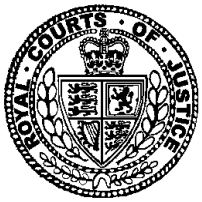

Neutral Citation Number: [2021] EWCA Civ 23

Case No: A2/2020/0025

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
Kerr J

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 January 2021

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))

LORD JUSTICE MOYLAN

and

LORD JUSTICE NEWEY

- -

OLUFUNSO ADEDEJI — **Appellant**

v

UNIVERSITY HOSPITALS BIRMINGHAM NHS FOUNDATION TRUST — **Respondent**

- -

The Appellant in person
Ms Gemma Roberts (instructed by **Mills and Reeve LLP**) for the **Respondent**
Hearing date: 10 December 2020

- -

Approved Judgment

Lord Justice Underhill:

1. The Appellant was employed by the Respondent Trust as a consultant colorectal surgeon. Following the deaths of a patient in 2014, and associated issues, he was the subject of a prolonged capability and conduct process which culminated in a hearing in late 2016 and early 2017. The panel decided that he should be dismissed from his current position, but he was offered what was in effect a demotion to a role involving less complex day-care surgery. He initially accepted that offer, but there were problems about agreeing consequential matters, and on 25 May 2017 he gave three months' notice of resignation. His employment accordingly ended on 25 August.

2. On 27 November 2017 the Appellant commenced proceedings against the Trust in the employment tribunal, complaining of unfair (constructive) dismissal and race discrimination. The attached "claim details" are not professionally pleaded (though there appears to have been some legal input). The gist of the unfair dismissal claim is that the concerns about his capability were unfounded and that there were no grounds for the decision that he should be dismissed from his previous role: various episodes over the period back to mid-2014 are referred to, though there are also complaints about the handling of the demotion, which triggered the Appellant's resignation. As for the discrimination claim, the only allegations of race discrimination relate to an episode in late 2016 when proposals were made by the Trust that he should return to Nigeria: two specific dates are pleaded – 30 November and 8 December.[1]

3. In its response the Trust took the point that the Appellant's claim was out of time. That issue was determined by Employment Judge Woffenden at a preliminary hearing held on 24 July 2018 in Birmingham. She held that both the unfair dismissal and the discrimination claims had been presented outside the primary time limits and she declined to grant any extension; the complaint was accordingly dismissed. Written reasons were sent to the parties on 23 October 2018. The Appellant applied for a reconsideration of the decision but the Judge refused that application.

4. The Appellant appealed to the Employment Appeal Tribunal. On 3 December 2019 Kerr J dismissed his appeal.

5. On 6 April 2020 Henderson LJ granted the Appellant permission to appeal, but only as regards (one aspect of) the claim of race discrimination, and on limited grounds which I will explain below.

6. Before us the Appellant appeared in person, as he also did in the ET, although in the EAT he was represented by counsel. The Trust was represented by Ms Gemma Roberts of counsel, who also appeared at both stages below.

7. I start with the relevant provisions about limitation. By section 123 (1) of the Equality Act 2010 a complaint of discrimination may not be brought after (a) the end of a period of three months starting with the date of the act to which the complaint relates ("the

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[1] There is also reference to an incident in June 2017 which could be understood as an allegation of harassment in the statutory sense, but that is not now pursued, and I mention it only because there is a reference to it in a passage from ET's Reasons which I quote below.

primary time limit") or (b) within such other period as the employment tribunal thinks just and equitable: the latter alternative is commonly referred to as the tribunal granting an extension.

8. I should also refer to two aspects of the statutory early conciliation process introduced by the Enterprise and Regulatory Reform Act 2013:

(1) Section 18A (1) of the Employment Tribunals Act 1996 ("the ETA 1996") provides that before a prospective claimant presents a claim to the employment tribunal they must (in summary) notify ACAS of the dispute and the intended claim. A conciliation officer is then required to endeavour to promote a settlement within a prescribed period (subsections (2) and (3)). If he or she concludes that a settlement is not possible, or the prescribed period expires without a settlement, they must issue a certificate to that effect (subsection (4)). Proceedings cannot be issued without such a certificate (subsection (8)).

(2) Where the process under section 18A has not yet run its course, section 140B of the 2010 Act provides for the automatic extension of the primary time limit by a period whose exact length depends on the circumstances. (Section 207B of the Employment Rights Act 1996 ("the ERA 1996") makes equivalent provision as regards claims under that Act, which include complaints of unfair dismissal.)

In *Commissioners of Revenue and Customs v Garau* [2017] UKEAT 0348/16, [2017] ICR 1121, the EAT held that once the process under section 18A had been completed no further attempt at conciliation through ACAS would have the effect of extending time under section 140B.

9. It appears to have been accepted throughout these proceedings that, since the conduct which the Appellant says entitled him to resign included an act of discrimination (see para. 2 above), he was at least arguably entitled to treat the expiry of his notice on 24 August 2017 as a distinct discriminatory act occurring on that date.[2] Even on that basis, however, his claim in respect of that act was presented three days outside the primary limitation period; and as regards any prior act of discrimination the delay would be longer. Before the ET the Appellant's main case was that the primary time limit had been extended by section 140B of the 2010 Act; but he contended in the alternative that it was just and equitable that he should be granted an extension under section 123 (1) (b).

10. As will appear later, the Appellant is not entitled to pursue before us his contention that his discrimination claim was in time by reference to the primary time limit as extended by section 140B. We are thus only concerned with the claim for an extension under section 123 (1) (b). As to that, his case in the ET principally appears from a document which he presented to the tribunal at the start of the hearing, and which was treated as his witness statement, although he evidently developed it somewhat in his oral evidence and submissions at the hearing. The case had three strands, though there is some overlap between them. I summarise them below. Essentially the same points were relied on in support of the application for an extension as regards his unfair dismissal

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[2] I am not myself persuaded that that approach was correct, but since the point was not argued before us I should accept the basis on which the parties proceeded.

claim, though in that case the test is whether it had been "reasonably practicable" to present the claim in time: see section 111 (2) of the ERA 1996.

11. The first strand in his case was that he said that until almost the end of the primary limitation period he believed that he could obtain an extension under section 140B of the Act (and section 207B of the ERA 1996 as regards his unfair dismissal claim) by giving a notification to ACAS under section 18A (1) of the ETA 1996. If, which he did not accept, he was wrong about that he contended that his mistake was a reasonable one. The circumstances are a little complicated, but I can sufficiently explain them as follows.

(1) By an e-mail sent on 20 May 2017, i.e. some five days prior to his resignation, the Appellant sought to initiate the statutory early conciliation procedure by notifying ACAS of his dispute with the Trust and his intended claim. In the e-mail he identified as his representative the BMA employment adviser who had been assisting him in his dealings with the Trust.

(2) On 22 May his adviser informed him that she should not have been named as his representative because the BMA had not agreed to represent him in any proceedings. Accordingly he telephoned ACAS the next day in order, as he put it in his witness statement, "to withdraw the application so that I could wait until I could get representation".

(3) The same day, i.e. 23 May, ACAS issued an "Early Conciliation Certificate" under section 18A (4) of the ETA 1996 "to confirm that the prospective claimant has complied with the requirement under ETA s18A to contact Acas before instituting proceedings in the Employment Tribunal". The certificate was evidently issued on the basis that ACAS treated the effect of the Appellant's "withdrawal" as being that settlement pursuant to his notification on 20 May was not possible, thus triggering the first alternative under subsection (4) (see para. 8 (1) above). There is no issue before us about whether it was correct to do so, and the certificate must accordingly be treated as valid. The Appellant nevertheless maintains that that does not correspond to what a layman would expect, since no actual attempt at conciliation had occurred: he submits that the natural understanding would be that when a notification had been "withdrawn" it could simply be treated as if it had never occurred, and thus that the certificate of 23 May was a nullity.

(4) On 16 November 2017, i.e. just over a week before the expiry of the primary time limit, the Appellant telephoned the solicitors Irwin Mitchell with a view to their acting for him in his dispute and spoke to a paralegal there. According to his witness statement, he told her about his earlier "withdrawn" application to ACAS. The statement continues:

> "She told me that I will still need to submit an ET1 by 24th November 2017 because I had undergone conciliation. At this time, I thought she had misunderstood what I had told her, because I had withdrawn my application and allowed [*sic*] to reapply at a later date. I was asked to send all my documents and the Acas certificate to her. I prepared a 600 page document which I sent over the next few days."

I observe, because it is important to what follows, that it thus appears from the Appellant's own evidence that he had been advised by Irwin Mitchell to present his claim by 24 November but that he did not accept that their advice was correct.

(5) On 23 November, i.e. the day before the expiry of the primary time limit, the Appellant submitted a fresh "notification" to ACAS. He said that, notwithstanding what he had been told by Irwin Mitchell, he believed that that would be effective to entitle him to an extension of time for presenting his complaint. He said in his witness statement that he had left it so late because he was awaiting the results of an investigation by the General Medical Council which he believed would vindicate him and would make it more likely that a settlement could be achieved.

(6) At 3.41 p.m. on 24 November, which was a Friday, the paralegal at Irwin Mitchell to whom the Appellant had spoken previously e-mailed him to say that, although he had not included the conciliation certificate in the papers which he had sent her, on the basis of what he had told her about it any further notification to ACAS would not be effective to extend time: she referred to *Garau*. She warned him that if he did not lodge his ET1 that day he risked being out of time. He says that he tried to get further advice from ACAS and from the Employment Tribunal Office but without success.

(7) It was the Appellant's case that only at that point did he appreciate that he needed to present an application that day. He at once began to prepare a claim but, for reasons to which I refer below, he did not present it until the following Monday, 27 November.

The Appellant says that that sequence of events constituted a reasonable excuse for his failure to present his application within the primary time limit and that that was highly relevant to whether it was just and equitable to extend time.

12. Second, the Appellant said that he did in fact manage to present what he believed to be a valid claim (albeit one which said that details of the claim would be supplied later), using the ET online portal, between 6 p.m. and 8 p.m. on 24 November. He received an automated message at 8.05 p.m. headed "Employment tribunal complete your claim". This acknowledged that he had "started a claim to the employment tribunal" and assigned it a claim number, which it said he would need to use "to return to your claim". It included a "Complete claim" button and told him that he would receive a confirmation email "once you've submitted your claim". It is clear from that message that he had not thus far achieved the formal presentation of a claim, but he says that he did not see it that evening but only the following morning. He worked on the ET1 over the next three days and finally submitted it late on the Monday night. The implication in the witness statement is that his initial misunderstanding that he had submitted a complete claim in time was venial and that that too was relevant to whether it was just and equitable to extend time. To anticipate, the Judge did not accept that the Appellant was under any such misunderstanding.

13. Third, he was only out of time by three days, which is not on any view a substantial period. In particular, it could not sensibly be said that the Trust had suffered any prejudice from such a delay (and still less so given that but for the fact of his first notification to ACAS, which he had not needed to make when he did, he would have had an absolute right to present the claim up to, at earliest, 24 December 2017).

14. It is convenient to mention one complication at this stage. It was necessary for the Appellant, by reason of section 18A (8) of the ETA 1996, to quote in the ET1 which he presented on 27 November the reference number for a certificate issued by ACAS under section 18A (4). At that stage ACAS had not attempted conciliation pursuant to his notification of 23 November, so he had no certificate relating to that notification, and accordingly he gave the reference number for the certificate issued on 23 May. In taking that course, the Appellant was trying to ride two horses which were going in different directions. He could only rely on the May certificate if it was valid; but if that was the case he was not entitled to an extension under section 140B because the attempt at conciliation which it evidenced pre-dated the start of the proceedings, and the claim should have been presented on 24 November. Conversely, if the May certificate was a nullity, he had entitled himself to an extension by his further notification to ACAS, and he not only did not need to but could not present a claim until he had a fresh certificate. However, I do not think that that complication advances the argument. We have to proceed on the basis that the May certificate was valid, in which case the Appellant's claim was presented outside the primary time limit and the Judge had to consider (among other things) whether there was a reasonable excuse for that. The fact that in the awkward situation in which he found himself he took an inconsistent course is not relevant to that question.

15. I turn to the Employment Judge's reasoning as regards the extension issue.

16. At para. 4 of her Reasons she makes her findings of fact. She summarises the events which I have set out at para. 11 above, including what the Appellant said about his understanding and motivation. In particular, at para. 4.3 she accepts that he believed following his telephone call to ACAS on 23 May 2017 that he had "effectively withdrawn his notification"; and at para. 4.7 she finds that until he received Irwin Mitchell's e-mail on 24 November 2017 he believed the ACAS certificate of 23 May to be a nullity. The only point at which she explicitly rejects his evidence relates to his statement that he initially believed that he had presented a valid claim on the evening of 24 November 2017: at para. 4.8 she describes his evidence to that effect as vague, confusing and difficult to follow and as not being credible. Her rejection of that evidence is not challenged before us.

17. At paras. 5-15 she sets out the relevant law. Most of this part is concerned with the test of reasonable practicability under the ERA 1996. As regards the correct approach to section 123 (1) (b) of the 2010 Act, she refers to *Robertson v Bexley Community Centre* [2001] UKEAT 1516/00, [2003] IRLR 434, as authority for the proposition that the burden is on the claimant to persuade the tribunal that it is just and equitable to extend time. She then refers to the often-cited decision of the EAT in *British Coal Corporation v Keeble* [1997] UKEAT 496/98, [1997] IRLR 336. At paras. 8-9 of her judgment in that case Smith J refers to an earlier decision of the EAT (Holland J presiding) in the same case ([1995] UKEAT 413/94) in which the issue of an extension under the predecessor to section 123 (1) (b) had been remitted to the industrial tribunal: Holland J had suggested that the tribunal in considering that issue should have regard to the terms of section 33 of the Limitation Act 1980, which gives courts the power to extend

the primary time limit in personal injury cases. She says (paraphrasing the relevant provisions rather than quoting them verbatim[3]):

> "8. … That section provides a broad discretion for the Court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to –
>
> (a) the length of and reasons for the delay;
>
> (b) the extent to which the cogency of the evidence is likely to be affected by the delay;
>
> (c) the extent to which the party sued had cooperated with any requests for information;
>
> (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;
>
> (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.
>
> 9. The decision of the EAT was not appealed; nor has it been suggested to us that the guidance given in respect of the consideration of the factors mentioned in s. 33 was erroneous."

The Judge summarises the points made by Smith J, though she also notes that in *London Borough of Southwark v Afolabi* [2003] EWCA Civ 15, [2003] ICR 800, this Court had observed that it was not necessary to go through the full section 33 checklist in every case. I say something more about *Keeble* at paras. 37-38 below.

18. From para. 16 to the first part of para. 28 the Judge summarises the parties' submissions. These included not only those directed to an extension of time under section 123 (1) (b) but also those directed to the Appellant's main case, i.e. that his claim was in fact in time, and also to the extension of time for his unfair dismissal claim.

19. In the second part of para. 28 and in para. 29 the Judge rejects the Appellant's case that his claim was in time. At para. 30 and the first of two paragraphs which are numbered 31 she decides that it had been reasonably practicable to present the unfair dismissal

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3 Paraphrase was desirable in order to strip out some of the language of section 33 which is specifically relevant to the personal injury context. But Smith J carefully preserves the important points (a) that the five particular factors which are identified as (a)-(e) (which broadly reflect section 33 (3)) are not intended as an exhaustive list but simply as particular aspects of "all the circumstances of the case"; and (b) that the court also has to consider "the prejudice which each party would suffer as the result of the decision to be made" (which reflects section 33 (1)). Those points are sometimes overlooked, with tribunals focusing only on the five particular factors.

claim in time, with the result that it fell to be dismissed. In that connection she observes, at (the first) para. 31:

> "The claimant is … a well-educated man. He is intelligent and had a sophisticated understanding of his ability to make a claim to the tribunal, and of the relevant time limit having had access to lawyers and his trade union and taking advice from lawyers. He had been advised in terms of when to present his claim and still failed to do it. … He left matters too long waiting for the GMC to respond positively. That was a high risk strategy. He thereby put himself in the position where if there was any problem in presentation it would not be possible to remedy it in time. He has to bear the consequences of his choices."

20. From the second para. 31 to para. 36 the Judge considers whether it is just and equitable to extend time for the discrimination claim. I should set out paras. 32-36 in full:

> "32. In the case of any complaint in respect of the allegedly constructive unfair dismissal the delay is not substantial. If however the complaints are the alleged acts on 30th November 2016 and 8th December 2016 and the alleged act of harassment on 5 June 2017 the complaints are substantially out of time. There was no evidence before me about why the claimant did not present his complaints about the latter within time. He was not ignorant of his rights or any facts relating to the claim. He had access to advice and information and was not suffering from any relevant ill health. The reasons for the delay were of his own making; he was entirely the victim of his own misfortune having consciously resolved to leave matters to 16 November 2016 [this is evidently a slip for 2017] before obtaining legal advice and then either not following it or leaving it too late to do so spending a further three days working on the claim form before presenting it although he knew (or ought reasonably to have known) on 24 November 2017 that he had not sent it to the tribunal. The drafting process could and should have been put in train in good time in preparation for a claim he had had in mind since May 2017.
>
> 33. In my judgment there is an inevitable impact on the cogency of evidence given the historic nature of the claim of constructive unfair dismissal (if that is said to be an act of race discrimination) and the time which has elapsed in relation to the other allegations of race discrimination allegations [*sic*].
>
> 34. The claimant would be unable to pursue a claim of race discrimination (which may or may not have any merit) if I were not to exercise discretion in his favour. If I decide to exercise my discretion in his favour the respondent will be put to the cost and expense of defending such a claim and its ability to do so is likely to have been affected.
>
> 35. There is a public interest in the enforcement of time limits which are exercised strictly in employment tribunals.

> 36. Having considered all of the above, the claimant has not persuaded me that it would be just and equitable to extend time in his favour and allow his claim of race discrimination to proceed. It is dismissed."

I think I should spell out the essential elements in that reasoning.

21. At para. 32 the Judge is addressing the first of the five "particular" factors identified in *Keeble*, namely "(a) the length of and the reasons for the delay". So far as the length of the delay is concerned, she distinguishes between (1) the complaint of constructive dismissal, in respect of which (because it was common ground that time ran only from the expiry of the notice on 24 August 2017) the delay is "not substantial", and (2) the complaints based on the two acts of discrimination pleaded in late 2016, which are substantially out of time: I will call these complaints "claim (1)" and "claim (2)". She then proceeds to consider the reasons for those two delays. As regards "the latter", i.e. claim (2), she says that the Appellant has not given any reason why he did not present that claim in time. Although the drafting is not as clear as it could be, the rest of the paragraph is evidently directed to claim (1). The essential points are (i) that the Appellant left the drafting and presentation of the claim to the last minute, despite having had it in mind since May; (ii) that he was clearly advised by Irwin Mitchell on 16 November that the time limit appeared to be 24 November, but failed to act on that advice until it was repeated on 24 November itself; and (iii) that he failed to submit anything before midnight on 24 November but instead spent another three days working on the claim. As regards points (i) and (ii), it is necessary to bear in mind what the Judge had already found in (the first) para. 31, in particular that the Appellant had deliberately adopted a high-risk strategy in leaving everything till the last minute: see para. 19 above. As regards point (iii), it should be recalled in this regard that she had rejected his explanation that he mistakenly thought that he had managed to present a claim on that evening. In short, she found that there was no good reason for the delay.

22. At para. 33 the Judge appears to be addressing the second of the "*Keeble* factors", because she refers to the "impact on the cogency of evidence"; I will have to come back to whether that is in truth the substance of her point – see para. 31 below. She says that there is inevitably an impact as regards both claim (1) and claim (2). Her reasoning is compressed, and I need to spell it out. As regards claim (2), she simply refers to "the time which has elapsed", but evidently she is referring to the fact that the two pleaded incidents occurred in November/December 2016. As regards claim (1), she refers to "the historic nature of the claim of unfair dismissal (if that is said to be an act of race discrimination)". The reference to "unfair" dismissal is strictly inapt in this context, but it is clear that the Judge's reference is to the constructive dismissal if regarded as an act of discrimination. That claim is "historic" in two senses. First, although the act of discrimination was being treated as occurring at the expiry of the notice, in truth the substantive repudiatory conduct cannot have occurred any later than the date at which notice was *given*, i.e. on 24 May. But, further, in order to show that the repudiatory conduct was (at least in part) on the grounds of his race the Appellant relied on the conduct in November/December 2016, which was about a year prior to the issue of proceedings.

23. At para. 34 the Judge addresses Smith J's reference in *Keeble* to the prejudice to the parties if an extension either is or is not granted. She clearly took the view that in practice these cancelled each other out.

24. At para. 35 she says that there is a public interest in the enforcement of time limits and that they are applied strictly in employment tribunals. The former point is unexceptionable. The latter reflects a statement made by Auld LJ at para. 25 of his judgment in *Robertson*. That statement was the subject of some discussion in the later decision of this Court in *Chief Constable of Lincolnshire Police v Caston* [2009] EWCA Civ 1298, [2010] IRLR 327 (*per* Wall LJ at paras. 24-25 and Sedley LJ at para. 31), but it is not a ground of appeal that the Judge's reference to that statement constituted a misdirection, and in any event I do not think that it did.

25. In short, the substance of the Judge's reasoning was as follows. The proper starting-point is that other things being equal time limits ought to be enforced: para. 35. In this case there was no good reason for the Appellant missing the applicable deadline, for the reasons given in para. 32. If an extension were granted, the key events which the tribunal would be being required to examine would have occurred almost a year before the start of the claim (in a context where the primary time limit is three months from the date of the act complained of): para. 33.

26. The Appellant's appeal to the EAT was considered by HH Judge Auerbach at a hearing under rule 3 (10) of the Employment Appeal Tribunal Rules 1993 (as amended), following an initial rejection by HH David Richardson under rule 3 (7). He permitted it to proceed on a single basis, which he identified as follows:

> "The point that I conclude is – just – arguable, is that the Judge failed to take into account (or to explain if, or how, she had) that, if the claim form had been presented just three days earlier, then the (possible) discriminatory constructive dismissal claim would have been in time, and would have had to have been considered, notwithstanding that it relied, evidentially, on historical allegations in respect of which there might be memory issues, and hence she did not sufficiently consider or address whether the *additional* impact on such issues of an extra three days should have been regarded as not material in relation to *that* claim (as opposed to the claims about such alleged incidents in their own right)."

27. Kerr J's reasoning in dismissing the appeal was essentially that the Judge had not omitted any of the relevant factors and that it was for her to decide what weight to give them. He emphasised in particular that the shortness of the delay noted by Judge Auerbach had to be considered in the context of the much longer delay following the discriminatory events relied on.

28. Permission to appeal to this Court was given by Henderson LJ on grounds which he expressed as follows:

> "With some hesitation, I think it is arguable, with a real (in the sense of not insignificant or fanciful) prospect of success, that the EJ was wrong in law to refuse the necessary extension of time for the discriminatory constructive dismissal claim and/or that she failed to explain her reasons for doing so with sufficient clarity. She nowhere expressly addressed the additional impact (if any) of the extra three days' delay, which she rightly found at [32] to be 'not substantial', nor did she expressly consider the relevance of her important findings of fact in [4.3] and [4.7]

> that the Appellant believed he had effectively withdrawn his first notification to ACAS, and believed the Early Conciliation Certificate ('ECC') purportedly issued on 23 May 2017 to be a nullity, until receipt by him of the email from Irwin Mitchell at 15.41 on 24 November 2017. Had the May 2017 ECC been a nullity, or at least not a valid certificate within section 18A (4) ETA 1996, he would have been unable to present any relevant claim to the ET (see section 18A (8)), let alone been nearly out of time for doing so."

There are two distinct aspects to those grounds. The first concerns the impact of the three days' delay and is essentially the same as had been permitted to proceed in the EAT. The second, relating to the Appellant's misunderstanding of the position about the ACAS certificate, does not seem to me to fall easily within the limits of the basis on which Judge Auerbach permitted the appeal to the EAT to proceed, and it is not addressed by Kerr J; but Ms Roberts took no point on this.

29. The Appellant's skeleton argument in several respects went beyond the ground on which Henderson LJ gave permission. Among other things, he continued to maintain that the ACAS certificate was a nullity because no attempt had been made to engage the Trust in conciliation. I do not propose to address those aspects of his submissions. However, in his clear and succinct oral submissions he mostly focused on the points which were properly open to him. The gist of those submissions will be sufficiently evident from my consideration of the two points identified by Henderson LJ.

30. As to the first point, plainly the three days by which the Appellant missed the deadline could have made no difference to the cogency of the evidence about any material issues of fact. In his submissions he emphasised that fact, adding in his reply the fact that the proposals in late 2016 about his return to Nigeria which he said were discriminatory were contained in emails, so that nothing would turn on the reliability of anyone's memory in any event.

31. However, I do not believe that the substantive point that the Judge was making at para. 33 of her Reasons was about the impact of that very short delay, which she herself described as "not substantial". Rather, she was making the point that the substance of the claim concerned events which had occurred long before the formal act complained of, and that the evidence of those events was likely to be less good than if a claim about them had been brought nearer the time: see para. 22 above. I appreciate that, if that was her point, her reference to "impact on the cogency of evidence" is rather inapt because if taken by itself it would suggest that she had in mind "*Keeble* factor (b)", which is indeed focused specifically on the impact of the delay following the expiry of the relevant deadline; but we are concerned with the substance of her reasoning, which is in my view adequately clear, and we should not be distracted by any mere looseness of expression.

32. So understood, I see no error of law in this element in the Judge's reasoning. Of course employment tribunals very often have to consider disputed events which occurred a long time prior to the actual act complained of, even though the passage of time will inevitably have impacted on the cogency of the evidence. But that does not make the investigation of stale issues any the less undesirable in principle. As part of the exercise of its overall discretion, a tribunal can properly take into account the fact that, although the formal delay may have been short, the consequence of granting an extension may

be to open up issues which arose much longer ago. On the facts of this case the Judge clearly had in mind both the respects in which the events of late 2016 were historic, as identified at para. 22 above; and she also had in mind the fact that the Appellant could have complained of them in their own right as soon as they occurred or in May, immediately following his resignation. She does not, rightly, treat this factor as decisive: in fact, as I read it, she placed more weight on the absence of any good reason for the delay. But what matters is that she was entitled to take it into account. As regards the Appellant's point that the relevant proposals were contained in emails, it is not clear that this specific point was made in either the ET or the EAT, but in any event it cannot be assumed that it follows that no oral evidence on the issue would be required: the assessment of whether there was a risk of evidence being less satisfactory because of the passage of time was for the Judge and cannot be challenged in this Court unless it was perverse. (I would add, while acknowledging that this does not appear to have been the Judge's approach in this case, that the fact that the grant of an extension will have the effect of requiring investigation of events which took place a long time previously may be relevant to the tribunal's assessment even if there is no reason to suppose that the evidence may be less cogent than if the claim had been brought in time.)

33. I turn to the other element in Henderson LJ's reasons for giving permission, namely the Appellant's misunderstanding of the effect of the ACAS certificate. As to that, I accept that the fact that he was (at first) under that misunderstanding was something which the Judge was obliged to take into account. I am also prepared to accept the Appellant's contention before us that the misunderstanding was not an unnatural one for a layman. But I do not believe that the Judge overlooked this factor. It would be surprising if she had done so, given that she made express findings of fact about it, and the Appellant no doubt emphasised it in his submissions to her, as he did to us. But para. 32 of the Reasons, as analysed at para. 21 above, read with (the first) para. 31, shows why she did not regard the misunderstanding as justifying the grant of an extension. The Appellant – a highly educated man with ready access to legal advice – left it till very near the expiry of the primary deadline to take advice because he hoped that a decision in his favour from the GMC would improve his negotiating position. When he did finally approach solicitors he was advised in clear terms of the true position, but he chose not to act on that advice because he thought that it was they and not he who had misunderstood the position. Even when the advice was repeated on the last day he still had a few hours to present his claim and indeed started to do so but chose to miss what he had been advised was likely to be the deadline in order to do more work on it. I do not therefore think that the Judge failed to explain her reasoning on this aspect.

34. I believe that that approach was entirely open to the Judge. This was not a case of the typical kind where a claimant misses a deadline because through misunderstanding or ignorance he or she is unaware of it: the Appellant was explicitly advised of it (twice) by solicitors but chose not to act on that advice. I see nothing unreasonable in a tribunal treating that as weighing heavily against the grant of an extension.

35. The Appellant referred to *Meek v City of Birmingham District Council* [1987] IRLR 250 and complained that the Judge's Reasons simply failed to show why she had declined to exercise her discretion in his favour. For the reasons given above, I cannot accept that.

36. I would accordingly dismiss this appeal; but I should like to make two points in conclusion.

37. The first concerns the continuing influence in this field of the decision in *Keeble.* This originated in a short concluding observation at the end of Holland J's judgment in the first of the two *Keeble* appeals, in which the limitation issue was remitted to the industrial tribunal. He said, at para. 10:

> "We add observations with respect to the discretion that is yet to be exercised. Such requires findings of fact which must be based on evidence. The task of the Tribunal may be illuminated by perusal of Section 33 Limitation Act 1980 wherein a check list is provided (specifically not exclusive) for the exercise of a not dissimilar discretion by common law courts which starts by inviting consideration of all the circumstances including the length of, and the reasons for, the delay. Here is, we suggest, a prompt as to the crucial findings of fact upon which the discretion is exercised."

The industrial tribunal followed that suggestion and, as we have seen, when there was a further appeal Smith J as part of her analysis of its reasoning helpfully summarised the requirements of section 33 (so far as applicable). It will be seen, therefore, that *Keeble* did no more than suggest that a comparison with the requirements of section 33 might help "illuminate" the task of the tribunal by setting out a checklist of potentially relevant factors. It certainly did not say that that list should be used as a framework for any decision. However, that is how it has too often been read, and "the *Keeble* factors" and "the *Keeble* principles" still regularly feature as the starting-point for tribunals' approach to decisions under section 123 (1) (b). I do not regard this as healthy. Of course the two discretions are, in Holland J's phrase, "not dissimilar", so it is unsurprising that most of the factors mentioned in section 33 may be relevant also, though to varying degrees, in the context of a discrimination claim; and I do not doubt that many tribunals over the years have found *Keeble* helpful. But rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate *Keeble*-derived language (as occurred in the present case – see para. 31 above). 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 (as Holland J notes) "the length of, and the reasons for, the delay". If it checks those factors against the list in *Keeble*, well and good; but I would not recommend taking it as the framework for its thinking.

38. I am not the first to caution against giving the decision in *Keeble* a status which it does not have. I have already noted the Judge's reference to the decision of this Court in *Afolabi*. At para. 33 of his judgment in that case Peter Gibson LJ said:

> "Nor do I accept that the ET erred in not going through the matters listed in s. 33 (3) of the 1980 Act. Parliament limited the requirement to consider those matters to actions relating to personal injuries and death. Whilst I do not doubt the utility of considering such a check-list … in many cases, I do not think that it can be elevated into a requirement on the ET to go through such a list in every case, provided of course that no

> significant factor has been left out of account by the ET in exercising its discretion."

In *Department of Constitutional Affairs v Jones* [2007] EWCA Civ 894, [2008] IRLR 128, Pill LJ at para. 50 of his judgment referred to *Keeble* as "a valuable reminder of factors which may be taken into account" but continued:

> "Their relevance depends on the facts of the particular case. The factors which have to be taken into account depend on the facts and the self-directions which need to be given must be tailored to the facts of the case as found."

That point was further emphasised by Elisabeth Laing J, sitting in the EAT, in *Miller v Ministry of Justice* [2016] UKEAT 0004/15: see paras. 11 and 29-30 of her judgment. In *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640, [2018] ICR 1194, Leggatt LJ, having referred to section 123, says, at paras. 18-19 of his judgment:

> "18. … [I]t 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 the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see [*Keeble*]), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see [*Afolabi*]. …
>
> 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)."

Although the message of those authorities is clear, its repetition may still be of value in ensuring that it is fully digested by practitioners and tribunals.

39. Secondly, this case is a further illustration of an appeal for which permission would not have been given if it had been subject to the second appeals test. Important as it of course is to the Appellant, it raises no important point of principle or practice. It is a regrettable anomaly that appeals from the EAT are not subject to that test when almost all other second appeals are.

Lord Justice Moylan:

40. I agree.

Lord Justice Newey:

41. I also agree.