EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M. Kashani-Akhavan	v	H.R.Owen plc

PRELIMINARY HEARING

Heard at: **London Central** **On: 28 September 2017**

Before: Employment Judge Goodman

Appearances
For the Claimant: Mr. G. Mansfield Q.C.
For the Respondent: Mr D. Craig Q.C**.**

RESERVED JUDGMENT

1. The effective date of termination is 13 January 2017.
2. The claim was presented in time. If it had been out of time, it was not reasonably practicable to present it in time and it was presented within a reasonable time thereafter.
3. The application to strike out detriments does not succeed.
4. The breach of contract claim is dismissed because it has no reasonable prospect of success.
5. The final hearing on the merits is postponed from 30 November 2017 and is now listed for **11-22 June 2018**.

REASONS

1. The claimant has brought complaints of unfair dismissal and detriment for whistleblowing, and the ordinary unfair dismissal and breach of contract. At a preliminary hearing the case management on 10 July 2017, following preliminary issues were identified for decision:

   1.1 What was the effective date of termination of the claimant's employment?
   1.2 Were the claims of unfair dismissal and breach of contract presented in time?

1.3 If not, was it reasonably practicable for the claimant to present them in time?

1.4 Does the tribunal have jurisdiction to consider whistleblowing detriments listed in paragraph 54 of the particulars of claim; in particular, whether those documents and attachments listed in paragraph 55 and 56 are capable of amounting to "a series of similar acts or failures"

1.5 Should the breach of contract claim be struck out on the grounds has no reasonable prospect of success?

2. To decide the issues, the tribunal heard evidence from:

Mohammed Kashani-Akhavan the claimant
Mehmet Dalman, the Respondent's Chairman
Catherine Desmond, the respondent's Group HR Director

There was a bundle of documents of just under 300 pages.

3. Each side made written and oral submissions. The hearing finished late in the day and judgment was reserved.

Factual Findings

4. In September 2013 Berjaya Philippines Inc. acquired a majority shareholding in the respondent company, and Mehmet Dalman became the company chairman.

5. Berjaya Philippines is owned or controlled by Mr. Vincent Tan, a Malaysian known as Tan Sri.

6. The claimant was employed by the respondent as Chief Executive from 4 December 2014. The contract of employment provided for an annual salary of £120,000 and 3 months' notice of termination either side. There was no clause providing for payment in lieu of notice.

7. On 6 July 2015 the claimant's salary was increased to £280,000. On 4 December 2015 the contract was amended to add entitlement to a bonus, and \t the same time notice of termination was increased to 24 weeks either side.

8. During 2016 the claimant engaged in a property development project on his own account for Tan Sri and his family, known as the Islington project, involving detailed negotiation of a grant of planning permission. This collaboration ended on 12 October 2016 when at a meeting in Kuala Lumpur the claimant was told by Tan Sri that he was dissatisfied and was removing him from the project. The claimant was upset (he considered he was on the wrong end of a family intrigue, and humiliated at being told so in the presence of others) and said: "if this is the way you conduct business then we can't work together at HR Owen (the respondent)". Later that day the claimant explained his side of the story to Tan Sri, and told him that in removing him in this way he had acted like a banana republic dictator.

9. Tan Sri took him at his word. On 27 October 2016 he wrote to the claimant, copied to Mehmet Dalman and others:

> "Further to our last conversation in KL and further to my today's conversation with Stanley, I confirmed on behalf of the board of HR Owen to fulfil your desire to resign as CEO of HR Owen by April/May 2017. I thank you for excellent service to HR Owen. We have designated Ken Choo to be your successor. As the CEO designate, Ken will join the board as a director when you officially cease duty as CEO".

He was thanked for his services, invited for a family visit to Malaysia, and told that they would be happy to work on property opportunities in future.

10. The Claimant wrote back at length on 28 October, suggesting that "it would be unfair for me to walk away with nothing after all my hard work and contributions", so suggesting some financial deal. He referred to the Islington disappointment and "I have come to the single conclusion that there is no job security or future for me at HR Owen. I am sure you will agree that I was left with no option but to resign".

11. The claimant says that despite this he regretted that he had spoken as he had, and hoped to persuade Tan Sri to change his mind and let him stay. His oral evidence went further - he had not resigned, but "disagreeing with Tan Sri (about this) would be suicide for me".

12. The respondent's board met on 2 November. Earlier that day the claimant learned of this emergency board meeting and messaged Tan Sri asking to postpone Mr Choo being announced as CEO designate as: "6 months is quite a long way to go". The tribunal reads this as a reference to the claimant's notice period. The claimant was present at the meeting with Mr Dalman and U-Peng Tan. The minute reads:

> "Mr Dalman confirmed that a quorum was present and that, following the recommendation from the company's major shareholder, the purpose of the meeting was to consider and vote on the appointment of Mr Ken Choo as Executive Director of HR Owen plc. He is the designated CEO, replacing the current CEO who has decided to step down."

13. Although Mr Choo's appointment was approved, it was agreed to delay the announcement. The timing of any announcement was still not clear at the board meeting on 14 December.

14. On 30 November the claimant wrote to Stanley Tan, (unrelated to Tan Sri) "I am considering withdrawing my verbal resignation to Tan Sri", but "I shall be removed from the business sooner or later no matter what I do". Subsequent emails to Stanley Tan show that he felt under pressure from Sri Tan's family to leave early, but intended to resist.

15. On 20 December 2016 the claimant wrote to the chairman, Mehmet Dalman saying:

> "my understanding is that HR Owen will need to give formal notice under my contract employment to trigger the 6 months notice provision",

and Mr Dalman replied that the company would serve notice.

16. On 23rd of December Mr Dalman wrote to the claimant:

> "as agreed with you, I am now, for sake of good order, give you 6 months notice as per your contract of employment. Thank you for your hard work and contribution in restructuring the phone. You have a lot to be proud of."

At the same time Mr Dalman sent the claimant a draft of the note he was sending to Tan Sri, referring to giving the claimant 6 months notice, and saying the claimant:

> "has agreed to work with the coming CEO to do professional handover. As soon as he does, and is released from his contract the balance of his notice period will be paid to him."

17. The Claimant wrote to Tan Sri asking for:

> "sufficient time for me to do a proper professional handover to Ken",

and got the reply:

> "we don't like a departing CEO to linger around as we need a new CEO to take over ASAP to provide continuity and assurance or associates… Hope you understand".

At the same time he had a discussion with Mr Dalman on 21st of December at which they did not agree a time for his departure, but Mr Dalman did that as soon as the handover was done he would have to go.

18. On 26th of December 2016 the claimant wrote to Tan Sri:

> "please allow me to continue until 1 May and only announce Ken's appointment in April".

He thought this was better for the business. Tan Sri replied:

"any request to stay till in April, I understand the board has already decided as Mehmet first met you to finalise the 6 months notice compensation to you. Please direct your request to Mehmet. Personally I would advise you to leave early and finalise the 6 notice compensation to you".

19. On 28 December Mr Dalman asked the claimant to join him and Ken Choo for a meeting on 10 January to discuss the way forward.

20. The claimant and Mr Dalman met as arranged on 10 January and there were two more meetings on 11 January. It seems that the claimant's departure date was not fixed at any of these meetings; Mr Dalman thought it was agreed in a telephone call between meetings that his "last day of employment", would be 13 January. The claimant agrees he was told on 10 January that his last working day was 13 January but denies he was told this was the last day of employment. They spoke about the claimant making himself available to assist

with ongoing queries. Mr Dalman says that this was a reference to his duty as a director, which would continue after termination of his employment. The claimant says he was told that he "had to be available" to answer queries, but no end date was identified, so he assumed it was 24 weeks after 23 December.

21. On 11 January the respondent posted an announcement drafted by Catherine Desmond:

> "the board of directors are pleased to announce the appointment of Ken Choo as chief executive of HR Owen and take this opportunity to confirm the departure of Mamad Kashani-Akhavan as of Friday 13 January".

The claimant had seen the draft, and does not seem to have disputed the date.

22. Catherine Desmond also asked the IT department to retrieve the claimant's phone and laptop. The Group Compliance Manager was told the claimant was leaving "effective Friday 13 January" and Ken Choo joining, and that the claimant: "will still have contact the business for a further 6 months to complete ongoing projects".

23. After 13 January the claimant did not attend the office.

24. On 17 January Mr. Dalman sent an email to the board:

> "(the claimant) has stepped down as chief executive officer as of Friday, 13 January 2017. We have honoured our contractual obligations and given him 6 months pay".

As will be seen, it was not however true that he had been paid.

25. On 30 January he signed a letter resigning from his directorships with HR Owen and seven related companies with effect from 13 January 2017.

26. On 13 February, having noticed that on pay day at the end of January he had not received a full months pay, the claimant telephoned Catherine Desmond, who explained that he been paid up to 13 January only.

27. The claimant followed this up with an email to Mehmet Dalman: "I performed handover with Ken Choo as requested and was told that my last day of work was on 13 January 2017. My contract does not have a garden leave clause therefore the balance of my notice pay is due to me now."

28. Ms Desmond wrote on 21 February, saying that on 23 December Mr Dalman had

> "activated your 24 week's notice period in an email as per your terms and conditions",

and that in a series of conversations it was agreed that his last working day would be 13 January, and that although they could ask him to work his notice,

> "we would be happy to pay the remainder of 24 weeks on Monday 20th February. If we do that, it would mutually bring employment to an end on that date and obviously there is an advantage to you in receiving the lump sum upfront. Accordingly, if you want to proceed on that basis, I need confirmation from you and return you are in agreement with the contents of this letter and we mutually agree to bring your employment to an end with HR Owen in this manner".

He was invited to sign and return a copy.

29. The claimant replied on 23 February that his last working day "was brought forward by the company", and that he was not obliged to confirm his agreement, and the respondent was already in breach of his contract. He asked for payment of the balance of his notice period forthwith.

30. Ms Desmond replied, following instructions from Mr Dalman, that it was not agreed that they were in breach of contract, but the chairman had approved payment:

> "you understand that by accepting it this is the final monies owed to you from HR Owen".

Mr Dalman's evidence was that he wanted the claimant to agree their understanding because he had become hostile, he was threatening acts against the company (Mr Dalman did not say what) and he "would be intriguing".

31. On 24 February 2017 a payment of £66,660.66 was made to the claimant's bank account. This is stated on a payslip of that date to be a gross payment of £115,453.37, from which was deducted £24.78 for pension, £2,586.73 for national insurance, and £46,181.24 tax under PAYE. On 3 March the claimant acknowledged receipt and said it was correct as settlement of his notice period.

32. The claimant was sent a P45 giving as his leaving date 24 February 2017. Ms Desmond says this date was chosen because the accounts department told her that under real time tax reporting they could not process a P45 in the current month for the previous month.

33. The breakdown for this payment was given to the claimant by Ms Desmond in an email on 11 April 2017. She identified the notice period for which payment was made as 14 January to 16 June, and said that as he had resigned in fact on 14 December, and already been paid to 13 January, he had been overpaid by one month.

34. Documents in the bundle show that the claimant has served (in July) a letter of claim with draft particulars, in his name and that of a finance company of which is the beneficial owner, on the respondent, and Vincent Tan, and two Berjaya companies. The respondent in turn has intimated a claim against the claimant for breach of his duties as a director, and the details of those breaches in the letter are said to be "the tip of the iceberg", with investigation ongoing.

Effective Date of Termination - Relevant law and Discussion

35. Time for presenting claims for unfair dismissal and breach of contract to an employment tribunal runs from the effective date of termination - Employment Rights Act 1996 section 111(2) (a); Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 regulation 7.

36. Effective date of termination is defined in section 97 of the 1996 Act:

> (1)(a)in relation to an employee whose contract is terminated by notice, whether given by his employer by the employee, means the date on which the notice expires
>
> (b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect.

37. In the claim form presented to the Tribunal on 10 May 2017 the claimant stated his employment ended on 13 January 2017. The grounds of claim state he was given notice on 23 December 2016, and subsequently summarily dismissed. Paragraph 34 gives 13 January 2017 as his last working day. Paragraph 39 says that by virtue of the correspondence between 21 February and 3 March "the respondent purported to terminate the claimant's employment in breach of contract and the claimant accepted that his employment was at an end, albeit in breach of contract".

38. On the face of it, the email to claimant on 23 December giving 6 months notice of termination, without naming an end date, or discussing payment in lieu of notice, is unambiguous, and meant that as of that date his employment was to terminate in June on the expiry of the notice. Although argued at this hearing that the claimant had resigned and was not dismissed, and although there may be an issue of constructive dismissal, how and why notice came to be given came about is for the tribunal deciding the merits of the claims. This Tribunal holds that that the thermal 'resignation' in October, purportedly accepted by Sri Tan, was not a resignation (if it was) to his employer, so not effective. At most it was an indication of his intention to resign. The date of leaving, for example, was uncertain

39. The relevant question for now is whether and when the respondent brought the contract to an end before the expiry of the notice, and if so, what was the date the "termination takes effect".

40. Undoubtedly the respondent did bring the contract to an end early. The dispute between the parties is whether this was on 13 January or on 24 February.

41. The question is when the respondent clearly and unambiguously made known to the claimant that his employment was at an end on an earlier date, and what that date was; guidance on this is given in **Stapp v Shaftesbury Society (1992) IRLR 326.**

42. On the evidence, the claimant knew he was not to attend work of 13 January, and he did not attend.

43. He was asked to deal with queries that arose after that date, but this could fall within his duties as a director as much as his duties as an employee, and although there are one or two queries addressed to him in the documentary bundle, they do not appear to have been answered, and no witness was taken to them. Ms Desmond told the compliance officer he might be engaged in projects for a further 6 months, which might affect his FCA compliance requirements, but there is no evidence from either side that he was so engaged.

44. The Claimant saw the public announcement that he was stepping down from 13 January, and did not dissent from it.

45. Of fundamental importance is the fact that he was not paid after 13 January until he took up the question and it became the subject of dispute. Being paid to work is central to the employment bargain, and if he was in any doubt about his position from 11 January onward, short pay on 24 January will have told him that this was the end of the contract, even if the respondent was in breach of that contract by not paying the balance of his notice. On this last point, Mr Dalman represented to the board that the claimant had been paid when he was not, which sits ill with his evidence that he can bring the contract to an end within the notice period provided he writes the employee a cheque for the balance.

46. Nevertheless, when the termination is effective depends on what the employee understood or should reasonably have understood was happening. All the evidence points to the claimant being told on the 10 or 11 January that his employment was ending on 13 January, and that he understood this, even if he was reluctant to accept it, indeed that he had been anticipating it, though hoping to put it off for as long as possible.

47. The claimant has argued that Ms Desmond's letter indicates that the environment was still on foot needed to be brought to an end. The respondent argues that it sought to get the claimant to agree to a termination on agreed grounds to avoid a claim of unfair dismissal, but was not intending to undo what had already happened. Other than this letter, the claimant relies for evidence of employment ending on 24 February on the P45, and the fact that this is when he was paid the balance due for the notice period. The administrative explanation for this date means that the evidence of the P45 does not displace the other evidence that employment ended on 13 January. The fact that he was paid late does not mean that the ending of his employment was postponed to that date, only that his employer had until then been in breach of contract by not paying him for dates after 13 January. The respondent's letter of 22 February is best interpreted as negotiation after dismissal.

Were the claims presented in time?

48. This is a question about the early conciliation provisions for extending the 3 month time limit for presenting a claim. They are set out in section 207B of the Employment Rights Act.

> (2) In this section:
>
> (a) day A is the day on which the complainant… complies with the…

requirement to contact ACAS before instituting proceedings

(b) day B is the day on which the complainant concerned receives… The certificate issued.

(3) in working out when a time limit set by relevant provision expires the period beginning with the day after day A and ending with day B is not to be counted

(4) if a time limit set by relevant provision would (if not extended by this subsection) expire during the period beginning with day A and ending one month after day B, the time limit expires instead at the end of that period

49. In this case, day A is 7 March 2017 and day B is 7 April 2017.

50. The claimant says time was extended to 12 May 2017, that is, three months from termination, counted after stopping the clock between day A and day B, so presentation on 10 May was in time. This relies on subsection (3).

51. The respondent says time expired one month after day B, so 7 May 2017, and the claim was presented out of time. This relies on subsection (4), in particular on subsection for superseding the meaning of subsection (3).

52. The dispute is about whether subsections (3) and (4) are to be read cumulatively or alternatively (does a claimant have both, or is it one or the other but not both). What does it mean to say: "if not extended by this subsection"?

53. The point has been explored in a number of first instance employment tribunal decisions, but not so far by the employment appeal Tribunal, though I understand that such an appeal is pending. In this connection I was taken to the position of the employment tribunal (neurology ED), 3 (10) hearing of the respondents's application for permission to appeal a decision that subsections are you read cumulatively. The appeal in terms down on the set by HH Judge Richardson, who said reviewing the argument the notice of appeal it was "plainly wrong" and it was "the argument in this appeal involves regional section 207B (4) as if it set "reception". It does not. It says "subsection". It is entirely plain on the wording of section 207B (4) as it is not in some mysterious way take precedence over section 207B (3). HH Judge Eady, hearing the oral submission, tended to share Judge Richardson's view but was concerned by the respondent telling her: "that this is an argument that is increasingly being taken before ETs and informal advice given, for example by CABs". She went on "if what Mr Caiden tells me is corect – I have no reason to think that it is not, though I am not personally aware this point yet come before the EAT – then I can allow that there is a compelling reason for permitting this matter to proceed to a full hearing. At this stage I cannot say that otherwise persuaded of the merits of the underlying argument" and "with some reluctance therefore" the latter was to proceed to a full hearing, whereas the respondent did not succeed he should "not be surprised if it faces a costs application". The tribunal is invited to find that the likely outcome of this appeal will be to uphold the cumulative interpretation, and it is only going to a full hearing at all because EAT has been told that there is a problem requiring a guidance.

54. Before embarking on an analysis of the arguments, it is interesting to note the advice to which the tribunal was taken on what the statute means given out by 2 reputable bodies to members of the public who are in dispute with their employers, ACAS and the citizens advice bureau. Neither interpretation is a statutory force, but both may be relevant to the question of what is reasonably practicable, if it is necessary for the tribunal to consider that point. And ACAS leaflet entitled "conciliation explained" in May 2015, explains the effect of early conciliation on the time limit as follows:

55. "When someone notifies ACAS of their intention to make a tribunal claim, the clock stops ticking on their limitation period. The clock starts again once early conciliation ends and extra time it is added to ensure that everyone has at least one calendar month in which to present a tribunal claim after early conciliation ends", though noting that if the time had already expired when starting early conciliation, no adjustment is available. The online advice from ACAS is similar: "when the claimant contact ACAS this will "pause" the time limit for presenting their claim for tribunal. This pause can be for up to one calendar month, as a further 14 days is more time is needed. The time limit will start to run again when the claimant receives their formal acknowledgement (the certificate) as a conciliation is finished. Once early conciliation has ended the claimant will have at least one calendar month in which sent that claim", subject again to this not apply if the fence already out of time when early conciliation figure.

56. The citizens advice bureau advice online takes a contrary view. It says: "if your original time limit falls between day A and one month after day B (the date on which you receive your early conciliation certificate), the new time limit will be one month after day B", and it is only longer: "if your original time limit falls more than one month after day B then time will be extended by a period equivalent to the early conciliation period. The length of the early conciliation period is calculated from the day after day A up to and including day B".

57. So the advice of these reputable bodies is in conflict: everyone gets one more month after day B, but there is a difference of interpretation on whether it is the original time limit or the time after stopping the clock that is menat when (4) talks of expiry within the period between day A and day B, will get even longer. If they were right, this claim would not have been presented out of time.

58. There is also advice on the government website, GOV.UK. On early conciliation this says:

> "time you spend in early conciliation doesn't affect the total time left to make a claim. If early conciliation doesn't work, ACAS will send you an early conciliation certificate – use this when you make claim to the tribunal. Once you receive your certificate, you will have the same amount of time to make your claim as you did before you started conciliation".

There is no mention of the extra month, let alone whether it is as well as the clock stopping, or an alternative to it.

59. The claimant's argument is that if time runs from 13 January, then without section 207B, a claim would have to be presented by 12 April. By stopping the clock from 7 March to 7 April time that would have expired 12 April now expires 12 May. This is later than "the period of one month after day B", which is 7 May. The claimant says 12 May is the expiry date.

60. The respondent's argument is that without the early conciliation extra time, time would have expired on 12 April, which is "during the period beginning the day A and ending one month after day B" (i.e. between 7 March and 7 May), so time expires one month after day B, that is 7 May. It is argued that section 207B (4) is a cut-off, so that whatever the date is when calculated by subsection (3), the most it can be extended by is one month from day B, and that cuts back the extra time allowed by the stop the clock provision of (3).

61. The claimant says subsection (4) is a minimum extension, not a maximum. This is because if the expiry date set by stopping the clock under subsection (3) is more than a month after day B, subsection (4) does not apply as "the time limit set by a relevant provision" - subsection (3) - does not expire during the period ending one month after day B. The claimant relies on the employment tribunal decision in **McGarry v ARKeX Ltd case number 3400903/2014**, which held that if it was intended that if subsection 4 applied, subsection 3 did not, Parliament would have said so. In **Booth v pasta king UK Ltd** case number 1401231/14, another Employment Tribunal took the same view: "the logical reading of (4) is that in a case where time would not expire within that period because of the extension under subsection (3), subsection (4) would not come into play. Furthermore, subsection (3) operates by altering the primary calculation of when time expires on the relevant provision. Accordingly, when subsection (4) refers to the expiry of a "time limit set by relevant provision" it must refer to the time limit as calculated in accordance with subsection (3). This was also the view in **Savory and others v South West Ambulance Service NHS Foundation Trust case number 140 0119/2016**, (though the Employment Judge conceded that the respondent's alternative view was "at least arguable"), and in **Wass v Delta Global Source (UK) Ltd**, **case number 260 0605/15,** which added that the aim of early conciliation was to facilitate agreement and that would be "defeated if the claimant was to be deprived of one of the 2 ways in which time can be extended".

62. Reliance is also placed on **Tanveer v the East London Bus and Coach Company Ltd, UKEAT/0022/16/RN**, although this EAT case about not this issue, but the corresponding date principle, where, in analysing the early conciliation dates, HHJ Eady said: "stopping the clock for the purposes of early conciliation in this case would, on anyone's argument, give rise to a date falling within the period beginning the day A and ending one month after day B…. It thus brought into play section 207B (4)", so proceeded on the basis that the sections were cumulative, rather than alternatives. Looking at the dates in **Tanveer** however shows a different factual scenario, because early conciliation only began a day or two before the expiry of the limitation period, so stopping the clock made little difference – both the original and the extended dates fell in the period between day A and day B plus one month, so this is not useful.

63. The respondent argues that the parenthesis "(if not extended by this

subsection)" is designed to exclude the extension of subsection (3), and that it is clear that it is talking about time as extended by (3), the clock having stopped, so (4) is to be understood as a reference to the original time limit falling within the period between day A and day B plus one month.

64. The respondent argues that on the proper construction of section as a whole, when section 207B (4) is brought into play, then the extended time limit is to be determined by reference to that subsection, not (3), which is why the draughtsman included the word "instead" in subsection (4). The word "instead" indicates that they are alternatives. Dealing with the interpretation of Judge Eady's words in **Tanveer**, in the passage already quoted, if the claimant was in "subsection 3 territory", time is to be determined by subsection (3), or if he had left it relatively late to contact ACAS, he was in subsection (4) territory, which applied "instead". The claimant is not deprived of anything by the guillotine of subsection (4), as he has had some extra time for conciliation. Subsection (4) means looking at the original time limit, not the time limit is extended by (3).

Discussion

65. Looking at the meaning of the statute, subsection (1) talks about "relevant provision", as the "where this Act provides for it to apply for the purposes of any provision of this Act"; section 111 on the 3 months time limit for unfair dismissal claims refers at section 111(2A) to section 207B extending time limits. So section 111 is the "relevant provision".

66. Subsection (3) is clear enough: in "working out" the time limit, the time between Day A and Day B is not to be counted.

67. It seems to me plain that the words: "if the time limit set by a relevant provision", in subsection (4) mean the time limit set by the relevant provision as worked out by following 207B (3). It does not mean the time limit set by the relevant provision as if that provision had made no reference to section 207B. So when subsection (4) talks about a time limit expiring between day A and one month after day B, it means the time limit as extended by (3).

68. I add that if Parliament had meant the original time limit as if section 111 made no reference to section 207B, and not as extended by subsection (3), it could have said so. It could have said in (4): "if not extended by this *section*", and "this section" would be section 207B, about extending of time limits, and including how to work out a time limit in 207B (3). It would then have meant the original time limit, not the extended time limit. Subsection (4) in fact says: "this subsection". The natural meaning of that is subsection (4), the subsection in which these words appear.

69. In other words where the time limit as extended by stopping the clock expires after day B plus one month, the claimant has that longer period. The time allowed by subsection (3) is not being cut back by (4), which is a special provision for those who have left it so late (as in **Tanveer**) that (3) may not give much more time. The sections are to be read cumulatively.

70. It remains that the word "instead", which suggests alternatively, is problematic. It makes sense if the words "if not extended by this subsection" in (4) were: "if

not extended by this section", or "if not extended by subsection (3)", but they are not. As it says what it does, instead must mean, a standard one month after day B for those who started too late to get more than that under (3).

71. On that analysis, this claim is presented in time.

Not reasonably practicable?

72. In case I am wrong about that, I go on to consider whether it was *not reasonably practicable* to have presented a claim by 7 May, instead leaving it to 10 May.

73. The meaning of these words helps to be something between what is "practicable" or practically possible", and what is "reasonable". **Palmer v Southend-on-Sea Borough Council (1984) ICR 372**. What is "not reasonably practicable" is a question of fact for the tribunal.

74. What prevented the claimant from presenting his claim by 7 May? Included in the bundle is an email from claimant's junior counsel to her instructing solicitor, on 6 April, which, in the context of the claimant wanting to present his claim before Easter (which in 2017 fell on 16 April), indicated that the deadline is 12 May, and that she and her leader needed to update the draft grounds of complaint to include the claimant's comments, which "may take more than a week. A further email of 8 May says it should be submitted by 10 May "at the absolute latest to avoid any arguments about time limits". Presumably the argument anticipated was 13 January or 24 February, as 10 May would be too late if the anticipated dispute was whether 7 May was the last date. The explanation seems to be (1) counsel's workload (as by 6 April they had the claimant's comments and needed to revise the draft to incorporate them) and (2) a belief that time extended for early conciliation expired 12 May. As to workload, there is no further evidence suggesting that the work could not have been done in time to present the claim by 7 May, so the real reason why it was "not reasonably practicable" to present by that date was the belief of the claimant's advisers that 12 May was the correct date.

75. The case on behalf of the claimant (as it was set out in a letter sent to the respondent's solicitors on 2 August 2017, pursuant to an order made at this tribunal's preliminary hearing for case management on 10 July), is that the advice given about 12 May being the correct date was correct, and "in the alternative, it was reasonable and supported by a number of first instance decisions and published guidance", referring to GOV.UK and the ACAS material, as well as **McGarry, Booth, Wass** and **Tanveer**, such that "in circumstances where the government guidance, explanatory literature, employment tribunal's and EAT's approach all support the claimant's interpretation of section 207B, it would be unreasonable for the claimant to the expected to take a different interpretation. Accordingly it was not reasonably practicable for him to present his claims in time". (And if it was not, presenting a claim so soon thereafter was reasonable and had not caused prejudice to the respondent).

76. On the evidence, it was practicable, meaning the practical reason why not, to present a claim by 7 May. The question is whether it was reasonably

practicable of the claimant's advisers. In **Dedman v British Building and Engineering Appliances Ltd (1974) ICR 53,** it was held that if the reason for late presentation is the fault of skilled advisers, the claimant cannot say that it was not reasonable practicable to present in time, and he must bring his claim against them. This was followed in **Riley v Tesco stores (1980) ICR 323**, where the citizens advice bureau made a mistake about the time limit. In **Northamptonshire County Council v Entwistle (2010) IRLR 740**, it was held at the adviser's mistake about the date was reasonable, because they had not picked up that the respondent itself had made an error when stating what the date was. It was reasonable to rely on what the respondent said, and not identify that the respondent itself make a mistake. However, in **T-mobile (UK) Ltd v Singleton UKEAT/0410/10**, the employee's solicitor had made a mistake advising him about a time limit, and the employer had failed to disabuse him. **Entwistle** was distinguished; as there was no evidence the employer had even thought about it, he could not be said to have misrepresented the position by act or omission, and had not misled the claimant's adviser.

77. In the light of that guidance, the tribunal must decide whether counsel's mistake (if this tribunal is wrong about the interaction of 207B (3) and (4)) was reasonable. Firstly, that mistake has nothing to do with actions or omissions of the respondent. It is about whether it was reasonable to think that the 207B point was settled law. It is the case that no adverse decisions have been cited to this tribunal. The possibility of appeal in **Luton BC v Haque** dates from 31 July 2017, so will not have been known at the time. The claimant's junior counsel had appeared in **Wass** in September 2015, and while in 2015 the point was contentious, it is not shown that by 2017 there had been any decisions the other way, except March 2017, **Ferguson v Combat Stress**, which was slightly different because Day A preceded the effective date of termination, and also Scottish case, which shows that until then the point been unknown in Scotland. The only materials suggesting that the cumulative argument might be right comes from the aside in **Savory**, a 2016 decision which so far as is known has not been appealed, and the CAB explanatory material.

78. Generally, prudent legal advisers who are aware that a time limit may be contentious will always head for the earlier date, even if confident they are right and that the risk they are wrong is very small, so as not to run a risk on a point they did not need to argue. The question is whether the claimant's legal adviser was right to think this was settled law. The decision dates show decisions in favour of the cumulative interpretation were made in April 2014, October 2014, September 2015 and December 2015. **Tanveer** (EAT) was decided in 2016. The point was still being argued, in January 2017 (**Haque,** decision sent to the parties April 2017) and even May 2017 (**Savory**, but not sent to the parties until 6 June). It was also being argued in **Ullah** (January 2016 (sic), decision reversed and sent the parties March 2017) but that is a case where day A preceded the effective date of termination, so it was not about cumulative application, but about how (3) worked, a different point. If it was still being argued, though without, so far, success, could advisers still think the point was settled? As first instance decisions are unreported, as are pending appeals, it cannot be said that a prudent adviser would have had reason to think in April or May 2017, with no decisions known on the point in 2016, that the point about cumulation of (3) and (4) was not settled. While cautious advisers would have

worked to 7 May, it cannot be said that such caution was at that time reasonable.

79. So I conclude that to have presented by 7 May was practicable, but not reasonably practicable; it was presented within a reasonable time thereafter, a matter of days, and within the time understood by the claimant's advisers.

80. I add only that things are different now it is known that an appeal is to be heard in **Haque**.

Application to Strike Out Detriments

81. The detriments claimed to have occurred on ground of making protected disclosures are listed in paragraph 54, 55 and 56 of the grant of claim. It is common ground that the detriments listed in 55 and 56 are in time. The respondent says that those listed in paragraph 54 out of time, and cannot be linked to later events so as to include them. On that basis the Tribunal is asked to strike out these claims for want of jurisdiction.

82. The relevant statutory provision about whistleblowing detriment is that the claim must be brought within 3 months beginning with the date of the act or failure to act to which the complaint relates, or, where the actual failure is part of a series of similar acts or failures, the last of them and "where an act extends over a period, the "date of the act" means the last day of that period – employment rights act 1996 section 48 (3) (a) and (4) (a).

83. Both **Hendricks v Metropolitan Police Commissioner** (2003) IRLR 96 and **Eszias v North Glamorgan NHS Trust** are authorities about striking out fact sensitive discrimination and whistleblowing claims at preliminary hearings, before evidence is led to find facts. Unless either there is clearly contradictory documentary evidence on a relevant point, or if, taking the claimant's case at its highest, there is no reasonable prospect on the pleaded case of a successful claim, the facts must be tested as a full hearing before it is safe to strike out.

84. Arthur v London Eastern Railway (2007) IRLR 58, held that a determination under section 48 (3) on whether there was a series of similar acts or failures should be considered in light of the following: were the acts committed by fellow employees; if not, was there a connection between them or were their actions organised or concerted in some way; why did they do what is alleged; acts may not be physically similar to each other; a series of apparently disparate acts could be shown to be part of a series of similar acts if done on the ground of a protected disclosure.

85. Paragraph 54 interim refers back to paragraphs 12, 13, 20, 21, 23, 33 and 34.

86. Paragraph 12 is that Vincent Tan's sons persuaded him that the claimant "was a troublemaker and an unnecessary roadblock, and needed to be squeezed out of business". It refers to 2 deals, one (Tormen) not before 2 August 2016, the other (Upbrook) not before 6 September 2016, and the further information supplied pursuant to request refers to events or statements made on 11 August 2016, 11 October 2016 and 13 November 2016, and to pressure on the claimant to go on or around 27 October 2016.

87. Paragraph 13 is the claimant was "subjected to hostile aggressive in undermining treatment" giving an incident in May 2016 as an example. Further information simply refers the questionnaire back to 11 and 12, the same 3 items

88. Paragraph 20 appears to be a recital of the claimant's disclosures about Brooks Mews, but other than the claimant's objections not being recorded at the board meeting on 6 September 2016, it is hard to discern a detriment.

89. Paragraph 21 records Vincent Tan's anger (at the 6 September meeting) at the claimant's resistance as a detriment.

90. Paragraph 23 is a general allegation of being "undermined and unsupported in his role as chief executive" in respect of which there is no further information.

91. Paragraph 33 is about being advised on 26 December 2016 by Vincent Tan to "leave early", paragraph 34 is about the claimant being asked on 10 January to leave on 13 January.

92. The claimant argues that pleaded, all these acts relate to a campaign on the part of members of the Tan family working within HR Owen to punish the claimant, make his life difficult, and force all him out of his job, for having made protected disclosures on 27 April 2016 (Tormen), 19 August 2016 (the Bentley car) 4 August 2016 and on later occasions (Upbrook Mews). The campaign ended when he was forced out of his job on 13 January 2017.

93. The respondent argues that the last appearance was on 10 May (totally 13th of May) and on the claimant and construction of section 207B the time expired 9th of May. It is argued that they are not continuous with cancellation of his leading, delay in paying his notice and other later matters which are in time.

94. The tribunal concludes that the nature of the claimant's case, relying on a series of different protected disclosures but all involving disputes with other family members about the propriety of the use of the respondent's resources is on the face of it a series of similar acts if he can substantiate that these disclosures were the reason for the falling out. The Tribunal has to hear evidence to resolve that. Many of the personnel are the same; it is hard to pick out anyone who was not part of the family or a confidant of Vincent Tan. Even if some of these matters pleaded as detriment – some are hard to pin down even after further information - are better seen as evidence of the reasons why he was asked to leave as soon as his successor was ready, without completing his notice, the tribunal will have to hear this evidence, and decide whether pressure from the Vincent Tan family was the reason for him being forced out, or whether (for example) the claimant's statement in October that he could not work at HR Owen any more were the reason for his leaving the company, with or without working his notice. Nor is time saved by cutting out decisions on whether disclosures were protected – it might still be argued that dismissal, if not the detriments, was on grounds of these disclosures.

95. This is a case where the merits will have to be decided after hearing the evidence, as it is not possible to sever or extract some acts as not interlinked without it.

Breach of Contract

96. The claimant's claim for breach of contract is about two matters: the first is that the respondent deducted tax from his final payment when it should have paid it gross. The case is that in the absence of a payment in lieu of notice clause in the contract, the payment is damages, and instead is a payment in connection with termination of employment of which £30,000, is by virtue of section 401 of ITEPA 2003 exempt, from income tax.

97. The Respondent says the that there was no contractual requirement to make a final payment without deduction of tax, and there is no basis for implying such a term. They argue that the claimant agreed to a termination, which means the he is liable to tax on the money as earnings. If they are wrong about that, they argue that the claimant has not suffered loss. His liability to tax is between him and HMRC. If he has paid too much tax he can get it refunded. There is no evidence that he has sought to do so and been refused.

98. The tribunal agrees that deducting tax from the claimant's final payment is not a breach of contract. Further, particularly where there is dispute about whether and when the contract ended, or if there was agreement about the basis on which it was paid, it is insufficiently certain to imply a term. If £30,000 of the money was not liable to tax, or if there is dispute about whether it was taxable, it is a matter for the claimant and the Revenue, and it is not the action of the respondent that causes loss, as the deduction arises from the law under which employed earners are liable to pay tax, and where employers are required to made deduction at source to discharge the employee's liability. This part of the contract claim has no reasonable prospect of success.

99. The second part of the claim is dispute about employer contributions to pension, and whether he is owed those contributions as part of damages for early termination.

100. The claimant does not particularise the pension benefits – the schedule of loss only says "TBC". The only document in the bundle stating what kind of pension scheme it was is the initial contract which says he will be automatically enrolled into a pension scheme with Standard Life under the new auto-enrolment measures. The only evidence of how much was involved is in the final February payslip, showing a deduction for pension (which must be the employee contribution) of £24.78. This is too small to be a percentage of the entire amount, though it may be based on part of it. Under the government scheme for auto-enrolment (though employees can opt out), until April 2018, jobholders contribute a minimum contribution of 1% pensionable pay, and the employer must match that. There is no evidence or even reason to believe, that this employer was contributing more than the minimum. On the basic salary payment made 24 February 2017 for the whole 6 months, 1% is £1,154, That is the most likely figure for the pension contribution loss claimed for the notice period.

101. The respondent's written submission asserts that the contributions to which he was entitled during the notice period was only £182; is not clear calculation has been made.

102. On the evidence of Ms. Desmond's communications with the claimant about the breakdown of his final payment, he was overpaid by one month, because she calculated the 6 months notice from 13 January, when he left, not from 23 December, when it was given. As a result he received three weeks more than his entitlement. On an annual salary of £280,000 this is worth £16,153.85. Clearly this exceeds the value of his employer pension contributions for the balance of notice period, and whatever the basis on which Ms Desmond made her calculations, the claimant is not out-of-pocket. Any loss of pension contributions in the notice period is exceeded by the overpayment.

103. It is clear from this that the claimant cannot establish that he has suffered loss by reason of the summary termination of his employment, and accordingly the claim for damages in breach of contract is dismissed under rule 37 as having no reasonable prospect of success.

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Employment Judge Goodman

Date: 31 October 2017