EMPLOYMENT TRIBUNALS

RECORD OF AN ATTENDED PRELIMINARY HEARING

Claimant: **Mrs. M Sacharzewska**

Respondent: **Kirby Grange Limited**

Heard at: **Nottingham**

On: **Monday 19 October 2020**

Before: **Employment Judge Rachel Broughton (sitting alone)**

Representation

Claimant: **Mr A. Johnston: Counsel**
Respondent: **Ms Wisniewska : HR Consultant**

JUDGMENT

1. The following claims presented in the claim form dated 4th September 2019 were presented out of time and are struck out under Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013;
   - The claim of unfair dismissal brought under section 94 and 98 of the Employment Rights Act 1996.
   - The breach of contract claim for unpaid notice pay.
   - The claims of direct discrimination brought under section 13 of the Equality Act 2010 on the grounds of the claimant's race and age.
2. The claims of disability discrimination under section 13 and section 15 of the Equality Act 2010 have been presented within time pursuant to section 123 (1)(b) of the Equality Act 2010.

REASONS

The Claim

(1) The claimant was employed by the respondent, which runs a residential care home, as a care assistant. The claimant had been employed by the respondent from 1 July 2012. The respondent's position as set out in its

response, is that the claimant's employment was terminated on 13 March 2019 by agreement. The claimant disputes that the termination was by agreement. Within her claim form she confirmed the termination date as the 13 March 2019.

(2) The claimant started the Acas early conciliation process on **9 July 2019** (day A). Acas issued the certificate on 9 August 2019 (day B).

(3) The claimant submitted a claim in the employment tribunal on 4 September 2019. The claimant indicated at box 8 that the claimant was pursuing a claim of unfair dismissal, age, race and disability discrimination in addition to claims for notice pay, holiday, arrears of pay and other payments. The particulars of the claim were brief and provided no details of the claims in respect of race and age discrimination, stating merely that the claimant felt; "*discriminated on grounds of disability, age and nationality".*

Background

(4) There was a preliminary hearing before Employment Judge Butler on 7 January 2020 where it was recognised that there was insufficient detail in respect of the discrimination complaints for the respondent to properly respond to the claims and that on the face of it all the claims were presented out of time. In those circumstances the matter was listed for today's preliminary hearing to determine whether the tribunal has jurisdiction to deal with the claims. Today's hearing was not to consider substantive issues of liability or whether the claimant is disabled for the purposes of the Equality Act 2010 (EqA).

Today's hearing

(5) The claimant was represented today by Ms Wisniewska who confirmed that she is acting for the claimant in a professional capacity as an HR consultant. The claimant who is Polish, was assisted by an interpreter.

Evidence

(6) The respondent produced a bundle of documents which numbered 47. The claimant produced her own bundle of documents which numbered 31. During the lunch adjournment the claimant produced a further document, a letter from the University Hospitals of Leicester (UHL) dated 25th of September 2019. Mr Johnston raised no objection to the inclusion of that document and this was added to the bundle at pages 32 to 33.

(7) The claimant had also produced a witness statement. No other witnesses were called. The claimant gave oral evidence and was cross-examined by the respondent. Both parties made oral submissions. The parties were informed that I may consider the merits of the claims when determining whether to exercise the discretion to extend time, particularly in relation to the race and age discrimination complaints, and were therefore invited to address merits when making their submissions.

Issues

(8) Before hearing evidence and submissions, it was necessary to clarify with Ms Wisniewska what the claims are and the dates it is alleged the acts of discrimination took place.

(9) It was confirmed that the claims the claimant is seeking to bring are as follows;

Unfair Dismissal

(10) A claim of ordinary unfair dismissal pursuant to section 94 and 98 of the Employment Rights Act 1996 (ERA). The claimant's case in essence, is that she was absent from work on sick leave from July 2018, there was no medical evidence indicating the claimant would not be able to return and the dismissal in March 2019 was both procedurally and substantively unfair.

Disability Discrimination;

(11) The claimant alleges that there were 4 acts of disability discrimination which took place on the following dates;

a. The act of dismissal: 13 March 2019
b. Failure to allow the claimant a right of appeal: Ms Wisniewska confirmed that the claimant relies upon the date of termination as the date of the alleged discrimination for these purposes:13th of March 2019.
c. Failure to pay the claimant sick pay (company and/or statutory sick pay): August 2018 to 13 March 2019 (continuing acts).
d. Failure to provide the claimant with payslips: August 2018 to 13 March 2019 (continuing acts).

(12) Ms Wisniewska confirmed that she was familiar with the different types of discrimination under the EqA and that the claimant relies only on direct discrimination pursuant to section 13 EqA and discrimination arising from disability pursuant to section 15 of the EqA.

Definition of disability

(13) With respect to the claimant's impairment/s which it is alleged meet the definition of disability under section 6 EqA, Ms Wisniewska explained that the claimant relies on the cumulative effect of the conditions but that some of the illnesses as referred to in the claimant's evidence, also meet the definition of section 6 independently however, she was not in a position to confirm what they were, not having taken full instructions from the claimant before today's hearing. It was not necessary however for the purposes of today's hearing to require the claimant to clarify further the nature of the disability and which disabilities it is asserted in their own right to meet the definition of section 6, that can be addressed at a further preliminary hearing should those claims proceed.

Race discrimination

(14) With respect to the race discrimination complaint, Ms Wisniewska explained that the claimant relies upon exactly the same acts in relation to the disability discrimination complaint and the same dates.

(15) Ms Wisniewska confirmed that the claimant relies upon direct discrimination under section 13 on the grounds of her race for these purposes by reference to her nationality, namely Polish. I asked Ms Wisniewska to explain the grounds on which the claimant is contending that the treatment she received was on the grounds of her race, she explained that the claimant case is that;

"if her English would be better, her employer would have treated her better"

(16) The claimant has been employed since 2012 and does not complain of any previous acts of discrimination prior to her absence in sick leave. When asked to explain further the grounds on which the claimant contends that the alleged less favourable treatment was connected to her nationality, Ms Wisniewska explained that it is; *"her suspicion."*

Age discrimination

(17) With regards the claim of age discrimination, Ms Wisniewska explained that the claimant was 47 years of age at the date of dismissal. The claimant relies on direct discrimination under section 13 EqA and a hypothetical comparator. The only act of alleged discrimination is the act of dismissal.

(18) When asked on what grounds the claimant believes that the treatment was connected to her age, Ms Wisniewska explained that the claimant believes it is; "*linked to disability, she had conditions and she's not so young any more".*

Breach of contract

(19) The only other complaint relates to 6 weeks' notice pay brought as claim for breach of contract claim outstanding on the termination date. (I understand that the sick pay and holiday pay has been paid and most of her payslips provided, however the claimant pursues the non-payment of sick pay and late provision of payslips as acts of discrimination).

Evidence

(20) The claimant had produced a witness statement and gave oral evidence. She was cross examined by the respondent. Each party then made submissions. I have additionally considered the documents and my written notes from the hearing in arriving at the following findings of facts;

Findings of fact

<u>Events immediately prior to termination</u>

(21) The claimant gave evidence that she had been suffering with a number of conditions since 2013 although she had been fit to continue working. A letter from UHL dated 5 August 2013 supports her account of historical health issues. The letter refers to her pain being the same since she was last seen (it does not state when this was), with "lateral sided deep pain" (p 30) and refers to the appearance of "*tears of her lateral meniscus as well as mild to moderate arthritis."* The claimant was referred for physiotherapy and placed on a list for an arthroscopy.

(22) There is documentary evidence of ongoing attendances at the UHL, with an attendance in January 2014 which reports an improvement in her symptoms but degenerative changes which may warrant a joint replacement in the future. A letter in 2015 records further discomfort due to the degenerative changes (p4/5).

(23) The situation with her health appears worse by 2016 (p 6) with a letter referring to steroid injections once or twice a year and with the pain by this stage; "*affecting her activities of daily living so much that she cannot manage"*. The claimant is reported as not keen on having a knee replacement and investigations recommended to decide on further surgical options if needed. A further letter notes that it may not be possible to improve the symptoms without a total knee replacement (p 7).

(24) Other than GP fit notes there is no further medical evidence after October 2016 until letters from UHL and her GP from March 2019.

Absence on sick leave from June /July 2018

(25) The claimant was absent on sick leave from her job with the respondent, from on or around June 2018 until the date her employment was terminated in March 2019. The claimant states in her witness statement that her absence started in July 2018 although in her claim she refers to the first GP fit note being 17 June 2018. The respondent in its response refers to her sickness absence commencing on 17 June 2018 and yet in the respondent's letter to the claimant dated 26 February 2019 it refers to her absence since 8 July 2018. It is not necessary for these proceedings to determine the exact date, it is sufficient to say that it was on or around June/July 2018.

(26) The claimant describes in her witness statement her health issues although it is not clear what period she is referring to, she refers to the problem with her right hip and the "*whole area*" in her body and of pain going to her stomach, through her groin to her knee. She complains of pain so strong that she cannot sit or lay down and to considerable weight loss and exhaustion due to lack of sleep.

(27) The GP fit notes disclosed for the period February 2019 to June 2019 refer to hip pain only, however there is a letter from her GP dated 4 March 2019 (p.8) which refers to the claimant not being able to return to work because of initially shoulder pain and then "*lower abdominal and right hip pain."*

(28) During this period when she was suffering from hip and abdominal pain, (prior to the termination of her employment) she had sought assistance in February 2019 from European Community Advice Ltd and in particular Mr Kostecki, a consultant. The claimant had requested that Mr Kostecki write a letter in English for her to send to the respondent questioning the respondent's decision not to pay her statutory sick pay and asking for her salary wage slips from August 2018. The letter is dated 15 February 2019 signed by Mr Kostecki.

(29) The claimant's evidence is that she "*presented the problem*" to Mr Kostecki and he prepared the letter for her. The letter itself refers to it being composed of information provided by the claimant but not a direct dictation by her. The claimant confirmed however that she had provided the instructions personally.

(30) Shortly prior to her dismissal, the claimant accepted that she had written again to the respondent. The letter refers to a scheduled meeting on 12 April 2019 with the respondent however, the claimant accepted that this was typographical error and should have read 12 March 2019 as the date of the proposed meeting. The letter is undated but it is clear that it was sent some time after 15th February and before 12 March 2019. The claimant raises again the issue of outstanding unpaid sick pay and her intention to raise this at the forthcoming meeting and if this is not to be paid.

(31) The letter goes on to explain that the claimant has an appointment with a rheumatologist on 16 May 2019 and that perhaps a doctor will start treatment if he finds a solution to what is wrong. She refers to receiving treatment for her pain and to taking a lot of painkillers.

(32) The claimant's evidence in cross examination, was that she had composed this letter herself in Polish originally which was then translated by her son into English. It is a cogent, reasonably well-structured letter and the claimant's evidence was that it had taken her some time to prepare.

Termination

(33) The respondent's case as set out its response to the claim, is that a meeting took place between the claimant and the respondent on 12 March 2019 and that it was agreed between them that the respondent would terminate the claimant's employment. The respondent alleges that the claimant had asked the respondent to terminate her employment to enable her to claim benefits. The claimant denies this.

(34) A letter was sent to the claimant on 13 March 2019 referring to the meeting on 12 March and confirming that her employment was being terminated effective from 13th of March 2019. The claimant denied under cross examination that she had been told at the meeting on 12 March that her employment would end on 13 March. Her evidence was that she was only aware her employment had been terminated when she received a letter via the post on 15 March 2019.

(35) I make no findings on what was or was not discussed at the meeting on 12 March or when the actual date of termination was, those would be matters to be determined at a full hearing, should the claims proceed.

(36) The claimant accepted that on her own case, she was aware that her employment had been terminated with effect from 13 March no later than 15 March 2019.

(37) The claimant accepted under cross examination that she considered the decision to terminate her employment to be unfair at the time that she received the letter on 15 March 2019 and that she believed at the same time that she had been dismissed because of her medical conditions, because of her nationality and /or because of the age.

(38) The claimant also accepted under cross examination, that she was aware as at the 15 March, that she had the right to bring a claim before the Employment Tribunal and that one of the things that she needed to do to bring a claim was first to engage with the Acas early conciliation process.

(39) The claimant also accepted in cross examination that she was aware that there were strict time limits and in particular that she was aware that the time limit to bring a claim was within a period of three months.

<u>The primary 3 month period: 15th March to 14th June 2019</u>

(40) The claimant accepts that prior to the 14th June 2019 (the expiry of the primary limitation period based on an effective termination date of 15th March 2019), she took no steps to contact Acas or commence proceedings in the Employment Tribunal.

(41) The claimant's explanation for not taking any action within the primary limitation period was that she was very unwell; "*after receiving the news of the dismissal which resulted in heart attack and I visited the accident and emergency department, I was unable to start proceedings within three months".*

<u>Gynaecological issues</u>

(42) The claimant within her witness statement refers to attending the Accident and Emergency unit on 6th April 2019 with suspected fibromyalgia and being prescribed medication. There is a letter from her GP (p.20) which refers to a diagnosis of possible fibromyalgia, which appears from how the events are set out chronologically in that letter, to be a diagnosis arising from an appointment with Dr Sheldon on 16 May 2019, along with report of abdominal pain.

(43) There is also within that same GP letter (p.20) reference to the claimant visiting the Accident and Emergency unit on 6 April 2019 with chest pain which was diagnosed as musculoskeletal pain and of her being discharged home.

(44) The claimant refers in her statement to her gynaecological issues getting worse around the time of the dismissal. The GP had referred in the 4 March 2019 letter, to lower abdominal pain and the claimant then presented to her GP practice on 9th May 2019 with a two-week history of heavy vaginal bleeding and was referred for an ultrasound. The undisputed evidence of the claimant is that she suffered with this heavy bleeding for five weeks. A letter in the bundle (p10) confirms that an ultrasound was carried out on 7th June 2019 which identified a fibroid and ovarian cyst.

(45) The disclosed GP fit notes for the period 3rd June 2019 to 2nd August 2019 refer no longer to just hip pain but to; "*Acute coronary syndrome, hip pain, heavy period/fibroid*".

(46) On the 7th June 2019 the claimant had a Transvaginal scan which revealed a "complex *cyst mass" on her right ovary"* (p.11)

(47) The GP fit note from 3 August 2019 to 2 October 2019 refer to; "ongoing *aches and pain, hip pain, heavy period".*

(48) The medical evidence therefore supports her account of abdominal pain during this period.

<u>Post Termination - Cardiological problems.</u>

(49) The claimant's evidence is that following the dismissal she also started having cardiological problems. She does not complain of suffering this sort of health issue prior to the date of dismissal. It is not disputed that she returned from having the scan on the 7th June and began to feel unwell that same evening. She was admitted into the Accident and Emergency department in the early hours of 8 June 2019 with pain in her chest and difficulty breathing. Her evidence is that she was told that she had had a heart attack. She was discharged on the 12 June 2019.

(50) The claimant referred in cross examination to having difficulty breathing such that she was "*fighting for every breath*", unable to walk, breathe and her evidence is that any physical effort exacerbated her symptoms. Her evidence is that her symptoms started to subside during the hospital stay and upon discharge when was given a lot of medication and a spray. The attacks were then less severe, one or two a week rather than one or two a day. She is still taking medication regularly and she describes her difficulties with breathing as ongoing. She describes being weak and tired and taking regular medication prescribed by the cardiologist.

(51) There is a letter from UHL to her GP (p 12/13) which confirms the reason for admission as 'chest pain'. The diagnosis however is not heart attack but

'ACS'. It was put to the claimant that she had exaggerated the problems with her breathing, in that her description in cross examination was not how she describes it in her witness statement and indeed, her description of the ongoing severity of her symptoms would not appear to be supported by the medical evidence, at least not in terms of the symptoms after her discharge. The letter from UHL refers to the claimant being managed on the ward and; "*chest pain resolved*", there is no reference to ongoing breathing difficulties as described by the claimant. The letter does confirm that the claimant was started on medication.

(52) There was some debate between the representatives over whether or not the claimant had suffered a heart attack. The claimant's evidence is that while she was at the hospital the doctor told her that she had suffered a heart attack. The discharge summary (p12/13) records the main diagnosis at discharge as ACS; it is not in dispute that this initialisation refers to Acute Coronary Syndrome (as confirmed in the GP letter of the 17 January 2020) as confirmed in her GP's letter of 17 January 2020 as the diagnosis. The claimant had an MRI scan on 17 September 2019. The MRI was recorded as being entirely normal and that it was difficult to know whether her admission was related to my myocarditis or a coronary plaque event, the consultant cardiologist considered the former to be the most likely. It is not in dispute between the parties that myocarditis is inflammation of the heart muscle. I find, on the medical evidence and on a balance of probabilities that it was not a heart attack but myocarditis but that is not to diminish the distress this must have caused the claimant at the time.

<u>The Period following the expiry of the Primary Time Limit</u>

(53) The claimant then took steps to progress with her claims in July 2019.

(54) The claimant does not contend that she was unaware of how to source advice or that she did not otherwise have the means to do so and she ultimately engage Ms Wisniewska on the 3rd or 4th July 2019.

(55) The claimant's evidence is that she was unable to walk after what she describes as the heart attack and that she had a spray to help with her breathing. Her first contact with her representative Ms Wisniewska was therefore not in person but by telephone. Although the first contact with Ms Wisniewska was on the 3rd or 4th of July 2019, contact was not made with Acas until 9 July 2019.

(56) The claimant's evidence was that she sent over to Ms Wisniewska "*all the documents*" in an electronic format and gave her authority to act on her behalf including to contact Acas.

(57) The claimant within her witness statement, complains that she had been informed by an Acas officer when the certificate was issued on 9 August 2019, that she had at least one calendar month i.e. until 8th September 2019 to present a claim to the Employment Tribunal. However, in cross examination she confirmed that she knew she was already out of time to bring her claim, and she had of course by this stage got experienced representation.

(58) The claimant conceded during cross examination that during the period following her discharge from hospital on 12 June and the presentation of the claim on 4 September 2019, she had not produced any evidence of any further medical appointments.

(59) The claimant has produced a letter from her GP dated 17th January 2020 (p.20) which refers to the claimant having a number of different health problems from 3rd March 2019 through to 30th July 2019 and refers to;

"***during this time,*** *she has had a number of different health issues which have been causing her significant distress resulted in a having to have time from work*". [my stress]

(60) It was put to the claimant in cross examination that her own doctor does not suggest she had active health problems after 30 July 2019. The claimant however disputed this and stated that she has been experiencing health problems including pain in the hip and abdomen which was persistent and without change. The claimant also referred to the possibility of a diagnosis of fibromyalgia but her evidence was that she not had any test due to the coronavirus pandemic. The claimant's evidence was that she had another appointment with the pain clinic the day after today's hearing but otherwise all treatments and tests had been delayed. The claimant produced a letter (p32 and 33) confirming the appointment with the pain clinic on 20th October 2020.

(61) Despite the inference which may be drawn from the GP's letter and the reference to active health problems up to 30th July 2019, I find that on a balance of probabilities, given the claimant's evidence, the GP certificates, the long-term nature of the hip pain in particular and the ongoing referral to the pain clinic, that the claimant had ongoing health issues which continued past July 2019 and are ongoing. The GP fit notes from 3 June 2019 to 2 August 2019 record: "*Acute coronary syndrome, hip pain, heavy period/fibroid"* (p24). For the period 3 August to 2 October 2019 the GP fit notes record "*ongoing aches and pain, hip pain, heavy period*" (p250 and the GP fit note from 2 October 2019 to 1 December 2019 refers *to "ongoing aches and pain, chest pain, hip pain".* There is a letter (p18) from UHL confirming an appointment at an outpatient pain management clinic on 15 October 2019. The claimant's undisputed evidence was that she had to wait 7 months for treatment and a gynaecological operation on 24 January 2020. There is a letter from UHL (p.17) referring the claimant in October 2019 for a hysteroscopy on 14 January 2020 to look inside the womb to check for abnormalities which may cause bleeding.

(62) The claimant also described in her a witness statement taking various types of medical painkillers and of her brain not working as usual and feeling woozy and drowsy when she was taking them. When asked during cross examination what was the difference before 12th June and after 12th June, the claimant's evidence was that after 12 June she stopped taking Naproxen. Naproxen is a painkiller and anti- inflammatory. The claimant's evidence was however that this particular medication of itself did not have any effect on her cognitive functioning because it was one of the weaker medications. She referred to giving her representative instructions at the beginning of July when she was "*fairly well"* although her evidence under cross examination was that she was not undertaking any physical activity at the time.

(63) The claimant's evidence is that after starting the Acas process there were discussions with the respondent for a month and then the certificate was issued on the 9th August.

(64) The claim however was still not promptly presented despite the claimant having representation. The claimant's evidence is that her legal representative, Ms Wisniewska had told her that it could be argued that

because she was dismissed without her six weeks' notice, that six-week period should be added on to the date of termination which would mean that the claim would have been brought within time. Ms Wisniewska attempted to put forward the same proposition in her submissions (see below).

(65) I now turn to the oral submissions from each party;

Claimant's submissions.

(66) Ms Wisniewska referred to the claim not presented within the primary time limit because of the claimant's health issues and that the medication impaired her thinking.

(67) Ms Wisniewska also mentioned that "*perhaps of the notice had been served to her*" the claim would have been brought in time however Ms Wisniewska did not seek to argue that the claim was brought in time, she accepted it had not been. She did not seek to argue that there are any legal grounds to support a proposition that the claimant's notice period entitlement (where the claimant was terminated summarily), should be taken into account when determining the applicable time limits. She accepted that the claim was already out of time when Acas were contacted but that it was hoped that; "*the judge would accept it out of time given the medical conditions".*

(68) Ms Wisniewska also referred to the advice from the Acas officer and argued that the claimant should have been given the correct advice however, she did not comment further or venture to assert that the claimant was misled by this advice and that this was the reason for submitting her claim out of time. Ms Wisniewska accepted that the claim was already out of time when Acas was contacted and indeed she was herself instructed to act IN early July. She did not seek to argue that the Tribunal shouLd exercise its discretion because of any incorrect advice she had given to the claimant.

(69) Ms Wisniewska referred to of: **Dedman v British Building and Engineering Appliances Limited ICR 34, University Hospital Bristol NHS foundation v Williams** and **Luton Borough Council v Hague UKEAT/180/17** however she made no submissions about how those authorities should be applied in this case. I did not consider the Luton case was relevant to the issues we were considering today. That case is concerned with the application of section 207B (3) and 207B (4) of the Employment Rights Act 1996 however, it is not in dispute that the claimant did not commence the Acas process until after expiry of the primary time limit.

(70) Ms Wisniewska had not addressed the guidance set out in Keeble and I reminded her of the factors the Tribunal may take into account and specifically the factors in section 33 of Limitation Act. Ms Wisniewska argued that there would be no prejudice to the respondent if the time limits were extended but the claimant would be prejudiced by not being able to pursue her complaints; *"in particular the disability discrimination claim and unfair dismissal claim and notice pay claim.*"

(71) I reminded the parties that I may take into account the merits of the claims however, Ms Wisniewska did not make any submissions beyond stating that the claimant; "*feels treated less favourably by being dismissed and being off sick because of age and nationality and that those are the basic merits that I am aware of*".

The Respondent's submissions

Reasonable Practicable Test

(72) The respondent's submissions were in essence that the as a matter of law the periods spent in early conciliation have no effect on the running of time limits in this case where the Acas process started after expiry of the primary time limit and the 'upshot' of the claimant's claims that they were presented a little under three months out of time.

(73) Addressing the reasonably practicable test in relation to the unfair dismissal and breach of contract claim, the respondent does not dispute that the claimant had been in hospital from the 8th to 12 June but does not accept that she suffered a heart attack but rather what was most likely was inflammation of the heart i.e. myocardial. The respondent accepts that her admission into hospital explains the delay of four or five days during that period.

(74) The claimant's own case is that she was aware from day 1 that she had claims and she was aware of the time limits but took no steps whatsoever prior to admission into hospital on 7 June, to pursue her claims.

(75) With regards to the claimant's contention about the impact of the medication on her general cognitive functioning, counsel argued that the claimant had managed to give instructions prior to dismissal to enable a letter to be sent to the respondent making enquiries about sick pay and payslips which is not consistent with a picture of the claimant being so affected by the medication that that she was unable to present a claim. On the face of it, there was no significant difference in her ability to articulate a claim before 14 June and after that date.

(76) In relation to the period before 7th June, prior to her hospital admission, while the respondent accepted she had a number of medical appointments and attendance at A&E in April, the respondent submits that it was reasonably practicable for her to present a claim before 14 June and the expiry of the primary time limit. In any event, even if that is not the finding it is argued that it was not presented with a reasonable period thereafter, when it took almost a further 3 months for a claim to be presented.

Just and Equitable Test

(77) With regards to the just and equitable test, the respondent argues that in terms of the prejudice to the respondent, it would have to face claims it would otherwise not have to face and these are serious claims of discrimination.

(78) The respondent argues the claims of race and age discrimination are inherently weak and taken at their highest the claimant has asserted no more than a difference in treatment and a difference in a protected characteristic and further, as she relies on hypothetical comparator, arguably she has not even advanced the difference in treatment. There is insufficient evidence therefore to establish a prima facie case on age or race.

(79) With regards to section 33 of the Limitation act it is argued;

- There is no proper explanation by the claimant why a claim was not issued, certainly since July 2019 when she has had legal representation.

- The respondent does not seek to argue that the cogency of the evidence will be affected in a material way by the delay.
- In terms of promptness with which she acted; the difficulty for the claimant is that on her own case she knew of the facts giving rise to the claim from day one and understood the time limits. The claimant did not do anything to secure all professional advice until early July 2019 by which time she was already aware that the claim was out of time.

The Legal Principles

Unfair Dismissal: reasonably practicable test

(80) The relevant time limit to bring a claim of ordinary unfair dismissal is as set out in section 111 ERA which provides as follows;

Section 111

(1) a complaint may be presented to an [employment tribunal] against an employer by any person that it was unfairly dismissed by the employer.

(2) [Subject to the following provisions of this section], an [employment tribunal] shall not consider a complaint under this section unless it is presented to the tribunal-

a) before the end of the period of three months beginning with the effective date of termination, or

*b) within such further period as a tribunal considers reasonable in a case where it is satisfied that it was **not reasonably practicable** the could complain to be presented before the end of that period of three months*

Breach of contract

(81) Article 7 Employment Tribunal's Extension of Jurisdiction (England and Wales) Order 1994 deals with the applicable time limit in breach of contract claim;

Article 7 Time within which proceedings may be brought

[Subject to [articles 8A and 8B], an employment tribunal] shall not entertain a complaint in respect of an employee's contract claim unless it is presented-
a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or
b) ..
*c) Where the tribunal is satisfied that it was **not reasonably practicable** for the complaint to be presented within whichever of those periods is applicable, within such further period of the tribunal considers reasonable*

Acas – Employment Rights Act 1996

(82) *The Employment Rights Act 1996 provides that the time limit is extended only where the*

207B Extension of time limits to facilitate conciliation before institution of proceeding
(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A.

(2) In this section—
(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and
(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.
(3) In working out when a time limit set by a 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 a 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**.*
(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power the power is exercisable in relation to the time limit as extended by this section.

(83) What is reasonably practicable is a question of fact and thus a matter for the tribunal to decide: walls **Meat Co Limited v Khan 1979 IC4R 52 CA:** Lord Justice Shaw; "*practical common sense is the keynote…"*

(84) The onus of proving the presentation in time was not reasonably practicable rests on the claimant: **Porter v Bandrige Ltd 1978 ICR943 CA**; "*that imposes a duty upon him to show precisely why it was that he did not present is complaint"*

(85) ***Schultz v Esso Petroleum Co Ltd 1999 ICR 1202, CA*****; Potter L.J**
"Thus, while I accept Mr. Wynter's general proposition that, in all cases where illness is relied on, the tribunal must bear in mind and assess its effects in relation to the overall limitation period of three months, I do not accept the thrust of his third submission, that a period of disabling illness should be given similar weight in whatever part of the period of limitation it falls. Plainly the approach should vary according to whether it falls in the earlier weeks or the far more critical later weeks leading up to the expiry of the period of limitation. Put in terms of the test to be applied, it may make all the difference between practicability and reasonable practicability in relation to the period as a whole. In my view that was the position in this unusual case".

(86) **Palmer & annor v Southend on Sea Borough Council 1984 ICR 372 CA: Court of Appeal**; reasonably practicable does not mean reasonable nor physically possible it means something like *"reasonably feasible*".

(87) With regards to ignorance of the rights to bring a claim Lord Scarman in **Dedman v British Building and Engineering Appliances Limited ICR 34** ; "*where a claim pleads ignorance as to his or her rights, the tribunal must ask further questions; what were his opportunities for finding that he had rights/did you take them? If not, why not? Was he misled or deceived?*"

(88) In terms of illness, the claimant illness may constitute a valid reason if supported by evidence to show the extent and effect of the illness. The test is one of practicability, what could be done not whether it was reasonable not to do what could be done: **Shultz v Esso Petroleum Co Ltd ICR 1202 CA Court of Appeal.**

(89) In **University Hospitals Bristol NHS Foundation Trust v Williams EAT 0291/12** a case of unfair dismissal, the EAT emphasised that this limb of section 111(2)(b) does not require the tribunal to be satisfied that the claimant presented the claim as soon as reasonably practicable after the

expiry of the time limit in order to allow the claim to proceed. The Employment Judge had in his judgement held that "*If it was reasonably practicable to put the claim in during that period then I must dismiss the claim. If I decide it was not reasonably practicable to put in the claim within that period, I will strike it out if not submitted promptly as soon as it was possible to do so*." The EAT held that this was the wrong test, what the correct test requires is the tribunal to apply the less stringent test of asking whether the claim was presented within a reasonable time after the time limit expired.

Discrimination Claims

(90) The section of the EqA which deals with the applicable time limits is section 123 which provides as follows*;*

(1) [subject to [sections 140A and 140B] Proceedings on a complaint within section 120 may not be brought after the end of-

a) the period of 3 months starting with the date of the act to which the complainant relates; or
b) such other period as the employment tribunal thinks just and equitable.

(2) …
(3) For the purposes of this section –

a) Conduct extending over a period is to be treated as done at the end of the period;
b) Failure to do something is to be treated as occurring when the person in question decided on it.

(91) Section 123 EqA does not specify any factors which a tribunal is required to have regard in exercising the discretion whether to extend time for 'just and equitable' reasons.

(92) The EAT suggested in **British Coal Corporation v Keeble and ors 1997 IRLR 336 EAT** that in determining whether to exercise their discretion to allow the late submission of a discrimination claim, tribunals would be assisted by considering the factors listed in section 33 (3) of the Limitation Act 1980 which requires the court in Civil cases dealing with personal injury claims, to consider the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

(93) The Court of Appeal in ***Southwark London Borough Council v Afolabi 2003 ICR 800, CA*****,** confirmed that, while the checklist in section 33 of the Limitation Act 1980 provides a useful guide for tribunals, it is not to be adhered to slavishly.

(94) The Court of Appeal in ***Department of Constitutional Affairs v Jones 2008 IRLR 128, CA*****,** emphasised that the factors referred to by the EAT in Keeble are a 'valuable reminder' of what may be taken into account but their relevance depends on the facts of the individual cases and tribunals do not need to consider all the factors in each and every case.

(95) The strength of the claim may be a relevant factor when deciding whether to extend time: ***Lupetti v Wrens Old House Ltd 1984 ICR 348, EAT*****.**

(96) Where the claimant relies on incorrect advice as the reason why the claim was brought out of time, the bad advice must have actually been the reason for the delay. In ***Hunwicks v Royal Mail Group plc EAT 0003/07*** In this case the adviser's incorrect advice played no role in the tribunal's decision as to whether the claimant's out-of-time discrimination claim should be allowed to proceed. This was because the time limit had already expired before any question of her being misled by the union representative arose. Accordingly, the union representative's mistake had had no causative effect and her claim was dismissed.

Merits – Discrimination Claims

(97) **Madarassy v. Noruma International [2007] IRLR 246;** the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination and they are not, without more, sufficient material from which a tribunal could conclude that the respondent had committed an unlawful act of discrimination.

Lord Justice Mummery;

"55. In my judgment, the correct legal position is made plain in paragraphs 28 and 29 of the judgment *in Igen v. Wong .*

28. … It is for the complainant to prove the facts from which, if the amendments had not been passed, the employment tribunal could conclude, in the absence of an adequate explanation*, that the respondent committed an unlawful act of discrimination.*

56. The court in Igen v. Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. ***The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination****.* ***They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.***

Conclusions

(98) It is clear from the evidence that the claimant has suffered since 2013, with various conditions, which have caused her degrees of pain and discomfort.

(99) Whilst I certainly do not seek to trivialise the impact of those conditions, it is a fact that the claimant was nonetheless able in February 2019 to give instructions to Mr Kostecki to write and enquire about the non-payment of her sick pay.

(100) During the period from March 2019 up to her admission into the A & E in June 2019, the claimant was clearly suffering with various health issues which I find were causing her significant pain and discomfort, although managed with medication to an extent. It must have been distressing to have to cope with so much discomfort, nonetheless it is a fact that she was also able to write a quite detailed letter for her son to transcribe to the respondent prior to the meeting on the 12 March 2019.

(101) The medical evidence provided, although it supports the claimant's account of the health problems she was suffering from and that she was in pain, it does not go so far as to demonstrate that the illness prevented her from submitting the claim on time or contacting Acas.

(102) The claimant referred to medication which impaired her thinking however in cross examination she accepted that the only difference between before 14 June and afterwards, was that she was no longer taking Naproxen, a painkiller and anti-inflammatory drug which did not impact on her cognitive functioning.

(103) The report from her GP on the 17 January 2020, written it would appear for the purposes of these proceedings, refers to her health issues; "causing *her significant distress and resulted in her having time away from work*". I accept what is written in that report however, it does not address her cognitive thinking, it does not support the Claimant's account that her thinking was so impaired that she was not able to take steps to proceed with her claims. The doctor makes no mention of her cognitive functioning being impaired. The report does not support the claimant's assertion that she was not able to submit a claim to the Tribunal or contact Acas during this period due to the extent of the physical pain or impaired mental functioning.

(104) The test is one of practicability; *what could be done* not whether it was reasonable not to do what could be done.

(105) There is no evidence which convinces me that the claimant's thinking was so impaired or she was otherwise so physically unwell, during the period up to 8th June 2019 (date of her admission into hospital) that it was not reasonably practicable for her to bring her claim in time. In fact, she had managed to give instructions to send a letter to her employer in February 2019 and although it had taken some time, put together a well-reasoned and cogent letter in March which her son transcribed for her. She was I find able during this period to either contact Acas direct by telephone or email or contact a representative to act on her behalf.

(106) However, the claimant was then admitted into hospital on the 7th/8th June 2019, and was not discharged until 12 June. Although it is necessary to consider what could have been done during the whole of the limitation period, more weight may need to be attached to the latter part of the period before the limitation; the more 'critical' period as Potter L.J referred to it as in ***Schultz v Esso Petroleum Co Ltd 1999 ICR 1202, CA*.**

(107) It is not disputed that during the claimant's admission into hospital it would not have been reasonably practicable for her to initiate Acas or tribunal proceedings. While she was discharged on the 12 June, I do not consider that it would have been reasonably practicable for her to have taken steps to pursue her claims during the immediate period after discharge, following what must have been a distressing and exhausting episode.

(108) I therefore find on balance, given her admission into hospital in the latter/critical stages of the limitation period, it was not reasonably practicable for her to issue her claim within the primary time limit, I have to go on to consider then whether she did so within a reasonable period thereafter and I find she did not.

(109) By 3 or 4th July 2019 she admitted that she was well enough to give instructions to her representative by telephone. She gave that representative the authority to contact Acas and to issue a claim.

(110) Negotiations continued with Acas and I am not persuaded that the claimant relied on the advice from Acas that she had until 8th September to issue a claim and that this was the reason why she delayed further before doing so. The claimant accepted she knew this was not the case and of course she had by this stage experienced and skilled representation from an HR consultant.

(111) If the claimant was informed by her representative, that her claim would be accepted out of time because of her ill health, this was unwise counsel. The claimant however does not seek to argue that time should be extended because she relied on incorrect advice from her representative. Her representative did not argue in her submissions that she was not a skilled advisor or that she had made a mistake in the advice she had given the claimant. In any event, she informed me that she was acting for the claimant in a professional capacity as an HR consultant and as Lord Denning MR put it in **Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, CA** put it ; *" a man engages skilled advisers to act for him — and they mistake the time limit and present [the claim] too late — he is out. His remedy is against them.'*

(112) I find that the further period within which it would have been reasonable for the claimant to have issued her claim, was by 9 July 2019, the date that her representative contacted Acas. The claimant provided instructions to Ms Wisniewska on the 3rd or 4th July, the claimant could herself have contacted Acas and issued her claim by the 9 July 2019. By the 9th July 2019, it was almost 4 weeks since her discharge from hospital.

(113) The claims for unfair dismissal and breach of contract are therefore out of time and are struck out.

Discrimination claims

(114) Had I been invited to take into account advice the claimant had received about time limits and the interplay with the notice period or indeed advice about the chances of time being extended because of her ill health, this would have potentially been a relevant consideration depending on what exactly that advice was and this may have weighed in the claimant's favour. However, the claimant did not seek to disclose details of the advice, only the broad nature of it and she did not seek to argue that she had received incorrect advice from her representative and that it was her reliance on that advice that was the cause of the claims being presented out of time. In any event, the claimant admitted in cross examination that she knew she was out of time when Acas was contacted.

(115) I will not restate my findings in relation to the claimant's health however, we are concerned in respect of discrimination claims with the just and equitable test which provides the tribunal with a much broader discretion.

Discrimination Claims: Age/Race and Disability

(116) In terms of the length of and reason for delay, the length of the delay is significant. Further, there is no satisfactory explanation for the failure to issue the claim at least by the 9 July when the Acas process had started; a delay of just shy of 2 months. There is no issue that the claimant failed to act promptly once she was aware of the facts giving raise to her claim, she admitted that as soon as she knew her employment had been terminated, she considered it was unfair and an act of discrimination, she did not require

any further information in order to form a clear view was as to her rights or her position.

(117) The claimant had taken advice in February 2019 concerning her sick pay, she was therefore able to seek and secure advice from a third party. She took further steps to seek advice and support and did so on 3rd or 4th July 2019, however it was still almost 2 months later before the claim was issued although she was aware that she was already out of time by that state.

(118) I now turn to the exercise of balancing the prejudice to the claimant of the loss of a claim with the prejudice caused to the respondent of granting an extension. The respondent does not assert that the delay will materially affect the cogency of the evidence and nor does the respondent assert that other than being faced with claims it would not otherwise have to face, it would suffer any prejudice or hardship.

(119) In terms of the prejudice to the claimant, I have considered, as the parties were informed I would, the merits of the claims;

Race Discrimination and Age Discrimination

(120) The claimant's case in respect of both the race and age discrimination claim, amounts to nothing more than an alleged difference in treatment and comparison with a hypothetical comparator.

(121) The claimant's grounds for asserting that the treatment was on the grounds of her age is that she has health conditions and "is not getting any younger". The claimant does not identify an actual comparator who is not of her age or age group with the similar level of sickness absence who was not dismissed, she relies on a hypothetical comparator with no further grounds for maintaining that the dismissal had anything to do with her age rather than solely her absence from work on sick leave.

(122) The case as presented does not meet the Madarassy test in that as presented the claimant I find, would not be able to present a prima facie case which would reverse the burden of proof.

(123) The merits of the claim are only a factor in this decision whether to exercise the discretion to extend time however , I find that on balance, the merits are such that the consideration of prejudice does not persuade me that taking all other factors into account, including the length of and reasons for delay, discretion should be exercised to extend time on just and equitable grounds under section 123(1)(b)EqA..

(124) With regards to the claim of direct race discrimination claim, the claimant asserts that the dismissal was because of her nationality. The claimant again cannot identify an actual comparator and the grounds she relies upon amount to no more than mere "*suspicion."* The surrounding factual matrix, is that she had been employed for a number of years and she does not complain of any incidents of less favourable treatment until her sickness absence.

(125) I find that in respect of the race discrimination claim, there are no reasonable prospects of the claimant presenting a prima facie case which would reverse the burden of proof. I find that the merits are such that when considering the relative prejudice, I am not persuaded that taking all the circumstances into account it would be just and equitable to extend time under section 123(1)(b) EqA.

(126) The claims of race and age discrimination are therefore presented out of time and are struck out under Rule 37.

Disability Discrimination

(127) The claims of disability discrimination have, taking the claimants case at its highest, reasonable prospects.

(128) The correspondence from the respondent to the claimant up to the meeting on the 12 March, refers to an inability to obtain information about the claimant's condition however, the claimant wrote prior to the meeting on the 12 March 2019 (at which she was dismissed), referring to being able to provide proof of her medical history. On the claimant's case, her employment was terminated without the respondent obtaining any medical advice about her condition and prognosis in circumstances where it appears, that at least by March 2019 she was engaging with them about providing medical evidence.

(129) The respondent's case of course is that they dismissed her without following any further process, because she wanted them to. There is therefore a fundamental factual dispute which can only be determined at a hearing where all the evidence can be ventilated.

(130) If a Tribunal were to determine that the claimant was disabled at the relevant time and finds that there was a dismissal in law, the claims of discrimination both section 15 and 13, have reasonable prospects.

(131) The failure to pay the claimant statutory sick pay and provide payslips during her sickness absence will also turn on the findings of fact regarding what happened during the claimant's absence. However, on the face of it, on the claimant's own case, there is merit in the claims that the failure to pay her during her alleged disability related absence or provide her with payslips was discrimination; arising from her disability related absence and/or less favourable treatment.

(132) Whilst the delay and reasons for the delay weigh against the claimant, the respondent does not assert that a fair trial is not possible and nor does it raise any prejudice beyond having to deal with the claims.

(133) On balance the merits of the claims are such that I consider taking into account all the circumstances including the prejudice to the claimant in depriving her of claims of disability discrimination which on the face of them have merit, it would be just and equitable to extend time pursuant to section 123(1)(b) EqA to 4 September 2019. The claims of disability discrimination have therefore been brought within time and those claims will proceed to a final hearing.

ORDERS
Made pursuant to the Employment Tribunal Rules of Procedure

1. The case will be listed for a 90 minutes telephone case management hearing to determine the issues in the case and make appropriate case management orders.

2. Other Matters;

1.1 **Public access to employment tribunal decisions**. All judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

1.2 **Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.**

1.3 **Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.**

Employment Judge Rachel Broughton

Signed: 9 December 2020

Sent to the parties on:

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For the Tribunal:

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