's claim raises the allegation that his alleged constructive dismissal was an act of race discrimination.

4. The Respondent's ET3 and Grounds of Resistance were issued on 11 April 2023. In its Grounds of Resistance, the Respondent asserted that the Claimant's claims were brought out of time, and should accordingly be dismissed.

5. On 15 June 2023, the Tribunal sent two Notices of Hearing to the parties. One Notice of Hearing listed the claims for a three-day final hearing, commencing on 29 July 2024, and made directions towards that. The other Notice of Hearing listed a preliminary hearing on 31 July 2023, and made appropriate directions. The Notice of Hearing for the preliminary hearing stated that the Tribunal would consider whether the unfair dismissal claim had been brought in time. It did not mention the race discrimination claim.

6. On 26 July 2023, the Respondent's solicitors wrote to the Tribunal, raising the point that they contended that the race discrimination claim, as well as

the unfair dismissal claim, was brought out of time. The letter asked the Tribunal to confirm that both matters would be considered at the hearing on 31 July.

7. Perhaps unsurprisingly, given that the letter was delivered just two clear days before the hearing, no response was given by the Tribunal. Before commencing the hearing, I had been concerned that, having regard to rule 54 of the Employment Tribunal Rules of Procedure 2013, the Claimant had not been given adequate notice of a hearing at which the possibility of dismissing his race discrimination claim as being out of time would be considered. However, when I canvassed the question with the parties, the Claimant was keen to deal with all matters together (in other words, to consider whether both his unfair dismissal claim and his race discrimination claim had been brought in time). Having discussed with the Claimant the different tests that might apply to the extension of time in respect of the different claims, I did not consider that he would be disadvantaged by dealing with both matters together, and accordingly I have done just that.

8. During the hearing, I heard oral evidence from the Claimant, who had also provided a witness statement addressing the time limit issues. The Claimant was cross-examined by Mr Mitchell on behalf of the Respondent, and I also asked the Claimant some questions. At the conclusion of the hearing, I heard submissions from Mr Mitchell. The Claimant was given the opportunity to make oral closing submissions, but ultimately elected not to do so.

9. Submissions concluded at around 4.35pm, and I did not consider that there was sufficient time to properly consider the matter and give judgment that day. I accordingly reserved judgment. Regrettably, there has then followed a very lengthy period of delay on my part in producing this judgment. In part, this has derived from ill-health on my part, but the period of delay has nonetheless been unacceptable, and I apologise to both the Claimant and the Respondent for this and acknowledge the disruption that this has caused them.

Findings of Fact

10. As I have noted above, the Claimant's employment by the Respondent began on 31 July 2017.

11. I have seen a contract of employment dated 18 May 2022 which appears to have been electronically signed by the Claimant on 19 May 2022. This contains provisions as to the notice to be given by the Claimant or the Respondent if either of them chose to terminate the Claimant's employment. Following the completion of his probationary period, the Claimant was required to give one month's notice.

12. The Claimant is of Black African (Zimbabwean) origin. It is his case that on numerous occasions from February 2021 onwards he was subjected to acts of racial harassment or discrimination. He identifies four such acts in his ET1, and has subsequently produced a schedule of incidents detailing a

total of eight acts. Many of the items in the schedule do no more than amplify or develop the four allegations raised in the ET1. I will here summarise the four acts specifically alleged in the ET1, albeit with some interpolations from the schedule, such as the dates of the acts complained of:

(1) In around February or March 2021 one of the Claimant's colleagues attended the workplace with an effigy of a Black man hanging from a noose clearly visible in his car. It is said that no action was taken against the colleague in question.

(2) In around March or April 2021, the Claimant was wrongly placed under investigation for alleged gross misconduct relating to working unauthorized extra shifts.

(3) In around March 2022, the Claimant very sadly suffered a double bereavement. While the Claimant was in Zimbabwe on compassionate leave, the Claimant was repeatedly contacted by the Respondent asking whether he had leave to remain in the UK. He says that he was told that he would not have a job upon his return to the UK.

(4) Following the Claimant's return to work in June 2022, he says that he was subject to 'humiliating treatment', and that in around the second half of August 2022 a request to transfer to a different depot was refused.

13. The Respondent does not accept that the Claimant was subject to any acts amounting to racial harassment or discrimination. However, it is not contended that the claims would, if brought in time, lack reasonable prospects of success, so at present I need do no more than record the nature of the allegations.

14. On 29 August 2022, the Claimant sent an e-mail to Diana Goodwin, Nigel Tovey, and Wayne Fraser of the Respondent. This read as follows:

> *After some self introspection and consideration, I have come to the realisation that for the sake of my wellbeing, I do hereby submit my resignation letter.*
>
> *This serves to notify that as of today 29 August 2022, I am resigning, and I will serve my notice as prescribed in my contract of employment.*

15. It is the Claimant's case that he resigned in response to the acts set out at paragraph 12 above, that these acts amounted to repudiatory breaches of contract, and that he was accordingly constructively dismissed. He contends that that dismissal was unfair. It is also clear to me that the way that the case as pleaded is broad enough to encompass the argument that the alleged dismissal was an act of discrimination (or possibly harassment), since the Claimant expressly alleges in his claim form that he resigned in response to acts that he identifies as acts of discrimination. In my view, it follows from this that the Claimant is alleging that the alleged constructive dismissal was itself an act of discrimination/harassment, and I approach my decision in this case on that basis.

16. As noted above, the Claimant's contractual notice period was one month. On the face of it, therefore, the Claimant was giving notice to expire on 29 September 2022.

17. However, the Respondent's case is that it was subsequently agreed that the Claimant's employment would end on 23 September 2022. In support of this, Mr Mitchell in cross-examination took the Claimant to the following particularly relevant documents:

    (1) On 31 August 2022, at 15:40, the Respondent's Ms Goodwin e-mailed the Claimant as follows:

        Apologies for the delay in responding and as per our phone call this afternoon I have had a HR meeting at 3pm today to discuss the garden leave and if we can get approval for it [I interpose that a previous e-mail had raised the possibility that the Claimant would be placed on garden leave].

        Unfortunately HR have advised that this would not be approved on this occasion so you will need to work your resignation, I have your last day as the 23rd September.

    (2) Also on 31 August 2022, a leaver's letter was sent to the Claimant. This begins with the words:

        I am writing to confirm acceptance of your resignation and that your last day of service with Thames Water will be 23rd September 2022. Please note that when you are paid on the 20th of the month you are paid from the 1st to the end of the month. Therefore your final pay is from the 1st to 23rd September 2022.

    (3) On 20 September 2022, the Claimant was issued with a payslip for September 2022. His basic salary payment was lower than in the payslips for July and August 2022, indicating that he would only be paid until 23 September rather than for the whole month. In cross-examination, the Claimant accepted this, but pointed out that the payslip stated that the 'period end' was 30 September 2022. In my view, however, that merely reflects the fact that the normal pay period was the entire month of September. The Claimant was plainly not paid for the entire month.

18. The Claimant was asked whether, if he considered that his employment should continue until 29 or 30 September, he ever questioned the letters stating that his employment would end on 23 September. He confirmed that he did not, but explained that he had been under a lot of pressure at the time. He described his feelings dealing with the Respondent at that time as being like 'a mouse fighting an elephant'.

19. As the Claimant accepted in cross-examination, he worked until 23 September 2022. On that day, he returned his work equipment, such as his vehicle, ID card, mobile telephone, and laptop. He did not work for the Respondent after 23 September, nor did he receive pay past that date.

20. As I have noted above, the Claimant subsequently commenced ACAS early conciliation on 28 December 2022. If his employment ended on 29 or 30 September 2022, then he contacted ACAS within three months of the end of his employment. If his employment ended on 23 September, then he did not do so.

21. The Claimant's statement dated 26 July 2023 set out various reasons why time should be extended, if his claim was indeed *prima facie* out of time. He emphasised his personal circumstances at the time that his employment came to an end. As I have referred to, the Claimant suffered a tragic double bereavement in around March 2022. He lost his wife and their unborn child. This left the Claimant raising three children in the UK, aged between 4 and 10. He explained that the combination of his own bereavement and the need to raise three young children who had lost their mother created significant difficulties for him. The alleged acts of discrimination made the period especially difficult.

22. In his oral evidence, the Claimant explained to me that he had been to see his GP and had been prescribed antidepressants. However, he had come off antidepressants by the time that he got a new job following the end of his employment by the Respondent. The Claimant started a new job on 3 October 2022, working 37 or 38 hours per week, so I infer that from that date he was capable of working and was no longer prescribed antidepressants.

23. The Claimant was cross-examined about the possible delay in bringing a claim. He said that he was not aware of Tribunal time limits, and although he accepted that he could have researched these on the internet, he had not in fact done so. He also had not sought legal advice, although it appears that he may have had some informal advice from friends. He agreed that had he been aware that (as the Respondent contended) time for bringing a claim began to run on 23 September 2022, he would have contacted ACAS by 22 December 2022.

Time Limits: Unfair Dismissal

24. The primary time limit within which a claim of unfair dismissal must be brought is three months beginning with the date of the dismissal: section 111(2)(a) of the **Employment Rights Act 1996**. In practice, for reasons noted below, this means that the Claimant must commence ACAS early conciliation within that period.

25. This is a strict time limit, and the circumstances in which it may be extended are limited. Whether the claim is one of unfair dismissal, time may only be extended where the Tribunal is satisfied (i) that it was not reasonably practicable to bring the claim within the primary time limit, and (ii) that the claim was brought within such further period as the Tribunal considers reasonable: see section 111(2)(b) of the **Employment Rights Act**

26. The test for an extension of time has two stages. Time is not extended indefinitely merely because it was not reasonably practicable to bring the claim within the primary time limit. Rather, if the Tribunal concludes that it

was not reasonably practicable to bring the claim within the primary time limit, then it must go on to identify the further period within which it would have been reasonable for the Claimant to bring his claim. If the Claimant brings his claim within that further period, then his claim will be in time, but if he falls outside that period, then his claim will be out of time.

27. The burden of satisfying the Tribunal that it was not reasonably practicable to bring the claim within the primary time limit rests with the Claimant: see the judgment of the Court of Appeal in ***Consignia plc v Sealy*** [2002] IRLR 624, per Hart J at paragraph 23.

28. In resolving the question of whether it was reasonably practicable to bring the claim within the primary time limit, the words 'not reasonably practicable' should be given a liberal interpretation in favour of the employee: see the judgments of the Court of Appeal in ***Dedman v British Building & Engineering Appliances Ltd*** [1974] 1 WLR 171, per Lord Denning MR at 176E, and ***Marks & Spencer plc v Williams-Ryan*** [2005] ICR 1293, per Lord Phillips MR (as he then was) at paragraph 20. This should not, however, obscure the fact that parliament has chosen to lay down a strict primary time limit, which the Tribunal should not be over-ready to disregard.

29. The time limits contained within the **Employment Rights Act** are jurisdictional in nature, and not merely procedural: see the commentary in *Harvey on Industrial Relations and Employment Law*, Division PI, paragraphs [91] to [101]. This means that, if a claim is brought outside both the primary time limit and any further reasonable period that may be relevant, then the Tribunal simply does not have the power to hear the claim, and must dismiss it.

Time Limits: Race Discrimination

30. The primary time limit for bringing a claim of racial discrimination or harassment is three months starting with the act complained of: **Equality Act 2010**, section 123(1)(a). In practice, this means that the Claimant must commence ACAS early conciliation within that period.

31. There are two relevant caveats to that in this case. The first is that, pursuant to section 123(3)(a) of the **Equality Act** 'conduct extending over a period is to be treated as done at the end of the period'. Thus if a Claimant can prove that he has been subjected to a series of discriminatory acts which he can satisfy the Tribunal amount collectively to conduct extending over a period, then time for all of those acts will only start to run on the date of the last act. In this case, that means that if the alleged dismissal is in time as an act of discrimination, then the Claimant may be able to rely on that as the last act in a chain of conduct extending over a period, in order to bring the earlier alleged acts of discrimination in time.

32. The second caveat is that the time for bringing a claim may be extended where it would be just and equitable to do so: **Equality Act**, section 123(1)(b).

33. The jurisdiction to extend time under the 'just and equitable' test is wider than the reasonable practicability test under the **Employment Rights Act**. However, it is not unlimited, and certain key points must be emphasised.

34. First, the burden of establishing that time should be extended rests with the Claimant, and there is no presumption in favour of extending time. Rather, an extension of time remains 'the exception rather than the rule': see ***Robertson v Bexley Community Centre*** [2003] IRLR 434, per Lord Justice Auld at paragraph 25.

35. However, just as it is important for the Tribunal to remember that the burden rests on the Claimant, it is also important not to approach that burden too restrictively, or to treat Lord Justice Auld's comments in ***Robertson*** as imposing restrictions on the discretion to extend time which are not found in the statute itself. In the recent case of ***Jones v Secretary of State for Health and Social Care*** [2024] IRLR 275, His Honour Judge Tayler said the following (at paragraph 30):

> *It remains a common practice for those who assert that the primary time limit should not be extended to rely on the comments of Auld LJ at para [25] of* ***Robertson v Bexley Community Centre (t/a Leisure Link)*** *[2003] EWCA Civ 576, [2003] IRLR 434, that time limits in the Employment Tribunal are 'exercised strictly' in employment cases and that a decision to extend time is the 'exception rather than the rule' as if they were principles of law. Where these comments are referred to out of context, this practice should cease.*

Judge Tayler went on to say that the text of paragraph 25 of Lord Justice Auld's judgment should be read in the context of paragraphs 23 and 24 of ***Robertson***, before going on to say the following (at paragraph 30 of ***Jones***):

> *The propositions of law for which* ***Robertson*** *is authority are that the Employment Tribunal has a wide discretion to extend time on just and equitable grounds and that appellate courts should be slow to interfere. The comments of Auld LJ relate to the employment law context in which time limits are relatively short and makes the uncontroversial point that time limits should be complied with. But that is in the context of the wide discretion permitting an extension of time on just and equitable grounds.*

36. In deciding whether to extend time, the Tribunal should have regard to all relevant factors, and there is no statutory checklist of magnetic factors. Nonetheless, matters which may be relevant will often include:

    (1) The length of and reason for the delay. Of potential relevance in this case is that where the reason for the delay relates to a mistake by the Claimant, the Tribunal should consider whether the mistake was reasonable (I add that the same approach applies when a mistake is invoked in respect of the reasonable practicability test in an unfair dismissal case).

    (2) The balance of prejudice between the Claimant and the Respondent.

    (3) The potential merits of the claim.

(See generally *Harvey on Industrial Relations and Employment Law,* Division PI, [281]ff).

Time Limits: ACAS early conciliation

37. Where a Claimant commences ACAS early conciliation within the primary time limit, time for bringing a claim will not run during the period of ACAS early conciliation. Further, where early conciliation is commenced in the last month before the expiry of the limitation period, then time will be extended so that a claim may be brought at any point up until one month after the issuing of an early conciliation certificate. See generally **Employment Rights Act 1996**, section 207B.

38. Here, early conciliation was commenced on 28 December 2022, and a certificate was issued on 8 February 2023. The effect of the extension of time provisions is that, if early conciliation was commenced in time, the Claimant had until 8 March 2023 to bring his claim to the Tribunal. He did so on 24 February 2023, so if early conciliation was commenced within the primary time limit, the claim was also commenced in time. This point will not, however, assist the Claimant if he commenced ACAS early conciliation after the primary time limit had expired.

39. I accordingly do not need to say any more about the early conciliation provisions. Rather, the focus in this case is on the question of whether early conciliation was itself commenced in time.

Analysis and Decision

40. I now turn to set out my conclusions on the matters before me.

41. It is necessary to begin by consider whether the claims were in fact brought outside the primary time limits. As I have already observed, this will depend upon whether the Claimant's employment by the Respondent ended on or after 29 September 2022 (in which case, the unfair dismissal claim will be in time, as will that part of the discrimination claim which relates to the dismissal), or whether his employment ended prior to 29 September 2022 (in which case, his claims will be *prima facie* out of time).

42. At the outset, I repeat that the Claimant gave notice on 29 August 2022, and that in ordinary circumstances that would expire on 29 September 2022, such that he would remain employed until then.

43. However, it seems clear to me that subsequently there was a variation of what would otherwise have been the date of termination, such that the Claimant's employment ended on 23 September 2022. As I have set out above, the Respondent repeatedly wrote to the Claimant indicating that 23 September would be the last date of his employment. I have not seen anything to indicate that the Claimant wrote back either to agree or disagree with this. I accordingly do not find that the Claimant expressly agreed that his employment would end on 23 September. However, it seems to me that his conduct implicitly acknowledged that 23 September was the date on

which his employment ended. Thus, he ceased working on that date, returned all his company equipment on that date, and did not, it appears, express any concern when he was only paid up to that date. In these circumstances, I conclude that the Claimant has impliedly accepted the Respondent's proposal that 23 September 2022 was his last day of employment.

44. From this, it follows that the claims were all brought outside the primary time limit. The last day within the primary time limit was 22 December 2022, and that was the last day that the Claimant could commence ACAS early conciliation and not face the risk that his claim was brought out of time. In fact, he did not contact ACAS until 28 December 2022, six days later, and his claim was not brought to the Tribunal until 24 February 2023, some two months after the expiry of the primary time limit.

45. I then turn to the question of whether time should be extended.

46. I begin with the unfair dismissal claim, in respect of which I apply the 'not reasonably practicable' test described above. Unfortunately for the Claimant, he has failed to satisfy me that it would not have been reasonably practicable for him to bring his unfair dismissal claim inside the primary time limit (i.e. by 22 December 2022). In this regard, I note the following points in particular:

    (1) The Claimant was able to commence early conciliation by 28 December 2022 without apparent difficulty. It was thus clearly reasonably practicable for him to commence early conciliation on 28 December.

    (2) This was only six days outside the primary time limit. I have not had my attention drawn to anything that suggests that there was any significant impediment to the Claimant commencing early conciliation six days earlier than he in fact did so.

    (3) I note that the Claimant referred to his difficult personal circumstances. As I set out below, in my view this has some relevance to the just and equitable test in respect of the discrimination claims. However, it does not seem to me to come close to satisfying the higher hurdle of the reasonable practicability test. The Claimant was able to work full-time from 3 October 2022 (and had been working full-time for the Respondent until 23 September 2022). While he had been on antidepressants, this was no longer the case by 3 October. I appreciate that that does not mean that the combination of tragic and difficult personal circumstances that he faced had entirely resolved, but I do not accept that those circumstances were such that he could not reasonably have been expected to commence early conciliation by 22 December. I also reiterate that they were not such as to stop him commencing early conciliation on 28 December, and I have seen nothing to suggest a dramatic improvement in the Claimant's circumstances in the days or weeks prior to 28 December.

    (4) I have also considered whether the Claimant's delay could be attributable to a mistake. There seem to me to be two possible types of mistake that the Claimant could have made. First, I note the Claimant's

evidence that he was not aware of time limits. I have some doubts as to whether, by December 2022, he was totally unaware of time limits, given that he commenced ACAS early conciliation on what would have been the last day for doing so had his employment ended on 29 September. In any event, however, I must consider whether any mistake was one which it was reasonable for the Claimant to make. In this regard, I conclude that any mistake or ignorance as to the existence or duration of time limits was not reasonable. While I do not put overmuch weight on the fact that the Claimant did not seek professional legal advice (which might well have come at considerable cost), I take judicial notice of the fact that information about Tribunal time limits is readily available in response to a simple internet search (including on ACAS's website and on gov.uk), and I also note that the large majority of Claimants who represent themselves bring their claims in time. In my view, if the Claimant was unaware of the nature or extent of time limits, that was simply because he failed to avail himself of the information that was readily available to him. This is not reasonable ignorance, and in my view does not assist the Claimant in discharging the reasonable practicability test.

(5) A possibly more likely mistake in this case is as to the date from which time ran. The Claimant's case before me was that his employment ended on 30 September 2022, and I note that he commenced ACAS early conciliation on 28 December, which would have been just within time if the Claimant had been correct. It seems to me that this could reflect an attempt to bring the claim in time, together with a misunderstanding as to when time started running, although that was not an explanation expressly advanced by the Claimant before me. In any event, however, I do not consider that such a mistake as to the date on which time started running would be a reasonable one to make. I have found that the Claimant's employment ended on 23 September 2022, and it seems to me that this would have been a fact well within the Claimant's knowledge. Certainly, he would have known that this was what the Respondent's correspondence said, that this was the last day that he in fact worked, and that he was not paid until the end of the month. In these circumstances, I do not consider that a mistaken belief that his employment continued until 29 or 30 September would amount to a reasonable mistake. Accordingly, I do not consider that any such mistaken belief assists the Claimant on this issue.

47. In summary, I conclude that it would have been reasonably practicable for the Claimant to commence early conciliation by 22 December 2022. In these circumstances, there is no basis for extending time to bring the unfair dismissal claim, and that claim must be dismissed.

48. I now turn to the discrimination claim, where I must apply the just and equitable test for an extension of time. I have found this to be a more difficult issue. I begin by focusing simply on whether time should be extended in respect of the claim that there was a discriminatory dismissal. I will then turn to consider whether to extend time in respect of pre-dismissal matters.

49. As regards the alleged discriminatory dismissal, there are certainly factors militating against extending time. In particular:

(1) I remind myself that it is for the Claimant to prove the case for an extension of time, and that the starting point is that the strict time limits that the law prescribes should be upheld.

(2) I also consider that the Claimant has not shown a good reason for his delay. At most, there may be a plausible reason (namely, some form of mistake as to either the commencement or operation of time limits) operating in circumstances where he was, I accept, still experiencing considerable personal difficulties. But that is not, in my view, quite the same as showing a good reason – for the reasons set out above, any mistakes that the Claimant made were in my view not reasonable ones, even having regard to the Claimant's personal difficulties.

50. On the other hand, the following factors militate in favour of an extension of time:

(1) The balance of prejudice clearly favours the extension of time. On the one hand, the Claimant would, if time were not extended, lose the ability to bring his claim before the Tribunal altogether. This is a significant loss, which is not undone by the fact that he is at least partly the author of his own misfortune. On the other hand, I have seen no evidence to suggest that the Respondent would suffer any prejudice from an extension of time beyond the loss of the windfall gain that it would otherwise derive from being able to have the Claimant's claim struck out. There is no evidence of any forensic prejudice to the Respondent, in the sense that it would be unable to gather evidence relating to the matters of which the Claimant complains.

(2) Insofar as the discrimination claim relates to the alleged dismissal (or conduct culminating in the alleged dismissal), I have regard to the length of the delay. It is, in my view, a minimal delay of, in practice, only six days (a fact which also goes towards explaining the lack of real prejudice to the Respondent).

(3) While the Claimant has not, in my view, shown a good reason for the delay, I do consider it appropriate to have regard to what I acknowledge will have been the Claimant's difficult personal circumstances at the time that the delay occurred. These do not mean that there was a good reason, but in my view they do provide some mitigation for the absence of a good reason, by explaining the circumstances in which the Claimant came to commence early conciliation late.

51. I do not consider that the merits of the case point particularly strongly either for or against an extension of time. This is a case which depends substantially on its facts. The Claimant's claims are certainly arguable, in my view, but it is not possible for me to determine their strength, nor would that determination realistically be possible without a full exploration of the evidence. So this is not a case either where it can be said that the Claimant would be deprived of a clearly meritorious claim, or that his claim is so weak that he will lose nothing of value.

52. Overall, I am just persuaded that time in respect of the claim of a discriminatory constructive dismissal should be extended. In my view, the balance of prejudice between the parties and the limited nature of the extension sought outweigh the lack of a good reason for the delay, a factor which is, in any event, partially mitigated. I consider that it will be appropriate to extend time for bringing the claim to 24 February 2023, the date on which the Claimant actually issued proceedings.

53. I now turn to the pre-dismissal complaints of discrimination. Insofar as these are standalone acts of discrimination (i.e. insofar as they do not form part of continuing conduct ending in the alleged dismissal), I decline to extend time. The reasons for this are that (i) the delay is considerably greater in respect of these matters than in respect of the dismissal, ranging from around six weeks in respect of the complaint relating to the refusal to redeploy the Claimant up to not far off two years in respect of the allegations dating back to 2021, and (ii) the absence of a good reason becomes, in my view, a more significant problem when dealing with delays of such length – the fact is that there was no explanation before me capable of explaining these much longer delays. While I do not consider that the Respondent would be at any greater prejudice in responding to these matters (because they will in any event be matters on which the Tribunal will need to hear evidence, as I explain below), I take the view that with these matters, the length of and lack of a good reason for the delay become stronger factors, and outweigh the balance of prejudice.

54. However, that is not to say that the pre-dismissal matters will be irrelevant. They will be significant for two reasons:

    (1) They are the matters that the Claimant relies upon to establish repudiatory breaches of contract necessary to give rise to a constructive dismissal, and also to show that that constructive dismissal was an act of discrimination. As such, the Claimant may rely upon them as key parts of his claim of a discriminatory constructive dismissal.

    (2) The effect of my decision in respect of the alleged dismissal itself is that, if there was a discriminatory constructive dismissal, the claim relating to it has been brought in time. As such, having regard to section 123(3)(a) of the **Equality Act** (summarised above), any other acts of discrimination which amount to part of a course of conduct ending with the alleged dismissal will also be in time. Therefore, it will be open at final hearing for the Claimant to argue that the pre-dismissal matters were part of a course of conduct which also included the dismissal. If he succeeds in such an argument, then those matters will also be in time on that basis. I add that, in my view, the question of whether the pre-dismissal matters and the dismissal form part of a course of conduct is clearly a question that can only properly be determined at final hearing upon consideration of the totality of the evidence, and for that reason I do not intend to seek to decide it now.

55. For this reason, I am not going to dismiss or strike-out the claims relating to pre-dismissal acts of discrimination. However, the effect of my decision is that those claims can only succeed if the Tribunal at final hearing finds that they were part of a course of conduct concluding with the dismissal. If the

Tribunal does not find them to be part of such a course of conduct, then they must be dismissed as being brought out of time.

56. I end by repeating my apology to both parties for the delay in the production of this judgment. I am aware that this has meant that the final hearing date for this matter has been lost. In order to move the matter forward, I am going to list the matter for a case management preliminary hearing, to make directions towards a final hearing, and a separate notice of hearing will be issued by the Tribunal.

Employment Judge **Varnam**
1 December 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

5 December 2024

FOR EMPLOYMENT TRIBUNALS