EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr C Caswell	AND	Torridge District Council

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 31 October 2018

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: Miss A Gurden of Counsel
For the Respondent: Mr J Wibberley of Counsel

RESERVED JUDGMENT

The judgment of the tribunal is that the claimant's claims were presented out of time and are hereby dismissed.

REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not the claimant's claims of unfair dismissal and disability discrimination should be permitted to proceed given that they were presented out of time.
2. I have heard from the claimant, who gave evidence today. I am also grateful to Counsel for the respective parties for their factual and legal submissions. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
3. Background Facts and Chronology:
4. This is a sad case in which the claimant has gone through considerable personal trauma. The claimant worked as an Animal Welfare Officer for the respondent local authority from 1 April 2002 until his dismissal for gross misconduct which was effective on 29 July 2015. The claimant's partner committed suicide on 11 April 2015 and the claimant commenced a period of certified sickness absence on 13 April 2015 following that bereavement. On 11 June 2015 the respondent's Occupational Health Department recommended that the

claimant was fit to undertake a phased return to work, which commenced on 17 June 2015. The following week on 24 June 2015 the claimant returned to work on a full-time basis.

5. Immediately afterwards on 25 June 2015 the claimant was suspended from work in connection with allegations that he had entered fraudulent mileage claims (an allegation which was subsequently not upheld). The claimant then attempted suicide himself. During the initial disciplinary investigation the respondent discovered that the claimant had indecent images of a young woman (believed to be his stepdaughter) on the mobile phone which the respondent had supplied him for work purposes, and this gave rise to further allegations of gross misconduct.
6. There was then a disciplinary hearing on 29 July 2015 which the claimant attended, and at which he was represented by Mr Reid. Mr Reid was apparently a retired trade union representative but assisted the claimant in his capacity as a social worker with the Community Mental Health Team. The claimant was summarily dismissed at the end of this hearing. The claimant complained at that hearing that the young woman had taken the photographs herself without his knowledge and that it should not considered to be his fault. Mr Reid confirmed that they intended to appeal that decision.
7. The claimant's representative appealed against the decision to dismiss on 4 August 2015. Two prospective dates for the appeal hearing were postponed to enable the claimant's representative to attend, and to ensure that the claimant was fit to attend. The claimant was well enough subsequently to confirm his grounds of appeal in a handwritten letter dated 14 September 2015. He raised eight headline grounds of appeal, the last of which suggested: "I have sought legal advice and they inform me the whole case is full of discrepancies." There was then an appeal hearing on 21 September 2015 at which the appeal was rejected and the decision to dismiss was upheld. The claimant did not attend this appeal hearing, and he was represented again by Mr Reid, and Mrs Ismael, another social worker from the Rehabilitation and Recovery Service.
8. Nothing then happened until May 2016 when the claimant made contact with his local MP to complain about his dismissal by the respondent local authority. His MP referred him to the Bar Pro Bono Unit for possible representation, and they appear to have agreed to act for the claimant at some stage during June 2016. The claimant did not then commence the ACAS Early Conciliation process until 31 October 2016, and the Early Conciliation Certificate was issued by ACAS on 15 November 2016. The claimant then presented these proceedings just over a month later on 17 December 2016.
9. These proceedings were therefore presented more than 16 months after the date of the claimant's dismissal. In his originating application the claimant accepted that the claims had been brought out of time, but argued that it had not been practicable for him to bring the claim within time because of his continuing mental health problems, and he sought an extension of time in respect of the discrimination claims on the basis that it would be just and equitable to extend time.
10. The claimant's claims and the conduct of these proceedings:
11. The claimant's claims are for unfair dismissal and for discrimination on the ground of his protected characteristic, namely disability. There was a case management preliminary hearing before Employment Judge Emerton on 4 April 2017 which resulted in a case management order of that date ("the First Order"). The Judge recorded that the claimant was bringing claims of unfair dismissal; direct disability discrimination arising from the acts of his suspension and his dismissal; and a failure to make reasonable adjustments. The claimant relied on the mental impairments of depression and post-traumatic stress disorder ("PTSD"). The respondent conceded that the claimant was a disabled person for the purposes of these proceedings as a result of those impairments during the relevant period of 25 June 2015 to 29 July 2015. The respondent otherwise denied the claims and asserted that they were out of time.
12. In the First Order the Judge made orders that the matter should be listed for a Preliminary Hearing to determine the out of time issues, and ordered the claimant to "supply to the respondent documentary medical evidence relating to his medical condition at the time and subsequent to his dismissal, relevant to his case that his medical condition caused (or contributed to) his failure to present his claim within the applicable time limits." The claimant

did not comply with this order, but did provide a letter from his Recovery Care Coordinator namely Mr Beverton dated 30 August 2016.

13. The Preliminary Hearing was heard by Employment Judge Matthews on 29 June 2017. He allowed the claimant's claims to proceed. The respondent appealed successfully against that judgment to the Employment Appeal Tribunal ("the EAT"), which decided inter alia that Mr Beverton's letter was not medical evidence, and that Employment Judge Matthews had not given adequate reasons for his judgment which was not Meek compliant.
14. The EAT decided that the matter should be remitted to a different Employment Judge to be reheard as a further Preliminary Hearing to determine the out of time issues, and this is the judgment which follows that hearing. In its judgment the EAT offered the following guidance: "Turning to disposal we consider that this matter must be remitted to the Employment Tribunal for rehearing … Although it is ultimately a matter for that Tribunal, we would have thought it essential that proper medical evidence is obtained and put before the Tribunal, together with a copy of any initial communications from the Bar Pro Bono Unit - which as it is not advice, it is presumably not subject to privilege - and also from ACAS which, in each case, bears on time limits in employment cases."
15. Notwithstanding this indication the claimant has not adduced any further evidence, with the exception of his GP's notes, which have now been adduced for the first time. I have not had before me any formal medical evidence reporting on the claimant's ability or otherwise to prepare or to issue these proceedings, and if so when. Neither has the claimant disclosed any correspondence with the Bar Pro Bono Unit or ACAS.
16. The claimant's statement:
17. The claimant gave evidence before me today having attested to the truth and accuracy of a three-page written statement which I understand was the same statement of evidence before Employment Judge Matthews at the first Preliminary Hearing. I now explain what the claimant asserts in his statement, rather than making findings of fact as to the same:- The claimant explains in that statement that he had no history of mental illness prior to the events of 2015 and as of 19 June 2017 remained unable to work, and was under the supervision of his GP and the mental health care team. Following his partner's suicide and his own attempted suicide his mental health continued to deteriorate and he was prescribed sertraline and zopiclone (which are antidepressants) with the effect that he became withdrawn. He was not able to attend his appeal hearing and after his dismissal was unable to think about normal day-to-day activities and spent much of his time in bed. He felt unable to claim any state benefits for a number of months after his dismissal and says that his social worker made the necessary application on paper. He says it took some 6 to 8 months (that is until between March and May 2016) before he slowly began to recover, and after about eight months (from May 2016) before he started to think that he should do something about his dismissal. He says he felt unable to go to Citizens Advice, or a law centre, and his care worker suggested that he spoke to his MP about making a complaint. His MP then wrote to the Bar Pro Bono Unit who sent an application form to the claimant under which he could apply for assistance. He was able to provide basic information to them in June 2016, and they emailed notification on 11 October 2016 that they could provide support. The claimant was advised to make contact with ACAS which he did on 31 October 2016. He says that he was not able to discuss his case at length about becoming distressed and then submitted the claim on 17 December 2016.
18. The medical evidence:
19. As noted above (despite the previous First Order and the guidance from the EAT) there is still no medical evidence before this Tribunal which supports the claimant's contention that he was medically unable to prepare and present a Tribunal claim and/or when he first became able to do so. I have been referred to and considered carefully Mr Beverton's letter dated 30 August 2016, and copies of the relevant extracts from the claimant's GPs notes.
20. Mr Beverton confirms in his letter that the claimant was diagnosed with mental health problems and had been in receipt of treatment and support for the local NHS Mental Health Service team. He notes the claimant was discharged from hospital following treatment and was supported by a Recovery Care Coordinator and also had positive bereavement support. He suggests that the claimant's "higher executive functions such as his decision

making and long-term planning are negatively affected following exposure to stress". Although he concedes that there was no psychiatric diagnosis of PTSD he felt that the claimant did exhibit symptoms of the condition as well as depression. Mr Bevington's letter does not address the issue of whether the claimant was disabled by his condition from preparing and/or submitting a Tribunal claim nor, if that was the case, when this changed.

21. The GP notes record that the claimant telephoned and asked to be seen on 17 April 2015 following the death of his partner, and met with his GP on 20 April 2015. The conditions of depression and anxiety were discussed and the GP prescribed antidepressants. An entry on 5 May 2015 records "Doing as well as can be expected, still not coping, generally well, but not worse". The claimant then changed surgeries which caused some delay in the mental health referral to CRUSE (the support team). An entry on 29 June 2015 (after the claimant's suspension) records: "not coping, managed only four days at work and then incident with boss and felt acopic. Went home and tried to take own life with lots of tablets." An entry on 24 July 2015 (the week before his dismissal) records: "still low and poor sleep, now has key worker [Mr Reid] and he is organising counselling and help with work problems, seems has been inappropriately dismissed." The entry on 21 August 2015 records: "is feeling restlessness, is worse … Diagnosis bereavement." The entry on 18 September 2015 records: "mother now dying, ovarian cancer so spending most of time in Midlands." The entry on 20 October 2015 records: "mum dies peacefully as expected … Agreed plan now reduce [antidepressants]". The entry on 30 October 2015 records: "DWP want another backdated note, done, has seen CRUSE [mental health support] – helpful - examination: seems pretty buoyant, plan, return if struggling." The entry on 15 December 2015 records: "History: pretty low, anxiety worse again - struggle to get out of house - some self-harming thoughts – CRUSE helpful." The entry on 23 February 2016 records: "History: patient reviewed - inquest this Friday so poor sleep - frustrated with lack of contact from CPN … CRUSE very helpful." The entry on 13 April 2016 records: "clinical examination, not suicidal, some positivity but clearly low. Patient reviewed, helpful chat, doing okay, recent inquest and first anniversary so not so good at present but still seeing Lorraine at CRUSE and helping son in motorbike business and running 4 – 5K most days, still has bad days." The entry on 26 August 2016 reports: "came as wanting to take previous employers to court for unfair dismissal, has taken legal advice, they need medical report and I have said happy to do it but will need to be approached by them through normal channels." The entry on 27 October 2016 records concern about a cough which might be pneumonia and reconfirms the prescription of sertraline, but otherwise makes no comment about any mental illness.
22. <u>Other documentary evidence:</u>
23. Despite the indication from the EAT that the claimant should disclose communications from the Bar Pro Bono Unit, and from ACAS, the claimant has failed to do so. Similarly, no documents have been adduced with regard to his earlier referral and discussions with his MP. The respondent has now adduced the background information and Individual Application Form under which prospective litigants can seek support from the Bar Pro Bono Centre, which has now been rebranded under the name of Advocate. Although it is accepted that this was not the actual form which the claimant would have submitted under its previous name, nonetheless there is no reason to suggest that the form should be substantially different. It runs to nine pages and requires detailed information about the full names of the applicant and the prospective parties, detailed financial means testing, an outline of the claim to be brought, an equal opportunities questionnaire, and an attached sheet setting out what supporting documentation must also be included. That final sheet includes the comment: "Note: strict time limits apply for applications to the Employment Tribunal."
24. The respondent has also adduced the 14 page background leaflet from ACAS in connection with Early Conciliation, which is headed: "Conciliation Explained." This is a detailed form which gives all the necessary background information about Early Conciliation, including a warning that Employment Tribunal claims have to be presented within the limitation periods, which for unfair dismissal is explained to be three months.
25. <u>The claimant's Facebook posts:</u>

26. The claimant was challenged about a number of his Facebook posts (which have been copied and are in the trial bundle) and which significantly undermine his assertions that he was too unwell to lead a normal active life or was confined to his bed or his home. Two posts on 23 December 2015 show him coarse fishing on Dartmoor, and on the beach at Teignmouth. On Christmas Eve 2015 he posted: I have had a fantastic afternoon with a very good friend, we got a real good soaking caught in a hail storm, thank you Rachel you cheered me up, Merry Christmas to you and the family." On Boxing Day 2015 the claimant posted: "Had a fantastic day following the hunt at Exford today with Anne Alvis and a pint of cider and a sarny at the White Horse." He posted on 28 December 2015 that he was just back from an 8 km walk. It is also clear from his post on 29 September 2016 that at that time the claimant was well enough to undertake and to pass his motorcycle test.
27. <u>The claimant's credibility:</u>
28. I found the claimant's evidence to be unconvincing and lacking in credibility in a number of respects, for the following reasons. In the first place the claimant attested to the truth of his written statement, but under cross-examination when questioned upon its contents repeatedly failed to answer questions on it, or to explain further, on the grounds that he "did not know" or "could not remember". He explained that he wished to put all matters relating to the respondent out of his mind because of his mental health difficulties and how these were made worse by thoughts of the respondent, but was so vague and non-committal in the vast majority of his responses that it significantly undermined his suggestion that his statement in any way represented his recollection and/or was true. In addition, some of the assertions made by the claimant in his statement and in his evidence under cross-examination were clearly untrue when compared with such contemporaneous documentation as was available, namely the GP notes and the Facebook posts.
29. I now set out a number of examples of the vagueness or conflicts in the claimant's evidence. The claimant was asked about his appeal letter dated 14 September 2015 (which as noted above is in the claimant's handwriting and which sets out eight points of appeal, the latest of which records that he had taken legal advice at that stage). He now says that he did not know if he had written the letter, or whether it had been dictated to him to write. When asked if he was seriously suggesting that it had been dictated he replied "I haven't a clue". When asked if he had sought legal advice he replied "I don't know". When asked if it was possible he had spoken to a solicitor he replied "I don't know". He was reminded that at the previous preliminary hearing he admitted that he had claimed to have sought independent legal advice, but had not done so, and had merely put that comment in for effect. He replied "I don't know". When asked whether it was possible that he had taken advice from a solicitor in connection with the claim he replied: "It is possible but I don't know". When asked if he was advised that there was a three month time limit he replied "It is possible but I don't know".
30. When challenged as to why he did not attend his own appeal hearing, he asserted that it was because of his ill-health, when the GP records support the contrary contention that he had been spending time in the Midlands with his mother who was very ill. When challenged as to whether he was well enough to drive to the Midlands he first asserted that he could not remember, and then alleged that he had been driven.
31. When the claimant was asked whether either of Mr Reid or Mrs Ismael told him what had happened at the appeal hearing he claimed not to know. When asked if he had been advised that he could pursue an unfair dismissal claim he replied: "Probably, I don't know". When it was suggested that he could have asked Mr Reid and/or Mrs Ismael for assistance in bringing a claim he replied: "Probably, I don't know". When challenged as to how he could say his statement was true, having confirmed at the outset that it was true, he replied: "I don't know what I'm talking about, I have mental health issues." When asked what date he asserted that he was fit enough to undertake normal activities again he replied: "I don't know", and then when asked "So how can you say if your statement is true?" He responded: "I don't know".
32. The claimant was challenged about the GP notes, and in particular in October 2015 because of the reference to DWP and the fact that the claimant had therefore been well enough to submit a claim for State benefits. He was asked if he had submitted the claim,

whether he had received assistance from his carers, and whether it was true as recorded by the GP that he was at that stage "pretty buoyant", and to each of those questions he replied "I don't know".

33. The claimant was challenged about attending the inquest for his late partner, how he knew about the same, in what capacity he had attended, whether he had tried to obtain representation, and why the fact he was well enough to attend was not mentioned in his witness statement, and to each of these questions he replied: "I don't remember" or "I don't know".
34. The claimant was challenged about his knowledge of the right to bring an unfair dismissal claim. He was asked if he was aware about an unfair dismissal claim in May 2016; whether he knew that he could bring a claim at that time; whether he knew previously that from July 2015 when he was dismissed; and whether he knew that all that information was available from a Google search. He answered "Probably" to each of those questions. The claimant was also vague in his responses as to the completion of the application form for the Bar Pro Bono Unit, but when asked whether it was likely that he was well enough to fill out the relevant details he replied "Probably".
35. Finally, during his cross-examination the claimant agreed that it was straightforward to articulate his potential claim against the respondent. In particular he agreed that it could be articulated simply in this way: that his dismissal was unfair because he had not taken the photographs of which he was accused, and that he was discriminated against because he was not provided with sufficient support for his mental illness during the process.
36. I am of course conscious that the claimant suffered considerable personal trauma which at the very least consisted of the suicide of his partner, his dismissal, his own attempted suicide, and the death of his mother, and all within a short period of time. The respondent has conceded that the claimant suffered from depression and PTSD, and although I have seen no evidence of any formal diagnosis of PTSD, it is clear that he has been prescribed antidepressants by his GP and been supported by the relevant mental health support services. It would be normal to expect that at some stage(s) at least during this process the claimant would be too unwell to deal with paperwork and the possibility of presenting a claim. However, there is no medical evidence to support that contention, and no entry in the GP notes or even a letter from his GP to this effect. Even bearing in mind the claimant's personal difficulties and the claimant's depressive illness, I found his evidence to be unconvincing and unreliable.
37. Having established the above facts, I now apply the law.
38. The first relevant statute is the Employment Rights Act 1996 ("the Act"). Section 111(2) of the Act provides that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
39. This is also a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination, and a failure by the respondent to make reasonable adjustments. The protected characteristic relied upon is disability, as set out in sections 4 and 6 of the EqA.
40. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.
41. I have considered the following cases, namely: Palmer and Saunders v Southend-on-Sea BC [1984] ICR 372; Porter v Bandridge Ltd [1978] IRLR 271 CA; Wall's Meat Co v Khan [1978] IRLR 499; London Underground Ltd v Noel [1999] IRLR 621; Dedman v British Building and Engineering Appliances [1974] 1 All ER 520; Cullinane v Balfour Beattie Engineering Services Ltd UKEAT/0537/10; Wolverhampton University v Elbeltagi [2007]

All E R (D) 303 EAT; British Coal v Keeble [1997] IRLR 336 EAT; Robertson v Bexley Community Service [2003] IRLR 434 CA; Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13 Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT; and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.

42. In this case the claimant's effective date of termination of employment was 29 July 2015. The three month primary time limit therefore expired at midnight on 28 October 2015. The claimant does not enjoy any extension of time under the ACAS Early Conciliation provisions because the Early Conciliation process was not commenced until after the normal limitation period had expired nearly a year later on 31 October 2016. The EC Certificate was obtained on 15 November 2016, and these proceedings were issued on 17 December 2016. They were therefore more than 16 months out of time.
43. The unfair dismissal claim:
44. The grounds relied upon by the claimant for suggesting that it was not reasonably practicable to have issued proceedings within the relevant time limit are that he was precluded from doing so because of his mental illness.
45. The question of whether or not it was reasonably practicable for the claimant to have presented his claim in time is to be considered having regard to the following authorities. In Wall's Meat Co v Khan Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the claimant, see Porter v Bandridge Ltd. In addition, the Tribunal must have regard to the entire period of the time limit (Elbeltagi).
46. In Palmer and Saunders v Southend-on-Sea BC the headnote suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the Industrial Tribunal taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, in determining whether or not it was reasonably practicable to present the complaint in time, an Industrial Tribunal may wish to consider the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit. The Industrial Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used. Contrary to the argument advanced on behalf of the appellants in the present case and the obiter dictum of Kilner Brown J in Crown Agents for Overseas Governments and Administrations v Lawal [1978] IRLR542, however, the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time. The views expressed by the EAT in Bodha v Hampshire Area Health Authority on this point were preferred to those expressed in Lawal:-
47. To this end the Tribunal should consider: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) whether the claimant had been advised by anyone, and the nature of

any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.

48. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) concluded that "reasonably practicable" does not mean reasonable (which would be too favourable to employees), and does not mean physically possible (which would be too favourable to employers) but means something like "reasonably feasible".
49. Subsequently in London Underground Ltd v Noel, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing so. As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of practicability … the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204).
50. Underhill P as he then was also considered the period after the expiry of the primary time limit in Cullinane v Balfour Beattie Engineering Services Ltd (in the context of the time limit under section 139 of the Trade Union & Labour Relations (Consolidation) Act 1992, which is the same test as in section 111 of the Act) at paragraph 16: “The question at “stage 2” is what period - that is, between the expiry of the primary time limit and the eventual presentation of the claim - is reasonable. That is not the same as asking whether the claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted - having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months.”
51. In this case the claimant asserts that the substantial cause for his failing to comply with the time limit was the physical impediment of his illness. However, there is no cogent evidence to support this. There is no medical evidence which supports that contention. Although the claimant says that he was too ill to present a claim, his evidence was vague and inconsistent, and contrary to the other contemporaneous documents before the Tribunal. It seems clear to me that the claimant had taken legal advice and knew of his right to bring a claim because he said as much in his own letter of appeal as long ago as 14 September 2015, more than a year before he issued these proceedings. It is not the case that the respondent had misrepresented the position to the claimant in any way. Given that the claimant has adduced no evidence about any advice which he says he might have received from his social workers, or any legal adviser, or the Part Pro Bono Unit, it cannot be said that he had been wrongly advised by any legal advisers and that this prevented him from presenting a claim. The claimant has conceded that his claim can be simply articulated.
52. The burden of proof is on the claimant to establish that it was not reasonably practicable for him to have presented the claim before the expiry of three months on 28 October 2015. In circumstances where the claimant was well enough to write his own appeal letter on 14 September 2015; he says in it that he has taken legal advice; he had other support from social workers who represented him; he had access to the internet; and he accepts that his claim was straightforward to articulate, in my judgment it was clearly reasonably practicable and reasonably feasible for him to have presented a claim within time. The claimant has not discharged the burden of proving that it was not reasonably practicable for him to have presented the claim before the expiry of three months on 28 October 2015. I dismiss the unfair dismissal claim for this reason.
53. In any event even if it were the case that the claimant was unable to function normally and to prepare and present a claim for a period of 6 to 8 months following the traumatic events of 2015 as he alleges, he cannot be said to have presented the claim within a reasonable period thereafter. He was well enough to raise a complaint about his dismissal to his MP in May 2016, and by June 2016 had completed a complicated application process to the Bar Pro Bono Unit for representation. He told his GP on 26 August 2016 that he had taken legal advice and wished to have a medical report to support a claim for unfair dismissal.

He still waited until the end of October 2016 before notifying ACAS under the Early Conciliation provisions. He then waited a further month between obtaining the Early Conciliation Certificate in mid-November 2016 and presenting these proceedings on 17 December 2016. There is no satisfactory evidence, medical or otherwise, to explain why the claimant failed to present the proceedings during these subsequent periods of delay, nor why he was suddenly able to do so only in December 2017. Even if the claimant had been prevented by illness until about May 2016 from presenting his claim within three months (which for the reasons set out above I do not accept in any event), nonetheless I would have found that the claim was out of time because it had not been presented within such period thereafter as is reasonable.

54. In conclusion therefore I dismiss the claimant's unfair dismissal claim which was presented out of time.
55. The disability discrimination claims:
56. The grounds relied upon by the claimant for suggesting that it would be just and equitable to extend the time limit are that the claimant was prevented by his ill-health from presenting the claim, and that in those circumstances it is just and equitable to extend the time limit.
57. I have considered the factors in section 33 of the Limitation Act 1980 which is referred to in the Keeble decision. I deal with each of these in turn.
    a. The first is the length of and the reasons for the delay. The delay was more than 16 months. The reason relied upon by the claimant is that he was precluded by his mental illness from presenting the claim earlier than he did. For the reasons set out above I have rejected that contention. On the face of his own document (namely his own appeal letter) he had taken legal advice and was aware of his right to bring an unfair dismissal claim within the original primary time limit. There is no cogent evidence, medical or otherwise, to discharge the burden of proof upon him that he was unable to have presented his claim in time, which he concedes was simple to articulate.
    b. Secondly, I have considered the extent to which the cogency of the evidence is likely to be affected by the delay. The case is now rather stale, given that the claimant was dismissed in 2015, and the recollection of the various personnel involved could well have suffered in the intervening period. Nonetheless the respondent does not pursue the argument that it could not adduce relevant evidence and does not suggest that it has been adversely prejudiced by the delay to the extent that a fair trial is now impossible. This is not therefore a compelling factor to support the refusal of an extension of time.
    c. Thirdly I have considered the extent to which the parties co-operated with any request for information. In this case the claimant has repeatedly failed to adduce the medical evidence ordered at the First Order, and which was recommended by the EAT. In addition, the claimant failed to adduce any of the other documentary evidence which was recommended. Inevitably my conclusions have been reached on the basis of the evidence before me in the absence of this information which otherwise might have assisted the claimant.
    d. Fourthly, I have considered the promptness with which the claimant acted once he knew the facts giving rise to the cause of action. The claimant has not acted promptly at all. He threatened a legal claim in his appeal letter, and did not present one until some 16 months later.
    e. Finally, I have considered the steps taken by the claimant to obtain appropriate professional advice. Again, the claimant has been unfortunately vague in this respect. It seems that he obtained legal advice prior to his appeal letter; had representation from social workers throughout the disciplinary process; and subsequently spoke to his MP, the Bar Pro Bono Unit, and ACAS. The claimant has failed to clarify exactly what advice he sought or obtained, and at what stage.
58. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider

their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.

59. In addition, per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan before the Employment Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was.
60. Further, As Sedley LJ stated in Chief Constable of Lincolnshire Police v Caston at paragraphs 31 and 32: “In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it.”
61. In my judgment, on the evidence which was before me in this instance, on the balance of probabilities the claimant had obtained legal advice and was aware of his right to bring an unfair dismissal claim to this Tribunal within the primary time limit. Although he clearly suffered mental illness as a result of the traumatic incidents in 2015, there is no cogent evidence, medical or otherwise, to support the contention that his illness precluded him from presenting his claim, which he concedes was simple to articulate. There is no evidence before me as to the exact nature of what advice he received and when, and whether he was otherwise precluded from presenting the claim, for instance by incorrect advice. The claims were presented substantially out of time, and applying the above authorities this Tribunal cannot hear the complaint unless the claimant convinces it that it is just and equitable to extend time. The claimant has not done so, and I decline to exercise discretion to extend the relevant time limit because in my judgment it is not just and equitable to do so.
62. Accordingly, the claimant’s claims for disability discrimination are also hereby dismissed.
63. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 3 to 36; a concise identification of the relevant law is at paragraphs 38 to 41; how that law has been applied to those findings in order to decide the issues is at paragraphs 42 to 62.

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Employment Judge N J Roper
Dated 2 November 2018

Judgment sent to Parties on

19 November 2018

For the Tribunal Office