Case Number: 6000391/2023

EMPLOYMENT TRIBUNALS

Claimant **Mrs D Chhetri**

Respondent **Porthaven Care Homes No 2 Limited**

Heard at: **Bristol (by video)** **On:** 18 June 2024

Before: **Employment Judge Hogarth**

Appearances
For the claimant: The claimant in person, supported by her husband Mr Chhetri
For the respondent: Mr Mark Clayton, solicitor

Interpreter
Ms Gurung, Nepali interpreter

RESERVED JUDGMENT

1. The claims for unfair dismissal, wrongful dismissal (notice pay), holiday pay and whistleblowing detriment were not presented in time. While it was not reasonably practicable for those claims to have been presented in time, the further period of time elapsing before they were presented was not reasonable.
2. The claims for direct discrimination on the grounds of race and/or religion or belief and for harassment related to race and/or religion or belief were not presented in time. It is not just and equitable to extend time for those claims.
3. The claimant did not have two years' service with the respondent when her employment terminated and so does not have the right to bring a claim for ordinary unfair dismissal.
4. Accordingly, the Tribunal has no jurisdiction to deal with any of the claims, which are all dismissed.

REASONS

Introduction

1. The claimant is Nepalese. She was summarily dismissed in her absence for gross misconduct by the respondent on 17 February 2022. Her appeal against dismissal was rejected on 23 March 2022.

2. The claimant notified ACAS of a potential dispute on 28 February 2023 and an early conciliation certificate was issued by ACAS on 2 March 2023 naming "Savernake View Care home" as the prospective respondent. She presented a claim form on 3 March 2023 making the following complaints:
    a) Ordinary unfair dismissal (Employment Rights Act 1996 ("ERA 1996"), section 941));
    b) Automatic unfair dismissal on the ground of public interest disclosure (ERA 1996, section 103A);
    c) Detriment on the ground of public interest disclosure (Equality Act 2010, section 47B)
    d) Direct discrimination on the ground of race and/or religion or belief (Equality Act 2010, section 13);
    e) Wrongful dismissal (breach of contract relating to notice pay);
    f) Accrued but unpaid holiday pay.

3. The respondent's response to the claims was accepted on 3 June 2023. It denies all the claims, asserts that they are all well out of time and states that there is no good reason to extend time.

4. The factual allegations relied on by the claimant relate to acts taking place before the decision to dismiss, to the decision to dismiss on 17 February 2022, and the decision to reject the claimant's appeal against dismissal on 23 March 2022. Nothing done by the respondent after 23 March 2022 is in issue. For this reason, it was not in dispute at the hearing that the various claims in this case were made outside the initial 3-month period allowed for each claim. The key questions were how late and whether time should be extended under the relevant statutory provisions.

5. The case was listed for a preliminary hearing on 1 August 2023 to determine the time issues.The claimant was in Nepal on that date and so was unable to give evidence by video. It was not possible for the issues to be determined, but Employment Judge Bax was able to do some case management. His case management orders included amending the respondent's name to Porthaven Care Homes No 2 Limited. The list of issues contained in the Case Summary of 1 August 2023 does not include a claim for ordinary unfair dismissa,l because the claimant did not have two years' service with the respondent when her employment terminated.

6. A further preliminary hearing to deal with the time issues was listed for 23 November 2023. This was postponed and relisted for 23 April 2024, but no Nepalese interpreter was available on that date so the issues could not be determined. The hearing was relisted for 18 June 2024.

Documentation

7. I was provided in advance with (a) a bundle of 176 pages and (b) a copy of the Record of a Preliminary Hearing for the previous hearing on 23 April 2024. There was no witness statement from the claimant. However, Mr Clayton told me he received a short undated and unsigned document from the claimant on 17 April 2024 and forwarded it

to Bristol ET. Mr Clayton supplied a copy to the Tribunal at the start of the hearing. I accepted it as a written statement from the claimant.

8. At the start of the claimant's one-page statement there is a two-column table of references to specific GP records, some headed "anxiety/depression related" and others "Injury related but push me to anxiety/depression too". These relate to dates in 2021 or January 2022. Paragraphs 4 and 5 (taking up just over a third of a page) give a brief explanation for the delay in presenting her claims. She says that the reason for delay in opening the case was that she was not in a good physical and mental state, that when someone is not stable even doing day to day stuff gets difficult and that because of lack of knowledge she "had no clue that companies like ACS helps us". It goes on to say that she got a bit better, saw an advertisement from ACAS on Facebook and contacted them. Her limited English made things extra hard for her.

Form of hearing etc

9. The hearing was conducted by video (CVP). There were minor connection difficulties during the hearing, but nothing significant. The claimant was present throughout the hearing and I understood that her husband was present, offscreen, to support her. She gave sworn evidence.

10. The claimant can speak and understand English to an extent, but her English is limited. The claimant told me that she and her husband used Google translate to translate tribunal documents. She needed an interpreter to communicate fully and to understand what was being said in English, especially in relation to legal matters. Accordingly, a Nepalese interpreter, Ms Gurung, was present during the hearing and was able to interpret everything that was said by the claimant in Nepali into English and everything said by me or by Mr Clayton into Nepali. This was a difficult task and I am grateful to Ms Gurung for the calm and professional way in which she carried out her duties over a long day. The claimant occasionally said something in English rather than Nepali, responding to something that I or Mr Clayton said. However, I thought it best for her to repeat what she said in Nepali, to get the benefit of Ms Gurung's translation, before I or Mr Clayton responded to anything she said in English. I ensured this happened.

11. In line with paragraph 5 of EJ Bax's case management orders, I explained at the start of the hearing that I would take more breaks than usual to assist the claimant in coping with her anxiety. The claimant, when asked, did not request any other reasonable adjustments to participate in the hearing. She explained how her problems at work had affected her, causing a lot of problems and flashbacks, which she found stressful and upsetting. She said she did not know if she would survive or die but wanted to go to the media if she did not get justice.

12. The claimant was in a heightened emotional state which manifested itself during the hearing, and made her vulnerable. It was clear from the outset that she finds the proceedings, and the need to refer to and go over past matters, extremely stressful and distressing. I found (like other employment judges in this case) that she could quickly become extremely distressed and start talking in detail about what she says happened while she was employed by the respondent or about her physical and mental health

issues. This happened on multiple occasions during the hearing and could make it difficult for her to express herself clearly and to keep to the point. Several times when distressed she expressed fears, intentions and wishes that were troubling. However, pauses in the hearing were generally enough for her to regain her composure sufficiently to be able to say what she wanted to say. On two occasions, I ordered a longer break when she became exceptionally distressed.

13. At about 2.15 pm (after the lunch break) the claimant told me that she had a bad headache and could not continue. I paused the hearing for a few minutes to let her take paracetamol or something similar if she wished. She then said she could continue, and as she appeared to have composed herself I decided to continue the hearing.

14. At the start of the hearing, after establishing that everyone had the same documents, I explained the limited purpose of the hearing i.e. to determine whether the claims were out of time and, if so, whether time should be extended in favour of the claimant so as to allow the claims, or any of them, to proceed. I briefly explained the issues that arise under the two relevant legal tests for extending time, which EJ Bax had set out in detail in his Case Summary. I then explained what would happen during the day in terms of hearing oral evidence and then the parties' submissions. I used as simple language as I could, relying on Ms Gurung to pass the explanation on in Nepali. Ms Gurung told me that the claimant told her she had understood what I had said, although she also said a lot of things about the events that had given rise to the claims.

15. The claimant took no active part in the hearing other than responding to questions put to her through the interpreter by me or by Mr Clayton and making occasional interventions referring to past events. I considered that she was not in a position to conduct or put forward her own case, and that she would not understand what she needed to do to make out her case for extending time. This clearly put her at a significant disadvantage. So I suggested to her that I could ask her some questions about the matters mentioned in her statement (see paragraphs 7 and 8 above), Mr Clayton would ask her some questions and she could say anything else she wanted to. She agreed to that course of action. Mr Clayton did not object.

16. After the claimant was sworn, I asked her to re-read her statement. She gave a confused account of how it had come into existence, but she did confirm that the contents were her statement, that it was true and she did not want to change it. I then asked her a series of questions designed to give her a fair chance of putting forward her account as to why the claims were presented late in March 2023.

17. After the claimant's evidence in chief, I raised with the parties the question whether the hearing could be concluded in one day. The need for translation and other delays mentioned above had used up a significant amount of time. Mr Clayton suggested written submissions, but I decided that was not practicable. His submissions would have to be translated and there was potential unfairness if the claimant later (with no interpreter) did not understand what she needed to say and struggled to put anything in writing. Instead, I decided to continue the hearing until 5 pm.

18. Mr Clayton cross-examined the claimant. He offered to assist the Tribunal and the claimant by keeping his questions short and to limit them to essentials, which he did. Indeed, he abandoned some lines of questioning (including as to the merits of her discrimination claims) to assist the Tribunal in managing the hearing day. This enabled the hearing to end at about 5 pm. The claimant became visibly upset on several occasions during her cross-examination, and on one occasion she was so distressed that I decided to take a break in the hearing for about 10 minutes to allow her to compose herself. I must emphasise that Mr Clayton's questions to the claimant were entirely proper, and that he put them to her as sensitively as possible.

19. The claimant found it difficult to answer specific questions properly, often veering into more general matters such as things that had happened to her before and after her dismissal. Some questions had to be repeated more than once, and not all were answered. She could not recall some dates or other details in giving evidence. But she was able to give the answers she wished to give and, overall, I was satisfied that she was able to put forward her factual case on the time issues.

20. Mr Clayton's submissions were relatively brief, as time was short. I gave the claimant sufficient time to make her own submissions, having explained that she did not need to repeat all her oral evidence as I had understood it and noted it down. She used the time to repeat things she had already said about her claims and her experiences with the respondent. I asked her specifically if she wanted to say anything about the time limits issues or about what Mr Clayton had said, but she continued with what she was saying about more general matters. However, although she did not make any submissions about the time limits issues, she had said enough in her evidence for me to understand her case. She had a fair opportunity to address me on the issues towards the end of the hearing. Accordingly, I consider that it fair to both parties for me to make my decision on those issues in this judgment. Although almost all of what she said at the submissions stage was not relevant, she touched on the merits of her discrimination claims. That is a potentially relevant factor in considering whether it would be just and equitable to extend time for her discrimination claims.

21. I reserved judgment and explained to the claimant what that meant.

The issues relating to time limits

22. The issues for determination are set out in paragraph 3 of EJ Bax's Case Management Orders of 1 August 2023. The way they are set out there is different from the time issues set out in paragraph 1 of the list of issues at the end of his Case Summary. Reading them together, the issues for me are as follows (with a few minor verbal changes from the original):

    1. Was the unfair dismissal and/or whistleblowing detriment and/or wrongful dismissal (notice pay) complaint presented outside the time limits in section 111(2)(a) and (b) and Section 48 of the Employment Rights Act 1996 and Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and if so should it be dismissed on the basis that the Tribunal has no jurisdiction to hear it? Dealing with these issues may involve consideration of subsidiary issues including: whether it was

not reasonably practicable for a complaint to be brought within the primary time limit: what the effective date of termination was.

2. Was the claim for accrued but untaken holiday presented outside the time limits in regulation 30 of the Working Time Regulations and if so should it be dismissed on the basis that the Tribunal has no jurisdiction to hear it? Dealing with these issues may involve consideration of subsidiary issues including whether it was not reasonably practicable for a complaint to be brought within the primary time limit.

In dealing with issues 1 and 2 The Tribunal must consider:

(a) Was the complaint made to the Tribunal within 3 months (plus Early Conciliation extension) of the effective date of termination or act complained of?
(b) In respect of detriment only, if not, was there a series of similar acts or failures and was the claim made to the Tribunal within 3 months (plus Early Conciliation extension) of the last one?
(c) If not, was it reasonably practicable for the claim(s) to be made to the Tribunal within the time limit?
(d) If it was not reasonably practicable for the claim(s) to be made to the Tribunal within the time limit, was it made within a reasonable time?

3. Was the discrimination complaint presented outside the time limits in section 123(1)(a) and (b) of the Equality Act 2010 and if so should it be dismissed on the basis that the Tribunal has no jurisdiction to hear it? Dealing with these issues may involve consideration of subsidiary issues including: whether there was "conduct extending over a period"; whether it would be "just and equitable" for the Tribunal to permit proceedings on an otherwise out of time complaint to be brought; when the treatment complained about occurred.

In dealing with issue 3 the Tribunal must consider:

(a) Was the complaint made to the Tribunal within 3 months (plus Early Conciliation extension) of the act or omission to which the complaint relates;
(b) If not, was there conduct extending over a period;
(c) If so, was the complaint made to the Tribunal within three months (plus Early Conciliation extension) of the end of that period;
(d) If not, was the claim made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
    (i) Why were the complaints not made to the Tribunal in time?
    (ii) In any event, is it just and equitable in all the circumstances to extend time?

23. The substantive claims in this case appear in the list of issues in the Case Summary of 1 August 2023. So far as the claims for whistleblowing detriment, direct discrimination and harassment are concerned, the claimant's factual allegations refer to:
    (a) from the start of employment, threats to remove her mangal sutra;
    (b) on 22 October 2021, a colleague Cathy hitting her;
    (c) in October/November 2021, Claire locking her in a room;
    (d) in November 2021, being told she was eating lamb when it was beef;
    (e) inventing false accusations of misconduct;
    (f) on 17 February 2022, dismissing the claimant; and
    (g) on 23 March 2022, dismissing the claimant's appeal against dismissal.

Facts

24. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary and after listening to all factual and legal submissions made by or on behalf of the parties.

25. The only evidence before me in this case is the documentary evidence in the bundle, the claimant's brief written statement and her oral evidence at the hearing. Even allowing fully for her vulnerabilities, language difficulties and the stress she was experiencing, the claimant was not a satisfactory witness. She gave answers that were to some extent contradictory (usually in relation to dates). Other answers were incomplete or inconsistent with documentary evidence. She could not recall various dates and other details that were relevant. She agreed that she was unsure about dates, saying this was due to her being on medication. I do not know if that was the reason. I accept, of course, that at times when her mental health was poor and she was on medication that it would be understandable that her memory of the dates and other details might not be good. But she said she was not able to recall when she returned to the UK from Nepal at the end of 2022, or even the month, which is something I would have expected her to remember She also failed to answer quite a few of the questions she was asked, often by referring instead to past events and matters that were irrelevant to the question asked. She was plainly both stressed and distressed when giving her evidence, which will not have helped her to give considered and accurate answers.

26. All of the things described in paragraph 25 above led me to question the reliability of the claimant's answers on matters of detail, and especially in relation to the few factual matters disputed by Mr Clayton at the hearing (mostly relating to her state of health and/or legal knowledge between February 2022 and March 2023). I have considered her oral evidence carefully, but in these circumstances I consider the contemporary documentary evidence to be of considerable importance and weight in determining the facts. Where there is a conflict between the claimant's recollection and the medical records I prefer to rely on the records.

27. In this regard, I accept the medical records in the bundle as evidence of the claimant's health on the dates they refer to. This evidence was uncontradicted by either party, although on one point the claimant said Mr Clayton had misunderstood what a GP record said about her referring to a court case for unfair dismissal. The medical records in the bundle include extracts from the claimant's GP records. There are some gaps, which may reflect absence abroad. More generally, while I cannot be sure the records in the bundle are complete, they are all I have to go on in assessing the state of the claimant's health at material times. I note that the respondent relies on the medical records to support its case on the time limits issues.

28. The claimant has worked in the care sector since about 1998. She agreed that she had been dismissed before by different employers. I do not know any details of those matters, which are not material to the issues before me. Mr Clayton asked the claimant if she had received any legal advice about any earlier dismissal and she said she had not. I accept her evidence on this point, which was not disputed.

29. The claimant was employed as a care assistant by the respondent between 1 November 2020 and her dismissal on 17 February 2022.

30. The claimant's discrimination and/or harassment claims include allegations of acts taking place when she was working (see the acts listed in paragraph 23(a) to (d) above). I make no findings as to whether those alleged acts took place or constituted discrimination or harassment. It suffices, for the purposes of this judgment, to rely on the dates put forward by the claimant as the dates when the alleged acts took place.

31. Prior to the events in February 2022 leading up to her dismissal the claimant had a variety of health problems. Most appear to have been physical, including a shoulder injury, chest pain and various other pains, but there is also evidence of her suffering from anxiety towards the end of 2021 and in January 2022. I have looked at all the records listed in paragraph 2 of her statement (see paragraphs 7 and 8 above). However, only a few relate directly to her mental health, and there do not appear to have been any formal assessments of her mental health.

32. In January 2022 the respondent became concerned about certain matters involving the claimant's conduct at work and an investigation was commissioned. The claimant was suspended on 3 February 2022, pending further investigations into allegations of misconduct. This followed an investigation meeting on the same day (the minutes of which appear in the bundle) and the production of an investigation report by Carla Kell, who conducted the meeting I accept the minutes as an accurate record, as neither party questioned them. The investigation report records that the claimant confirmed that she was "fit and well to be at today's meeting", but she had had a physio appointment the previous day for shoulder pain. I accept that statement as an accurate statement of the facts as to the claimant's state of health on the day. The investigation report concluded that a formal disciplinary hearing was required.

33. The claimant said (and I accept) that she was working normally in the period of 3 months up until her suspension.

34. The claimant was sent a letter dated 3 February 2022 requiring her to attend a disciplinary hearing on 9 February and listing briefly five allegations of misconduct. The letter warned her that these would, if proved, be seen as gross misconduct and could result in dismissal without notice. She did not attend that meeting. I do not know the reason for her non-attendance. She was then sent a letter dated 10 February 2022 stating that as she was unable to attend on 9 February she should attend on 16 February for the disciplinary hearing. Again, she did not attend. On 15 February she was recorded in a medical report as having symptoms of severe depression and it is more probable than not that that was why she did not attend the meeting. This is supported by the minutes for the appeal hearing on 21 March which state that she was "off sick and did not attend the disciplinary". As she was suspended at the time "off sick" was perhaps not quite the right phrase, but it is evidence that she missed the hearing because she was unwell on 16 February.

35. The claimant was sent a letter dated 17 February 2022 from Sharon Adams (a senior manager) stating that the five allegations of misconduct were found to have been proved and that she was being summarily dismissed for gross misconduct with effect from "today's date" (i.e. 17 February).

36. On 3 and 4 March 2022 the claimant sent handwritten letters to her manager Sue and to the care home (8 pages in total) about the things she was accused of and various other matters. She said in evidence to me that she had used Google translate to give her the English words to use. It must have taken her some time and effort to write those letters. She must have been well enough to do so.

37. The claimant appealed against her dismissal. The accuracy of the minutes of the appeal hearing on 21 March 2022 was not disputed and I accept them as reliable evidence of what was said at the hearing. The claimant attended, accompanied by a trade union representative (Mr Blake). The minutes demonstrate that the claimant participated in the discussions, answering questions and putting forward her position that she had done nothing wrong. Mr Blake provided support. She referred on two occasions during the meeting to "if I go to court" and "If we go to court" which indicates that the possibility of taking her dismissal or her other concerns further was in her mind at the time. Mr Clayton asked the claimant about these references and the claimant became extremely agitated, leading to a 10-minute break in the hearing. She then said that she was very upset at the time of the meeting and had meant to refer to going to the police. However, the references minuted were to her taking various members of staff with her if she goes "to court", which in my view were references to a court or tribunal and not to the police.

38. There is no record in the minutes of the claimant or Mr Blake having raised her mental health or her physical health as a problem that affected her participation, or that she was becoming too agitated or upset to continue. I find that neither of them did so, and that the claimant was well enough to attend and participate on the day.

39. The claimant was informed by a letter dated 23 March that her appeal was not upheld. That letter was not in the bundle, but I heard enough evidence about it to have a reliable idea of its contents.

40. There is some uncertainty on the evidence as to exactly when the decisions to dismiss, and then to reject the appeal, were taken. For the purposes of this judgment I will take 17 February 2022 as the date of dismissal and 23 March as the date of the decision to reject the appeal. That may be slightly favourable to the claimant, but I cannot tell on the evidence whether the decisions were made on an earlier day, namely 16 February for the dismissal or 21 or 22 March for the appeal. In view of the significant delay before the claims were eventually presented on 3 March 2023, an extra day or two is not material. The same applies to any delay of a day or two in the claimant receiving and reading the letters.

41. The claimant's discrimination claims include alleged acts of discrimination or harassment relating to the claimant's dismissal on 17 February 2022 (see the acts listed in paragraph 23(e) to (g) above). The decisions to dismiss and to reject her appeal against dismissal have dates (see above) and I infer that the allegedly invented accusations would have had to have been invented shortly before the process leading to the decision to dismiss. The exact date or dates for that on the claimant's case is unclear, but would most likely have been in December 2021 or January 2022, before the claimant was invited to the investigation meeting on 3 February. The exact date(s) involved are not material if these three alleged acts are to be regarded as constituting a course of conduct over a period ending on 23 March 2022. As mentioned in my

conclusions below, I consider these three alleged acts to be connected in a way that do constitute a course of action over that period.

42. I make no findings as to whether the respondent invented the misconduct claims or whether (if it did) that that, or the decisions to dismiss and/or to reject the appeal against dismissal, constituted acts of direct discrimination or harassment.

43. A LIFT psychology report dated 15 February 2022 records that, when assessed on that day, the claimant was suffering from low mood and anxiety, owing to "severe depression", but concludes there was no current risk to her (presumably of self-harm). This date was only two days before the date of dismissal and I have found that this record explains her absence from the disciplinary meeting on 16 February.

44. A medical screening report dated 18 March 2022 refers to physical and mental health problems, apparently connected with events at work. I would expect that to have been based on what the claimant told the person concerned. Then, a second LIFT psychology report dated 22 March 2022 again records the claimant as having severe depression, and concludes there is no current risk to her. This was the day after the the appeal hearing took place. That hearing and the attendant stress she will have experienced at the time is more likely than not to have been a trigger for her state of mental health when assessed the next day (22 March). There is no other explanation in the evidence before me.

45. I find, based on the two LIFT reports, that on 15 February and on 22 March the claimant was suffering from severe depression – and so had significant mental health problems on those days. I note, however, my finding above that she was well enough to participate in the appeal hearing on 21 March. Her state of mental health on that day did not inhibit her participation and must, in my view, have been significantly less than "severe" on the relevant scoring system used in the LIFT assessments. This means that I cannot assume that the claimant's mental health between 15 February and 22 March remained consistently as poor as it was on those two dates.

46. It is possible that the claimant was seriously unwell in terms of her mental health for a few days before 15 February 2022, but she was well enough to participate in her investigation meeting on 3 February and she told the investigator that she was well on that day. So I find that she was not suffering from severe depression on that day, at least. I also consider it more likely than not that the significant mental health issues recorded on 15 February would have subsisted for at least some days before improving, allowing for any medication to take effect. But she had recovered enough by 21 March for her to participate fully in the appeal hearing on that day. Her poor mental health on 22 March is likely to have continued for some days (in the same way as her poor mental health on 15 February). But there is no evidence to suggest her symptoms remained at "severe" for a long time.

47. On 9 June 2022 a note of an in-person GP consultation refers to "her PHQ score dropping from 21 to 9 recently" and also says that while she was not working at the time she had an opportunity and is eager to work. If that refers to a LIFT psychology report it is not in the bundle. A PHQ score is the measure of depression used in the

LIFT reports following an assessment: a score of 9 is in the “mild” range. At the time the claimant told the doctor that she wanted to come off her medication, presumably because she did not feel she needed it any longer.

48. In her cross-examination the claimant agreed that her mental health was improving at this time and she wanted to work, but she said that a bad reference from her employer set her back and her stress started again. I can make no findings about the reasons but there is some evidence of further mental health difficulties in mid-June 2022: an ambulance was called on 19 June 2022 for a medication overdose. The record refers to the claimant being depressed and upset, for reasons connected with losing her job (presumably recording what the claimant said at the time).

49. A hospital report on 14 July 2022 is more positive. This followed a physiotherapy referral for a shoulder problem but records that she had been referred to LIFT psychology (the author of the psychology reports above) by her GP in relation to her anxiety. The claimant told the doctor that she now had a Nepalese GP and was happy to work with him on her anxiety.

50. A third LIFT psychology report on 20 July 2022 scored the claimant’s measure of depression as “moderate” (a PHQ score of 11), two levels below the “severe” scores on 22 March and 15 February. It also scored her measure of anxiety as moderate. This shows that her mental health was significantly better on this date (as compared with the position on 22 March) and I find that this was the case. Her symptoms had ceased to be severe by that date, and had become “moderate”.

51. There is no medical evidence of any further specific mental health problems after that date until after she submitted her claims on 3 March 2023.

52. In my view the records from 9 June and 20 July 2022 carry significantly more weight than her assertion in response to a question from me that she did not begin to “ feel better” (in relation to her mental health) until March or April 2023 after treatment and a long break in Nepal. I do not accept that assertion as it is not consistent with my findings as to her state of mental health after 20 July 2022.

53. On 22 June 2022 a note of a telephone GP consultation refers to a request by the claimant for a letter to be given to her solicitor. It refers to an “ongoing court case with her employer for unfair dismissal”. This may refer in part to the court case referred to below, but the record shows that she mentioned unfair dismissal to the doctor, and that she was aware that she could claim that she had been unfairly dismissed. In cross-examination the claimant denied that that she had at least been thinking about bringing employment proceedings, saying that she had referred to her court case for an accident claim. But that is simply inconsistent with the note made by the GP referring to unfair dismissal and I do not consider it likely the GP would have made up the reference or made a mistake in recording the claimant’s words. It is more probable than not that she had been thinking at the time about unfair dismissal proceedings and mentioned this to the GP.

54. There is no medical record in the bundle from the UK for any date between 20 July and the end of December 2022. The report dated 20 July is the last direct evidence about the claimant's mental health prior to 3 March 2023, when these proceedings were initiated. There is a letter referring to a missed LIFT psychology assessment on 10 November 2022, but this was when she was abroad in Nepal (see below). The GP records from January to March 2023 do not say much about mental health matters. A letter from a hospital doctor in Nepal dated 4 December 2022 refers only to physical health issues relating to neck and shoulder pain, a burning sensation of her upper limb and pain on her left knee. It appeared to me that this might well have been written and given to the claimant just before she returned to the UK, but I do not have enough evidence to find that this was the case.

55. Finally in relation to the medical evidence, there is a LIFT psychology report dated 21 March 2023 recording from an assessment that the claimant's mental state was "concerning". However, I do not see this report as strong evidence that her mental health was poor at any given time prior to the assessment. She brought her claims on 3 March 2023, after approaching ACAS and then finding someone to help her fill in the ET1 form, within a few days of deciding to take action after she saw something about ACAS on Facebook. No mental health difficulties inhibited her from acting at the time (in the week or so before 3 March). So, whatever the position on 21 March 2023, she was well enough to initiate these proceedings earlier in March. I conclude that this record of the claimant's mental health on 21 March 2023 is not relevant to the issues before me, which relate to the period from 17 February 2022 to 3 March 2023. The same goes for other medical records dated later in 2023.

56. The claimant said that when she was dismissed, she was involved in a personal injury claim against her employer in relation to an accident at work. This must have involved court proceedings, and input from the claimant. The time frame and the circumstances were very unclear, including as to whether the defendant was the respondent or an earlier employer. But she did have a solicitor acting for her provided by her union (GMB) for a period from before her dismissal until a time after the appeal hearing. She said (and I accept) that at some stage after she was dismissed the union asked her to drop the accident claim after 2 years, and she was unhappy about that. It was not clear exactly when the case was dropped but it is more likely than not that it was in the second half of 2022.

57. Mr Clayton cross-examined the claimant in relation to her assertion that she was not in a position to bring her claims until February/March 2023 owing to her ignorance about ACAS and related matters as well as her mental health. His questions related to whether she had received advice about her rights much earlier. When asked specifically by Mr Clayton about this, she said she could not recall when she was first told to go to the Tribunal, but she did say the union representative, as well as the lawyer, had given her some advice about making an employment tribunal claim.

58. The claimant agreed with Mr Clayton that her "union lawyer" had advised her to go to the employment tribunal in relation to bullying and harassment. I accept this evidence. This was a reference to the solicitor dealing with her accident claim. It was not clear exactly when this happened, but I consider it more likely than not that it was after her

dismissal. She must have told the solicitor about the events at work she was unhappy about. She also said that she remembered being told by someone, possibly her union lawyer, that she could also go to the Tribunal about her dismissal. Clearly, she must have told him about that after it happened

59. The claimant said that she had been advised by an agency to inform her union about what was happening to her at work, and did so. I accept her evidence, although it was not clear what "agency" that was or when she approached her union about her dismissal. But she was certainly supported at her appeal hearing on 21 March by Mr Blake from the GMB Union. She said in cross–examination that a union representative had given her some advice about going to the Tribunal; and I find that that was the case. Again, it is not clear exactly when this happened but I would expect him to have told her about complaining to the Tribunal around the time of the appeal hearing. She also had the opportunity at any time after she was put in touch with Mr Blake after her dismissal to ask him about how to make a claim, had she wanted to do so. She could also have asked her "union lawyer".

60. The claimant also said (and I accept) that she also approached the Citizens Advice Bureau for advice and she said she was told to approach the Tribunal. It was not clear when this happened, but (a) it appeared to be around the time she had had some advice from her union and union lawyer and (b) it was before she left the UK for Nepal later in 2022. This also shows that the claimant was aware of the CAB and could have asked them for further advice, had she wanted to.

61. I find, based on the evidence described above taken together, that the claimant did receive some legal advice or information from a lawyer, from her union representative and from the CAB about her right to go to the Tribunal in relation to the matters underlying her claims. The exact date or dates when this happened is not entirely clear, but in relation to the dismissal it would obviously have taken place after 17 February. I would expect her union representative to have mentioned the right to complain to the Tribunal around the time of the appeal hearing on 21 March 2022. For this reason I consider it more likely than not that she would not have had all the information she said she was given until a time after the rejection of her appeal on 23 March 2022. I consider it more probable than not that she had all the advice and information she referred to by 20 July 2022.

62. The claimant had those three direct sources of advice available to her after the appeal hearing until she left for Nepal in September 2022 (see below). If she had wanted to make a Tribunal claim she could have found out any missing information from them. That is in addition to the various sources of information available generally to potential claimants. I note also that in late February 2023 she was able to find a member of her community to help her with the ET1 form (see below). I cannot see any reason why she could not have done this after 20 July 2022, had she wanted to make a complaint to the Tribunal.

63. My findings above as to the claimant's state of knowledge about her legal rights, and her opportunities to take advice, contradict her assertion in her oral evidence that she did not understand her rights, the law and how to bring a claim until shortly before 3

March 2023. It is inconceivable that she would not have mentioned her complaints to her lawyer and union representative after she had been dismissed. I have found, based on her own evidence, that she was given some legal advice and information by her lawyer and union representative. She also knew about the CAB, had consulted them and been given advice on going to the Tribunal. So, in addition to the advice or information she was given, she could have approached the lawyer, her union or the CAB for more specific advice as to how to bring a claim, if she had wanted to.

64. The claimant did not give a coherent reason for not acting on the advice she had received. I found her oral evidence as to the reasons for the delay past July 2022 to be unclear and unsatisfactory, and especially in relation to why she did not "pay attention" (as she put it) to the legal advice or information that she was given. She said she needed to feel better before acting and that she forgot what she had been told. I do not accept her evidence that she simply forgot about what she was told. She certainly mentioned unfair dismissal to her GP in June 2022. She also said in evidence that at the time her mind was "not OK". Again, I do not accept her evidence on this point and have made various findings above as to the state of her mental health between February and July 2022 and beyond.

65. Mr Clayton asked her specifically why she did not act in June or July 2022 when her mental health had improved. Her answer was that she was uneducated and had no idea what to do. However, that answer is not consistent with the evidence about the information or advice that she was given and what further advice or information was available to her if she had wanted to proceed with a claim. There is no reason to think that her solicitor or her union representative, or the CAB, would not have given her further information if asked. There are also sources readily available to anyone as to how to make a Tribunal claim.

66. I do not know why the claimant did not go on to make a claim in August 2022, after her mental health had improved as recorded by the LIFT assessment on 20 July. She may have decided not to do so or perhaps put off making a decision. But she certainly failed to act on the advice or information she was given, when she had a reasonable opportunity to do so.

67. The claimant said that she saw an advertisement from ACAS on Facebook in February 2023 and then contacted them, received advice and found a member of her community who was able to help her complete and submit her ET1 form. She said all this happened within a few days, culminating in the presentation of the form on 3 March 2023. This evidence was not disputed by Mr Clayton and I accept it. But Mr Clayton did not accept her assertion that February 2023 was the first time she became aware of her rights and ability to bring a claim in the Tribunal. I agree with Mr Clayton that her evidence on that is contradicted by the evidence she gave about the advice or information she received in 2022, when she became aware of her right to go to the Tribunal. Whether at that time she was specifically aware of ACAS and the need to start off by approaching them is unclear, but if not aware of that she had sources of advice and information, and so had a reasonable opportunity to ask about this, had she wanted to proceed.

68. The GP record of 22 June 2022 referring to a request for a doctor's letter is evidence that on that date the claimant knew about the term "unfair dismissal" and had been thinking about making a complaint to the Tribunal. I find that this was the case. Whether the request was made because someone told her to approach her GP is unclear, so I make no finding on that.

69. At some point in mid-2022 the claimant worked for a former employer, doing two 12-hour shifts a week in a care home for at least a month. The exact dates were unclear but this information is consistent with her being fit to work at the time, although the claimant said that she stopped in the end owing to some pain she was experiencing. She also from time to time went to her husband's workplace (St John Care Trust) and did things which appeared to amount to light work, but the evidence about this was uncertain, so I make no specific findings about it.

70. The claimant spent some time in Nepal in the second half of 2022. Again, the details and dates were very unclear, but it appeared that she left at some point in September 2022 and came back at some point between mid-November and mid-December 2022. A GP note from 12 January 2023 refers to a return "1 month back", suggesting she returned in early December. She said this trip was for her health, and to get treatment, but the only medical evidence from this time relates to physical problems. If she had had treatment for mental health issues, I would have expected this to be demonstrated by documentary evidence. There is none.

The law

i.

71. The law relevant to the time limits issues was set out in Employment Judge Bax's Case Summary of 1 August 2023.

Unfair dismissal, notice pay, holiday pay and detriment for whistleblowing

72. Section 111(2) of the Employment Rights Act 1996 ("ERA 1996") provides that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination, or 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.

    This means that if the claim is not brought within the relevant 3 month period, it is for the claimant to show that it was not reasonably practicable for the claim to have been brought in time and (if so) that the claim was brought within a reasonable period thereafter.

73. There are similar time limit provisions relating to the claims for breach of contract (notice pay), for holiday pay and for detriment for whistleblowing. In the case of holiday pay, time does not necessarily start to run from the termination of the employment relationship, and might otherwise run from the date the payment should have been made. In the case of whistleblowing detriment time starts to run either when the act or

failure constituting a detriment took place or, where there is a series of two or more similar detriments, when the last took place.

74. There are legislative provisions for the 3-month period applicable to each kind of claim to be extended to allow for the time spent on early conciliation with ACAS. But if ACAS is approached within the 3 months period, that period is not extended.

75. The two questions posed by the provisions referred to above are essentially questions of fact for the Tribunal, taking all the circumstances of the case into account (*Palmer and Saunders v. Southend on Sea BC* [1984] IRLR 119). This will usually involve consideration of the following so far as relevant in the particular case (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 their 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 substantive fault on the part of the claimant or their adviser which led to the failure to present the complaint in time. In this case consideration (4) is not in issue, but the others are relevant.

76. In *Palmer,* the Court of Appeal (May LJ) concluded that "reasonably practicable" does not mean "reasonable" (which would be too favourable to employees) and does not mean physically possible (which would be to favourable to employers) but means something like "reasonably feasible".

Discrimination/harassment claims

77. Section 120 of the Equality Act 2010 ("EA 2010") gives jurisdiction to the Tribunal to deal with complaints of direct discrimination (section 13), or harassment (section 26), on the grounds of race and/or religion or belief. Section 123(1) provides that the proceedings on a complaint under section 120 (which confers jurisdiction on the Tribunal for such complaints) 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.

    Under section 123(3)(a), conduct extending over a period is to be treated as done at the end of that period.

78. There are legislative provisions for the 3-month period allowed by section 123(1)(a) to be extended to allow for the time spent on early conciliation with ACAS. But if ACAS is approached after the end of the 3-month period, that period is not extended.

79. If the claims for direct discrimination and harassment were made out of time (ie outside the primary period of 3 months plus any extension) the Tribunal has no jurisdiction to deal with them and the claims must be dismissed unless they were made within such period as the Tribunal may think "just and equitable".

80. The words “just and equitable” give the Tribunal a broad discretion in deciding whether to extend the time allowed for making a claim. Underhill LJ commented in *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, that a rigid adherence to any checklist of factors (such as the list in section 33 of the Limitation Act 1980) can lead to a mechanistic approach to what is meant to be a very broad general discretion. He observed in paragraph 37: “The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time including in particular … “The length of, and the reasons for, the delay”.”

81. This follows the dicta of Leggatt LJ in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640 at paragraphs 18 and 19: “[18] … It is plain from the language used (“such other period as the employment tribunal thinks just and equitable”) that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of [EA 2010] does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in the circumstances to put a gloss on the words of the provision or to interpret it as if it contained such a list … [19] that said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).”

82. It is also clear from the following comments of Auld LJ in *Robertson v Bexley Community Service* [2003] IRLR 434 CA that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds 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 discretion is the exception rather than the rule". These comments are supported in *Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT* and *Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.*

83. Langstaff J stated in *Abertawe Bro Morgannwg University Local Health Board v Morgan* (at the EAT) that before the Employment Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was.

84. However, As Sedley LJ stated in *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 CA at paragraphs 31 and 32: “In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened, and ought not to happen, in relation to the power to enlarge the time for

bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact and sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it.

85. If the claimant professes ignorance of his right to make a claim and/or the legal regime in respect of time limits, the overarching question for the tribunal is whether that state of mind (that is the ignorance or the mistake) was itself reasonable. It is not likely to be reasonable if it arises from a failure to make such enquiries as ought to have been made in all the circumstances (*Wall's Meat Co Ltd v Khan* [1978] IRLR 499).

86. As for the rule in section 123(3)(a) that conduct extending over a period is to be treated a done at the end of the period, the essential question is whether the alleged acts are continuing acts or separate distinct acts. In *Commissioner of Police of the Metropolis v Hendricks* 2003 ICR 530 the Court of Appeal advised employment tribunals against taking too literal an approach to the question of what amounts to conduct extending over a period. In that case a female police officer claimed (while on stress-related sick leave) that she had suffered sex and race discrimination throughout her 11 years' police service, making numerous allegations against about 50 colleagues. The employment tribunal and the EAT decided that if there was no 'policy' of discrimination there was, accordingly, no continuing act of discrimination. The Court of Appeal held, however, that the EAT focused wrongly on the existence of otherwise of a "policy". Instead, what was important was the substance of the allegations was that the respondent was responsible for a continuing state of affairs in which female ethnic minority officers suffered less favourable treatment. Was that an act extending over a period, as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each act was committed?

87. The test set out *in Hendricks* was followed by the Court of Appeal in *Lyfar v Brighton and Sussex University Hospitals Trust* 2006 EWCA Civ 1548. In that case there were 17 complaints of race discrimination concerning the way in which the respondent had investigated complaints of bullying and harassment made against her by a co-worker. The employment tribunal decided that the allegations about the employer's internal investigation and subsequent disciplinary hearing (which were, in themselves, continuing acts of discrimination) were not linked to later allegations about her manager's actions after the disciplinary hearing and the employer's handling of her grievance. So, the events giving rise to the 17 complaints were not all part of one continuing act of discrimination, Some of the earlier complaints were potentially time-barred. Ultimately the Court of Appeal upheld the decision on the facts, following the test set out in *Hendricks*.

88. Later cases have also followed *Hendricks. In Aziz v FDA* 2010 EWCA Civ 304, the Court of Appeal noted that, in considering whether separate incidents form part of an act extending over a period, 'one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents'. In *Greco v General*

Physics UK Ltd EAT 0114/16, the EAT held that despite six of seven acts of sex discrimination involving a particular manager, that involvement was not a conclusive factor and the employment tribunal was justified in finding that the allegations concerned different incidents treated as individual matters. Accordingly, they were not considered as part of a continuing act and, in consequence, some were out of time.

Conclusions

(1) Unfair dismissal, notice pay, holiday pay and detriment for whistleblowing

89. I deal first with the time limit issues relating to claims for unfair dismissal, detriment for whistleblowing, breach of contract (notice pay) and holiday pay.

    Was the complaint made to the Tribunal within 3 months (plus Early Conciliation extension) of the effective date of termination or act complained of?
    In respect of detriment only, if not, was there a series of similar acts or failures and was the claim made to the Tribunal within 3 months (plus Early Conciliation extension) of the last one?

90. The primary 3-month period for bringing claims for unfair dismissal and breach of contract starts with the effective date of termination of the claimant's employment contract. In this case, so does the claim for accrued but untaken holiday pay as there is no evidence to support a finding that the relevant date is earlier.

91. The effective date of termination was 17 February 2022. The 3-month period beginning with 17 February ended on 16 May 2022. The claimant did not contact ACAS during that period, so the provisions extending the period to allow for early conciliation through ACAS do not apply. Therefore, the claims made on 3 March 2023 were made about 9.5 months out of time.

92. In relation to whistleblowing detriment, there are five alleged detriments done by the respondent. The last three in terms of timing are clearly linked and are a series of similar acts culminating in the decision not to uphold the appeal against dismissal on 23 March 2022. So the 3-month period for them would end on 22 June 2022, making the claims in relation to those alleged detriments almost 8.5 months out of time.

93. The first two alleged detriments (in October or November 2021) appear to me to be isolated acts by colleagues of the claimant. The 3-month period ended on 21 January 2022 for the first (being hit by "Cathy" on 22 October 2021) so the claim for this was over 13 months late, The 3-month period for the second (being locked in a room by "Claire") ended on 29 February 2022, so the claim was more than one year late.

    I do not have enough evidence to conclude that these two alleged detriments were part of a series of similar acts with other three detriments. But if I am wrong on that, the 3-month period for them would end on 22 June 2022, making all the detriment claims about 8.5 months out of time.

94. As all the claims were made out of time, it is for the claimant to show that it was not reasonably practicable (i.e reasonably feasible) for the claims to be made in time. Otherwise, time cannot be extended and the claims must be dismissed. If the claimant can do that then she must show that the claims were made within a reasonable period after the end of the primary period of 3 months. Otherwise, time cannot be extended and the claims must be dismissed.

    Was it reasonably practicable for the claim(s) to be made to the Tribunal within the time limit?

95. The claimant's written statement (as further explained in her oral evidence) asserts that she had mental health difficulties which prevented her from bringing the claims in time. Such difficulties are, of course, capable of affecting a claimant's ability to bring employment tribunal proceedings. She also says she did not know about ACAS or how to bring a claim until towards the end of February 2023.

96. I refer to my above findings of fact as to the claimant's state of mental health from the end of 2021 until after she presented her claims in March 2023 and as to her knowledge of her right to complain to the Tribunal about bullying, harassment and her dismissal.

97. In the period from her dismissal on 17 February until after her appeal was rejected on 23 March 2022 I would expect the claimant to have been focusing on her appeal. It would not be reasonable to expect her to be thinking about initiating employment tribunal proceedings, even if she was aware of her rights in that regard and was well enough to do so. At times during that period, she was not well enough to do that, and I do not think the fact there may have been times when she was well enough makes it reasonably practicable to act. Her mental health was fluctuating.

98. After 22 March 2022, the claimant's mental health would need to have improved before I could properly regard it as reasonably practicable for her to be initiating employment tribunal proceedings. While things improved at the start of June there is evidence of further fluctuation, which makes it impossible for me to conclude that they had improved sufficiently and for long enough by 16 May 2022 to make it reasonably practical to initiate the claims that needed to be made within the 3-month period ending on that date (see paragraph 91 above). Accordingly, I conclude that it was not reasonably practicable, for reasons connected with her mental health, for the claimant to initiate her claims for unfair dismissal, breach of contract (notice pay) and holiday pay within the period of 3 months ending on 16 May 2022. I note that the first direct medical evidence of an improvement in the claimant's mental health relates to a time after that date, and I cannot infer from that evidence that she could reasonably have acted before 16 May.

99. In relation to the claims for whistleblowing detriments, the primary 3-month period ended on 22 June for the last three of the five alleged detriments. Those three detriments are all linked to the claimant's dismissal and I conclude that they form a series of similar acts over a period with the last taking place on 23 March 2022 (when the appeal against dismissal was rejected). While there is evidence of an improvement

in the claimant's mental health at the end of May or in early June 2022, her mental health was still fluctuating. It was not until 20 July that the LIFT report clearly records that her symptoms of depression and anxiety had reduced to "moderate". Accordingly, I conclude that it was not reasonably practicable, for reasons connected with her mental health, for the claimant to initiate her whistleblowing detriment claims in relation to the last three of the alleged detriments in the 3-month period between 23 March and 22 June 2022 (see paragraph 92 above).

100. As for the first two alleged whistleblowing detriments, the primary 3-month period is from 21 October 2021 to 20 January 2022 for the first and 30 November 2021 to 28 February 2022 for the second (see paragraph 93 above). I do not see any particular connection between these detriments, and do not regard them as similar. So I must consider the position in relation to each of those periods.

101. There is some evidence of the claimant having mental health issues between October 2021 and January 2022, which the claimant identified in her written statement. But the medical evidence is less clear as to the extent of those issues in this period than the later evidence from mid-February 2022 onwards. In relation to the second of the above 3-month periods (30 November 2021 to 28 February 2022), I have found that on 15 February 2022 she was severely depressed and failed to attend her disciplinary hearing on 16 February. There was certainly no realistic chance of her being in a position to take legal action in the last two weeks of the 3-month period ending on 28 February 2022, and that was more likely than not to be the position for some days prior to her LIFT assessment on 15 February. She was able to participate in the investigation meeting on 3 February, so her mental health must have been better then. She was also working normally up until her suspension on 3 February. I have not found that her state of mental health would have inhibited her from initiating claims prior to 3 February 2022. That is because the evidence does not, in my view, support such a finding.

102. In the light of all the medical evidence, I am unable to accept the claimant's assertion that her state of mental health prevented her bringing claims for her first two alleged detriments in the relevant primary 3-month period. In my view that is only made out for the last three weeks or so of February 2022. I have of course also considered the claimant's oral evidence as to the reasons for the delay, but this consisted of very general and sweeping assertions about her health, which did not mention any specifics. I prefer to rely on contemporaneous medical records.

103. But nothing much turns on my view of the claimant's mental health during the two relevant 3-month periods because I consider that her other explanation for not acting (i.e. lack of legal knowledge) is well-founded in relation to times before her dismissal on 17 February 2022. I reach this conclusion primarily because I have not found that prior to that date she had sufficient knowledge of her right to go to an Employment Tribunal for it to be reasonable to expect her to have done so. She was given relevant legal advice or information by her "union lawyer", her union representative and the CAB, but it was not clear exactly when she was given it, and I consider it more likely than not to have been after her dismissal. That is when it was most likely that she would be talking and thinking about employment law issues. For

these reasons I consider that it was not reasonably practicable for the claimant, as a lay person with limited or no legal knowledge about employment proceedings, to bring the claims in respect of the first two alleged detriments in time.

104. In relation to the second detriment, it is possible that she might have become aware in February 2022, after her dismissal, of enough information about her rights to enable her to take steps to initiate a claim. But it would not have been reasonably practicable for her to act on the information when she was seriously unwell or her mental health was fluctuating.

105. It follows from the above conclusions that it was not reasonably practicable for the claimant to make any of her whistleblowing detriment claims in time.

If it was not reasonably practicable for the claims to be made to the Tribunal within the time limit, were they made within a reasonable time?

106. This issue requires me to consider whether the claimant's state of mental health allowed her a reasonable opportunity to bring her claims before she did (on 3 March 2023) and/or whether the lack of legal knowledge she asserts made it reasonable for her to bring her claims when she did.

107. As discussed above, I have concluded that it was not reasonably practicable for the claimant to bring her claims in time, owing to her fluctuating mental health difficulties and/or her limited knowledge about her legal rights. Although there were periods when her state of mental health improved, there was insufficient evidence to show that the improvements lasted long enough to make it reasonable for her to have taken action to initiate proceedings during any of the relevant primary 3-mont periods for bringing her various claims (assuming she had or ought to have had the necessary legal information). However, the last mental health assessment for 2022 mentioned in the documentary evidence (the LIFT report on 20 July) recorded a significantly improved PHQ score at "moderate" for depression and a moderate score for anxiety. There is then no documentary evidence of any more significant mental health problems until after the claims were presented.

108. I conclude based on the documentary evidence that the claimant has not shown that her mental health problems were such that it was reasonable for her to bring her claims on 3 March 2023. That is because the mental health difficulties that were affecting her in February and March 2022 and her state of knowledge of legal matters in relation to employment tribunal proceedings did not prevent her bringing her claims during the whole period from 17 May 2022 until 3 March 2023.

109. Based on my findings as to the claimant's state of mental health after 20 July 2022 and on the legal advice and information given to her prior to that date, I conclude that, from that date, she did have a reasonable opportunity to initiate her various claims. Her mental health had greatly improved by that date and she had had legal advice or information from her lawyer, her union representative and the CAB. If she had wanted to initiate tribunal proceedings, there was information available from them as well as from all kinds of other sources as to how to do so. That reasonable

opportunity was open to her more than 7 months before she actually did present her claims.

110. While it might reasonably have taken some time, say up to a month, for her to initiate employment proceedings after 20 July 2022, there remains at least 6 months' further delay from 30 August 2022 before the claimant presented the claims. That is a significant delay. I note also that she mentioned "going to court" during her appeal hearing and mentioned unfair dismissal to her doctor in June 2022. But she did not take action to pursue her claims until the end of February 2023. It was not in my view reasonable for the claimant to delay taking steps to initiate her claims for so long, once she had a reasonable opportunity to ao so.

111. It follows from my conclusions above that the Tribunal does not have jurisdiction over the claims for unfair dismissal, breach of contract (notice pay), holiday pay and whistleblowing detriment. Accordingly, those claims are all dismissed.

112. I add two further observations on this issue. First, Mr Clayton submitted that the claimant could have initiated proceedings from about 9 June 2022, when her GP recorded a reduced PHQ score of 9 (mild depression). While the medical evidence suggests there had been a significant improvement by then, there was evidence of more serious issues later in June. Her mental health was still fluctuating. Also, it is difficult to be sure exactly when the claimant received the legal advice or information she said she had received; but it is in my view more likely than not that it was on or before 20 July 2022. This is why I prefer to base my conclusions on that date being the latest point at which he had a reasonable opportunity to act on any wish to make a Tribunal claim. It is possible that that point was reached before 20 July 2022, but that is the date I consider it right to focus on in determining the "reasonable period" issue.

113. Secondly, I do not consider that the claimant's absence in Nepal for up to 3 months in 2022 affects my conclusions. The reality was that she was unlikely to present a claim form while in Nepal. But I do not accept that her voluntary absence is itself a good reason for the delay so far as her time away is concerned. It might be different if she could have shown that her mental health problems were significant until she left for Nepal and that the trip was reasonably required for her to recover her mental health. But she has not, in my view, shown either of those things. There is no evidence that her mental health difficulties worsened after 20 July 2022 and before she did present the claims. So, I do not consider her absence abroad justifies her failure to act between 20 July 2022 and 3 March 2023. But even if I am wrong about this point, I agree with Mr Clayton's submission that she had a reasonable opportunity to initiate proceedings before she left, or after she returned, had she wanted to.

Direct discrimination and harassment claims

114. I deal now with the claims made by the claimant for direct discrimination and for harassment on the grounds of race and/or religion or belief.

Was the complaint made to the Tribunal within 3 months (plus Early Conciliation extension) of the act or omission to which the complaint relates?

If not, was there conduct extending over a period?
If so, was the complaint made to the Tribunal within three months (plus Early Conciliation extension) of the end of that period;

115. The dates of the alleged acts of direct discrimination and/or harassment (from the pleaded case as recorded by EJ Bax in his list of issues from 1 August 2023) are set out in paragraph 23 above.

116. The allegation relating to Monika and Claire threatening to remove her mangal sutra dates back to the start of the claimant's employment, but is presented as an ongoing matter as pleaded, so I will assume it continued until her dismissal on 17 February 2022. Accordingly, the discrimination or harassment claims relating to that allegation should have been made in the 3-month period ending on 16 May 2022, and so were made 9.5 months late. As the claimant did not approach ACAS until February 2023, the provisions for extending the 3-month period to allow for early conciliation do not apply.

I note that if this allegation and any other alleged acts of discrimination/harassment are part of a course of conduct over a period, other claims forming part of the same course of conduct would also be taken to have taken place on 17 February (the date of the last act) and so were made 9.5 months late.

117. The allegation that the claimant was hit by a colleague Cathy relates to events on 22 October 2021. Unless part of a course of action extending over a period ending later than 22 October the claims relating to that allegation should have been brought within the 3-month period ending on 21 January 2022, and so were made just over 13 months late. Again, there is no basis for extending the period to allow for early conciliation. I have not identified any basis on which this allegation could be said to be part of a course of conduct involving other acts alleged by the claimant.

118. The allegation relating to being told by the cook that the claimant was eating lamb (and not beef) relates to a date in November 2021. I will take that event as happening on 30 November, as the most favourable date as far as the claimant is concerned. That means the claims relating to this event should have been brought within the 3-month period ending on 28 February 2022 and so were made just over one year late. Again, there is no basis for extending the period to allow for early conciliation. Nor have I identified any basis on which this allegation could be said to be part of a course of conduct involving other acts alleged by the claimant.

119. The allegation that the claimant was locked in a room by Claire relates to a date in October or November 2021. Again, taking 30 November 2021 as the date most favourable to the claimant, the claims in relation to this allegation should have been made within the 3-month period ending on 28 February 2022 and so were made just over one year late, and there is no basis for extending time under the early conciliation provisions. Although this allegation involves the same person as the first allegation (see paragraph 116 above) it appears to me that what is being alleged are two isolated incidents, rather than a course of conduct. But the difference that would make, were I

wrong on that point, is modest: the claims relating to this allegation would still be about 9.5 months late, even if the act alleged was part of a course of conduct over a period.

120. The other three acts pleaded are linked and relate to the decision to dismiss on 17 February 2022. The claimant alleges the misconduct complaints made against her were invented by the respondent and that the decisions to dismiss her and then to dismiss her appeal (on 23 March 2022) were acts of discrimination. It is in my view right to take the three acts alleged as a course of conduct over a period ending on 23 March 2022. The claims should therefore have been made within the 3-month period ending on 22 June 2022. That makes the claims relating to those three alleged acts about 8.5 months late.

121. All of the above claims were, therefore, well out of time and can only proceed if the claimant has shown facts from which I can properly conclude that it is just and equitable to extend time.

If not, was the claim made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

(a) Why were the complaints not made to the Tribunal in time?

(b) In any event, is it just and equitable in all the circumstances to extend time?

122. The claimant gave no explanation as to why claims relating to the alleged incidents prior to her dismissal were not brought in time. Her explanation related to events after her dismissal and the decision not to uphold her appeal against dismissal. However, I will assume that her explanation is the same for all her claims, i.e. that she was not well enough to act until February or March 2023 and did not know about her legal rights or how to bring claims until the end of February 2023.

123. I have already dealt with the claimant's explanation for the delay from 17 February 2022 until 3 March 2023, concluding that while it was not reasonably practicable for the claimant to bring her other claims before 16 May 2023 it was not reasonable for her to delay from that date until 3 March 2023. That was because from 20 July 2022 she had a reasonable opportunity to act because her mental health no longer inhibited her, she had had legal advice or information as to her rights and had the opportunity to find out how to initiate an employment tribunal claim if she wished to make one.

124. In my view the same conclusions apply to her discrimination and harassment claims, in relation to the period from 17 February 2022 to 3 March 2023.

125. In relation to some of the specific allegations of direct discrimination or harassment, the primary 3-month period for bringing claims expired sooner than 16 May 2022. While she might have been better able to act at the time in terms of her mental health, she would not have had the necessary information about her rights and so the failure to act then is excusable.

126. The primary 3-month period relating to her three linked allegations about her dismissal and rejection of her appeal being discriminatory acts based on falsified

allegations expired on 22 June 2022. As I have found above, her mental health had improved by 20 July 2022 at the latest, and from then on she had a reasonable opportunity to bring her claims if she had wanted to.

127. As set out in more detail above under "the law", the legal test for extending time on the basis that it is just and equitable to do so is of course broader than the "reasonably practicable" test and involves consideration of all the relevant circumstances of the case. I have not identified anything in the circumstances of this case that indicates to me that it would be right to extend time for the direct discrimination and harassment claims. The claimant has not, in my view, shown through her evidence that it is just and equitable to do so.

128. In terms of the length of the delay, I have concluded above that the claimant delayed for at least 6 months after the time by which she could reasonably have initiated her claims, had she wanted to. That was based on her having a reasonable opportunity to initiate action by 20 July 2022, at the latest. In my view a delay for another 6 months after 30 August 2022 is significant and was not justified. I have not identified any good reason for the claimant's failure to present her claims by 30 August 2022 at the latest.

129. Mr Clayton submitted that the merits of the underlying claims are relevant and are weak. I do not accept his submission that this is a point against extending time. It is in the nature of discrimination claims that much depends on the actual evidence given at the final hearing, and there is limited material before me as to the evidence. For the same reasons I do not consider the merits of the claims to be a point in the claimant's favour. I have insufficient material on which to base any assessment of the prospects of the claims. I do not consider that the merits of the claims are anything but a neutral factor in relation to the "just and equitable" test.

130. I have considered the balance of hardship in this case. The claimant would of course lose the right to have her claims heard if time is not extended. But the claims were made very late. There is no direct evidence about this, but the delay will inevitably have made it harder for the respondent to defend the claims in practice than would have been the case had the claims been made 6 months earlier. I conclude that the balance of hardship is not a significant point in the claimant's favour.

131. It follows from the above conclusions that I do not consider that it is just and equitable to extend time in relation to the direct discrimination and harassment claims. Accordingly, the Tribunal has no jurisdiction over those claims, which must be dismissed.

Employment Judge Hogarth
12 September 2024

Sent to the parties on:

30 September 2024

Jade Lobb
For the Tribunal