



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4107619/2021 (V)

Preliminary Hearing held Cloud Video Platform (CVP) on 12 August 2021
& consideration of written submission in chambers on 2 September 2021

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Employment Judge M Sangster

Miss E Campbell

Claimant
Represented by
Ms Sharpe & Mr Smith
Student Advisors

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Lothian Health Board

Respondent
Represented by
Mr James
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the Tribunal does not have jurisdiction to
25 consider any of the complaints raised. The claim is therefore dismissed.

REASONS

Introduction

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1. This was a preliminary hearing which took place remotely. This was not
objected to by the parties. The form of remote hearing was video. A face-to-
face hearing was not held because it was not practicable due to the Covid-19
pandemic and all issues could be determined in a remote hearing.

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2. The claimant was employed by the respondent from 29 October 2018 to 3
January 2020. She engaged in early conciliation from 4-5 February 2021 and

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submitted a claim to the Tribunal on 11 February 2021. Her ET1 includes the following complaints:

- (i) Automatically unfair dismissal, contrary to section 100(1)(d) of the Employment Rights Act 1996 (**ERA**);
 - 5 (ii) Breach of contract;
 - (iii) Less favourable treatment as a fixed term employee; and
 - (iv) Unlawful discrimination on the grounds of gender reassignment (direct discrimination, indirect discrimination and harassment).
3. All the complaints relate to events which it is alleged occurred during the claimant's employment with the respondent.
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 4. Following a case management preliminary hearing, a preliminary hearing was fixed to determine whether the Tribunal has jurisdiction to hear the complaints, or whether they were submitted out of time. It is that matter which the Tribunal required to determine at the preliminary hearing.
 - 15 5. At the case management preliminary hearing it was noted that the claimant has dyslexia, dysgraphia, dyscalculia and dyspraxia. After discussion of the effects of these disabilities, it was determined that the claimant should, at any hearing, be given additional time to give evidence and answer questions in cross examination and afforded additional time to read any necessary
20 documentation. This was discussed further at the start of the preliminary hearing. The claimant's representatives confirmed that this remained the position and that no further adjustments were required.
 6. The claimant gave evidence on her own behalf. The respondent did not lead any evidence. A joint set of productions was lodged, extending to 195 pages.
 - 25 7. At the start of the preliminary hearing, the claimant's representatives, who are law students who volunteer to provide assistance to claimants via the Strathclyde University Law Clinic, requested that written submissions be lodged following the conclusion of the hearing, rather than oral submissions

being made. The reason for this was illness of the principal representative immediately prior to the hearing, meaning that she was unable to complete submissions to pass these to her supervisor, prior to her supervisor's annual leave. This application was opposed by the respondent. Having heard from the parties in relation to this, the Tribunal determined that it was in the interests of justice, and in accordance with the overriding objective, to proceed with written submissions, given the circumstances outlined by the claimant's representative, the fact that the respondent had already lodged a written submission and the fact that the claimant's representative indicated that submissions could be lodged by the end of the following day, once another supervisor had reviewed them, so the delay would be short. The respondent was offered the opportunity to lodge a further written submission, in response to that of the claimant. They indicated that they would wish to do so and would be in a position to lodge this by the end of the next working day, following receipt of the claimant's submission.

Issues to be determined

8. The parties agreed and lodged a list of issues, which set out the issues to be determined at the preliminary hearing as follows:

Unfair Dismissal and Breach of Contract

- (i) *Did the claimant present her claim for unfair dismissal and breach of contract to the Tribunal within three months of her effective date of termination, namely 3 January 2020, as required by s111(1)(a) of the Employment Rights Act 1996 and Article 7(a) of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994?*
- (ii) *If the answer to (i) above is no, was it reasonably practicable for her to have brought her claims for unfair dismissal and breach of contract within that three-month period?*
- (iii) *If the answer to (ii) above is no, did she bring her claims for unfair dismissal and breach of contract within such further time period as was reasonable?*

Fixed Term Employee Discrimination

(iv) *What was the date of any allegedly less favourable treatment in respect of*

(i). *An alleged failure to pay travel expenses; and*

5 (ii). *An alleged refusal to provide a parking space.*

(v) *Did the claimant present her claim for unlawful fixed term employee discrimination within three months of the date of any allegedly less favourable treatment, as required by Regulation 7(2) of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002?*

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(vi) *If the answer to (v) above is no, would it nonetheless be just and equitable to consider the claim of unlawful fixed term employment discrimination?*

Unlawful Gender Reassignment Discrimination

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(vii) *Did the claimant present any of her claims for unlawful gender reassignment discrimination within three months of the alleged discriminatory acts as required by 123(1)(a) of the Equality Act 2010, namely:*

(i). *In respect of the direct discrimination claims:*

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1. *December 2018;*

2. *21 March 2019; and*

3. *Late October/early November 2019;*

(ii). *In respect of the indirect discrimination claim, 21 March 2019; and*

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(iii). *In respect of the harassment claims:*

1. 21 March 2019; and

2. Late October/early November 2019.

(viii) *If the answers to any of the elements of (vii) above are no, would it nonetheless be just and equitable to consider any of the claims of unlawful gender discrimination which are out of time?*

(ix) *Are any of the alleged incidents part of a continuing act in terms of s123(3)(a) of the Equality Act 2010.*

Agreed Matters

9. The following were agreed by the parties as the dates of the relevant allegations in relation to the claimant's complaints:

(i) October/November/December 2018 – claimant allegedly requested reimbursement of travel expenses and/or a parking space, both of which were refused.

(ii) December 2018 – date of first instance of alleged direct gender reassignment discrimination.

(iii) 21 March 2019 – date of second instance of alleged direct gender reassignment discrimination, of alleged indirect gender reassignment discrimination, and of first instance of alleged gender reassignment related harassment.

(iv) Late October/early November 2019 – date of third instance of direct gender reassignment discrimination, and of second instance of alleged gender reassignment related harassment.

(v) 3 January 2020 – claimant's effective date of termination.

Findings in fact

10. The Tribunal found the following further facts, relevant to the issues to be determined, to be admitted or proven.

11. The claimant has dyslexia, dysgraphia, dyscalculia and dyspraxia. The claimant has a clear understanding of how these impact her, has strategies in place to address the impact of these conditions on her where possible and is otherwise aware of the adjustments which she requires as a result.
12. She has a Bachelor's degree, with honours, in Television and Broadcasting.
13. She has gender dysphoria and gender dysmorphia. From the age of 15 she has had depression and suicidal ideation.
14. The claimant commenced employment with the respondent on 29 October 2018. She was employed as an eHealth Desktop Support Officer. Her role involved providing second line IT support, which involved bespoke and complex IT issues, which could not be resolved via first line support. She was also involved in a project to modernise IT equipment.
15. The claimant understood that, during her employment with the respondent, she would be based at St John's Hospital in Livingston, which was near to her home. During her employment however she was expected to work at hospitals in Edinburgh. This involved considerable time travelling on public transport, as the claimant did not have access to car parking at the sites she was required to work.
16. The claimant became aware, during her employment, that one of her colleagues was suing the respondent in relation to issues arising from his employment.
17. The claimant attended her GP on a number of occasions during 2019 in relation to concerns related to her mental health, in particular on the following dates:
- (i) 1 April 2019, when she described having tension headaches, struggling to sleep, lacking energy, not registering conversations easily and low mood. She was prescribed amitriptyline.

- (ii) 8 April 2019, when she described continued low mood and that her anxiety was flaring up.
- (iii) 8 May 2019, when she indicated that she continued to experience tension headaches. She stated that she had stopped taking amitriptyline, due to side effects. She was not prescribed any further medication.
- (iv) 2 September 2019, when the claimant reported *'low mood, feeling more weepy feels like everything is more of a struggle of late, has gender dysmorphia and dealing with lots of challenges. Very supported family and friends but feels like no enjoyment in the things she likes to do, feels empty inside.'*
- (v) On 10 September 2019, when a referral for the claimant was made to 'Beating the Blues';
- (vi) 10 December 2019, where she reported that she was *'finding lots of things difficult at the present time. Anxiety/depression/gender dysphoria. Tearful and not coping at all. Feels she is not coping in the workplace and cannot face going there just now. Has a new job which will start at the beginning of the year and feels that it will be much better'*. She was prescribed fluoxetine, an anti-depressant, and certified as unfit to work until 22 December 2019, due to nervous debility;
- (vii) 31 December 2019, where the GP noted that she reported *'Feeling mood better but attributes this to the gym not medication. Starting new job in January with less travelling, looking forward to this. Not keen to continue with meds, has approx 9 tablets left. Advised may get some withdrawal symptoms, states will not continue to take them. Review if any worsening symptoms.'* The claimant stopped taking fluoxetine on this date.

18. The claimant was absent from work due to illness from 10-22 December 2019. She returned to work on Monday 23 December 2019 and worked until Friday

3 January 2020, when her employment terminated as a result of her resignation.

19. The claimant commenced working in her new role on Monday 6 January 2020.

20. The claimant attended the Chalmers Gender Identity Clinic on 9 January 2020.

5 Within a report, which was prepared for her GP following that, it was stated
*'Emily told me that her mental health is 'less than healthy', but has been better
since starting her new job. She has also taken up going to the gym. She feels
she is emotionally stable at the moment. She has told me she does have
thoughts of suicidality fairly regularly however has learned to live with this and
10 has no active intent to action them at the moment. She is aware of the signs
and symptoms of a major relapse and what actions to take and appears to
have a sensible relapse plan. She feels she has a good support network in
place including her GP, family and friends. She has also agreed she will
discuss any difficulties with her mental health here in the clinic.'*

15 21. While claimant continued to attend Chalmers in 2020 and receive treatment,
she did not raise any further significant issues in relation to her mental health
with Chalmers between that date and 11 February 2021.

22. The claimant was initially anxious about her new role, but she quickly realised
that the role was much better for her than her previous role with the respondent.

20 While she continued to experience symptoms of depression, these were to a
far less degree than when she was working for the respondent. She felt very
supported by her new employer and enjoyed her role. She did not consult her
GP in relation to mental health issues between 1 January 2020 and 11
February 2021. She was not on any anti-depressant medication during that
25 time. She was not absent from work due to illness during that time.

23. From 23 March 2020, as a result of lockdown, the claimant worked from home.
At this time she was physically well, eating well and exercising vigorously. She
felt that lockdown provided her with the personal time required to focus on her
mental health recovery.

24. During lockdown the claimant thought about her experience with the respondent and whether she should bring a claim. Around May 2020, she discussed with her former colleague, in broad terms, the claim he was bringing, with legal assistance, against the respondent. She felt she was not in a position mentally or financially to pursue a claim against the respondent herself: her health was improving, but she did not want to take any steps which may jeopardise that; and she could not afford legal fees.
25. The claimant did not, at that time, make any further enquiries of her former colleague in relation to how she may pursue a claim. She was aware of the existence of Employment Tribunals (and had been so aware during her employment with the respondent), but did not conduct any research in relation to how claims are brought before Employment Tribunals or in relation to employment claims generally. She did not explore options for free legal advice.
26. On 31 December 2020, the claimant had a long telephone conversation with her former colleague who was pursuing an Employment Tribunal claim against the respondent. He explained the process he had undertaken to raise his claim. The claimant asked him about costs and processes. He explained to the claimant that there were no fees involved and claims could be raised without legal representation. He reassured the claimant that complaints were taken seriously by the Employment Tribunal. The claimant remained worried about the time and effort pursuing such a claim may have on her. She was concerned it may detrimentally impact her mental health and her ability to undertake her new role. Notwithstanding these concerns, she decided, on or around 31 December 2020, to raise proceedings in relation to her employment with the respondent.
27. The claimant participated in early conciliation from 4-5 February 2021.
28. Following receipt of the early conciliation certificate, the claimant started to prepare her ET1 form and conduct research. As she has dyslexia, she required to take extra time to check her grammar, spelling and sentences. She was also assisted in the preparation of the form by her former colleague and her parents.

29. The claimant lodged her claim with the Tribunal on 11 February 2021. Within her claim form she stated *'I apologise for the timeframes in which I have brought this to the ET but I was not aware that I could make this claim without incurring financial risk or costs. Until...my college/former college made me*
5 *aware of this, which is the reason why I am late in bring this up before the ET. I have tried my best to outline regarding Employment Rights Act 1996, 108(3) Qualifying period of employment. Showing why my claim is valid after the time passed. I also feared backlash and/or discrimination for speaking out about*
10 *incidents that happened on a weekly and sometimes daily occurrence regarding discrimination and unconscious bias towards a person based on their gender/gender identity.'*

Claimant's Submissions

30. The claimant's representatives lodged a written submission extending to 11 pages, which is summarised below.
- 15 31. It was not reasonably practicable for the claimant to bring her complaints of automatic unfair dismissal and breach of contract in time. First and foremost, the overriding reason the claimant did not submit her claim on time was her mental health throughout her employment with the respondent and up to the point of her raising a claim. The other two reasons relied on, namely ignorance
20 in relation to the law and remit of the Tribunal and her stance in relation to patient care, were secondary to this. Her mental health did however make it not reasonably practicable for her to remedy her ignorance.
32. The complaints were submitted within a reasonable period thereafter, given the above points. The five-week delay in submitting her claim beyond late
25 December 2020 is explained by her dyslexia.
33. The same three points are relied upon by the claimant in relation to why she lodged her complaints of discrimination and less favourable treatment when she did. The Tribunal should have regard to the claimant's mental illness, the nature of the complaints she is bringing and the evidence she has offered,
30 when considering whether it is just and equitable to extend time. The medical

evidence demonstrates a clear downward trajectory in terms of her health and wellbeing during the period of employment with the respondent. Despite an improvement in her mental health after starting her new position, her depression continued to persist. The Tribunal should consider whether the incidents of discrimination and harassment specified constitute a continuing act for the purposes of the time limits, and whether there were continuing effects.

34. The cogency of the evidence would not be impacted by any delay and electronic records can be retrieved from backups. There is minimal prejudice to the respondent in allowing the claim to proceed, and any such prejudice is outweighed by the nature of the claim, the public sector equality duty, and the public interest in ensuring justice for marginalised people and groups. It is accordingly just and equitable to extend time for the complaints of discrimination and less favourable treatment as a fixed term employee.

Respondent's Submissions

35. The respondent lodged a written submission extending to 11 pages, as well as a supplementary submission, extending to 6 pages, in response to the submissions for the claimant. These are summarised below.

36. The claimant's complaints were all presented to the Tribunal outside the primary time limit.

37. It was reasonably practicable for the claimant to have brought her complaints for automatic unfair dismissal and breach of contract within the primary time limit. The claimant was aware of the existence of Employment Tribunals. Any ignorance of how to bring a claim or relevant time limits was at best unreasonable, and at worst, entirely willful. The claimant's stance on patient care could not have rendered it not reasonably practicable for her to bring a claim, as national lockdown measures were not put in place until the primary time limit had nearly expired. The claimant has not explained how or why any mental health condition formed an impediment to her lodging her claim in time. The claimant was not on any medication beyond 2019, she started a new job

on 6 January 2020 and her medical records in December 2019/January 2020 record that her mental health was improving. It was wholly feasible for her to bring her claim in time. The mere fact of her having a mental health condition does not in itself mean that it was not reasonably practicable for her to bring her claim in time.

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38. If it was not reasonably practicable for those complaints to have been brought in time, those complaints were not brought within a further reasonable period. The claimant's stance on the covid pandemic did not prevent her bringing a claim in February 2021, when the pandemic was particularly bad. Any ignorance was resolved by 31 December 2020. There is no suggestion that there was any change in the claimant's mental health, such that she was able to bring a claim when she did. She knew of her rights by at the latest 31 December 2020. She still did not bring her claim for more than a month thereafter.

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15 39. The complaints of fixed term employee discrimination and gender reassignment discrimination were not brought within such a period as could be considered just and equitable. The length of the delay is significant. The acts which are alleged to be instances of less favourable treatment on the grounds of fixed term employment status took place in the first three months of the claimant's employment. The acts which are alleged to be instances of gender reassignment discrimination took place in 2018 and 2019. It is from those dates that the time limit started to run. The claimant's asserted ignorance of her rights over that span of time was wholly unreasonable and due to her choice not to conduct any research. After her resignation, there was no new knowledge that caused the claimant to think she might have a claim. The only knowledge the claimant acquired was about the practicalities of how to raise a claim. That knowledge was acquired on 31 December 2020, at the latest. The claimant still did not bring a claim until 11 February 2021. She did not act promptly. Memories will inevitably have faded as to precisely what was or was not said. Some relevant individuals have left the respondent's employment. Emails, particularly emails sent round all staff, may have been deleted. The quality of evidence will be affected by the delay. The

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prejudice to the respondent of the claim being brought is far greater than the prejudice to the claimant of not being able to bring a claim.

Authorities referred to in Submissions

40. Both parties referred to the relevant legislative provisions in their submissions.

5 The following cases were also referred to

(i) ***Lowri Beck Services Ltd v Brophy*** [2019] EWCA Civ 2490

(ii) ***Marks and Spencer plc v Williams-Ryan*** [2005] EWCA Civ 470

(iii) ***Dedman v British Building & Engineering Appliances Ltd***
[1974] ICR 53

10 (iv) ***Palmer and Saunders v Southend-on-Sea Borough Council***
[1984] IRLR 119

(v) ***Wall's Meat Co Ltd v Khan*** [1979] ICR 52

(vi) ***Asda Stores v Kauser*** EAT 0165/07

(vii) ***Schulz v Esso Petroleum Co Ltd*** [1999] ICR 1202

15 (viii) ***Chouafi v London United Busways Ltd*** 2006 EWCA Civ 689

(ix) ***Grabe v United Reformed Church*** ET/2204367/2012

(x) ***Norbert Dentressangle Logistics Ltd v Hutton***
UKEATS/0011/13/BI

20 (xi) ***University Hospitals Bristol NHS Foundation Trust v Williams*** UKEAT/0291/12

(xii) ***Nolan v Balfour Beatty Engineering Services***
UKEAT/0109/11/SM

(xiii) ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** [2018] EWCA Civ 640

- (xiv) ***Adedeji v University Hospitals Birmingham NHS Foundation Trust*** [2021] EWCA Civ 23
- (xv) ***British Coal Corporation v Keeble & Others*** [1997] IRLR 336
- (xvi) ***London Borough of Southwark v Afolabi*** [2003] EWCA Civ 15
- 5 (xvii) ***Rathakrishnan v Pizza Express (Restaurants) Ltd***
UKEAT/0073/15/DA
- (xviii) ***Perth and Kinross Council v Townsley*** UKEATS/0010/10/BI
- (xix) ***Department of Constitutional Affairs v Jones*** [2007] EWCA
Civ 894
- 10 (xx) ***Hendricks v Hendricks v Metropolitan Police Commissioner***
[2003] IRLR 96
- (xxi) ***Pearce v Bank of America Merrill Lynch*** UKEAT/0067/19
- (xxii) ***Porter v Bandridge Ltd*** [1978] ICR 943
- (xxiii) ***Reed In Partnership Ltd v Fraine*** UKEAT/0520/10
- 15 (xxiv) ***Oxfordshire County Council v Meade*** UKEAT/0410/14
- (xxv) ***Greco v General Physics UK Ltd*** EAT 0114/16
- (xxvi) ***Robertson v Bexley Community Centre*** [2003] IRLR 434
- (xxvii) ***Mensah v Royal College of Midwives*** UKEAT/124/94

20 **Relevant Law**

Unfair Dismissal and Breach of Contract Complaints

41. The relevant time limits in relation to the unfair dismissal and breach of contract complaints are set out in section 111(2) of the Employment Rights

Act 1996 (**ERA**) and Article 7 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 respectively.

42. These provisions state that a Tribunal shall not consider a complaint unless it is presented to the Tribunal before the end 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.
43. In considering whether there is jurisdiction to hear such complaints, Tribunals accordingly required to consider the following questions:
- (i) Were the complaints presented within the primary three month time limit?
 - (ii) If not, was it reasonably practicable for the complaints to be presented within that period?
 - (iii) If not, were they presented within such further period as the Tribunal considers reasonable?
44. The question of a what is reasonably practical is a question of fact for the Tribunal. The burden of proof falls on the claimant. Whether it is reasonably practicable to submit a claim in time does not mean whether it was reasonable or physically possible to do so. Rather, it is essentially a question of whether it was 'reasonably feasible' to do so (***Palmer and Saunders v Southend-on-Sea Borough Council*** [1984] IRLR 119).
45. Whether the claim was presented within a further reasonable period requires an assessment of the factual circumstances by the Tribunal, to determine whether the claim was submitted within a reasonable time after the original time limit expired (***University Hospitals Bristol NHS Foundation Trust v Williams*** UKEAT/0291/12).

46. The relevant time limits in relation to the complaints of less favourable treatment as a fixed term employee and discrimination on the grounds of gender reassignment are set out in regulation 7(2) of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (FTE Regulations) and section 123(1) of the Equality Act 2010 (EqA) respectively.
47. These provisions state that such complaints should be brought within either:
- (a) the period of 3 months starting with the date of the act to which the complaint relates; or
 - (b) such other period as the Tribunal thinks just and equitable.
48. Section 123(3) EqA states that conduct extending over a period is to be treated as done at the end of the period and failure to do something is to be treated as occurring when the person in question decided on it.
49. Regulation 7(2) of the FTE Regulations states that where an act or failure to act is part of a series of similar acts or failures, time starts to run from the date of the last of them.
50. The 'just and equitable' test is a broader test than the 'reasonably practicable' test. What is just and equitable depends on all the circumstances. The burden of proof is on the claimant, as explained in **Robertson v Bexley Community Centre** [2003] IRLR 434, in which the Court of Appeal also said, at para 25:
- “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.”*
51. In **British Coal Corporation v Keeble** [1997] IRLR 336 the EAT indicated that task of the Tribunal, when considering whether it is just and equitable to extend time, may be illuminated by considering section 33 Limitation Act

1980. This sets out a check list of potentially relevant factors, which may provide a prompt as to the crucial findings of fact upon which the discretion is exercised, such as:

- (a) the length of and reasons for the delay;
- 5 (b) the extent to which the cogency of the evidence is likely to be affected by the delay;
- (c) the extent to which the party sued had cooperated with any requests for information;
- (d) the promptness with which the claimant acted once they knew of the
10 facts giving rise to the cause of action; and
- (e) the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

52. In ***London Borough of Southwark v Afolabi*** [2003] IRLR 220 the Court of Appeal confirmed that, whilst that checklist provides a useful guide for
15 Tribunals, it does not require to be followed slavishly. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** [2018] EWCA Civ 640, the Court of Appeal confirmed this, stating that it was plain from the language used in s123 EqA ('such other period as the Employment Tribunal thinks just and equitable') that Parliament chose to give Employment
20 Tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision or to interpret it as if it contains such a list.

53. In ***Adedeji v University Hospitals Birmingham NHS Foundation Trust*** [2021] EWCA Civ 23, the Court of Appeal approved the approach set out in Afolabi and Morgan and, at paragraph 37, Underhill LJ confirmed, that
25 '*rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language. The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess*
30 *all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular "the length of, and*

the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking.'

Discussion & Decision

5 54. The Tribunal firstly considered the relevant time limits for each complaint and whether the complaints were brought within that time limit. The Tribunal reached the following conclusions:

(i) It was agreed that the claimant allegedly requested a reimbursement of travel expenses and/or a parking space, both of which were refused, in October/November/December 2018. The claimant claims that the respondent's refusal to provide her with reimbursement of travel expenses and/or a parking space amounts to less favourable treatment on the ground that the claimant was a fixed term employee. Regulation 7(2) of the FTE Regulations states that where an act or failure to act is part of a series of similar acts or failures, time starts to run from the date of the last of them. Accordingly, taking 31 December 2018 as the last possible date that any such less favourable treatment occurred, the three month time limit expired, at the latest, on 30 March 2019. The claimant raised her claim over 22 months later, on 11 February 2021.

(ii) It was agreed that the acts of discrimination alleged occurred in the period from December 2018 to October/November 2019. The Tribunal did not hear detailed evidence in relation to each complaint of discrimination to enable it to make any findings which would allow a decision to be made in relation to whether the individual acts asserted in fact constituted a continuing act under s123(3) EqA. Instead, when assessing the preliminary issue (and for this purpose only), the Tribunal proceeded on the assumption (but make no findings as to whether this was in fact the case or not) most favourable to the claimant, namely that they did constitute a continuing act. Proceeding on that basis, the three month time limit in relation to these complaints

expired, at the latest, on 29 February 2020. Her claim was raised over 11 months later, on 11 February 2021.

5 (iii) In relation to the breach of contract and unfair dismissal complaints, the Tribunal noted that the claimant's employment terminated on 3 January 2020. Accordingly, the three month time limit expired on 2 April 2020. Her claim was raised over 10 months later, on 11 February 2021.

10 55. The Tribunal accordingly determined that none of the complaints were brought within the period of three months from the acts complained of, or the effective date of termination, as the relevant case may be.

Reasonably Practicable

56. In relation to the breach of contract and unfair dismissal complaints, the Tribunal then considered whether:

15 (i) It was reasonably practicable for the complaints to be presented within the initial three month period? and

(ii) If not, were they presented within such further period as the Tribunal considers reasonable?

20 57. In relation to whether it was reasonably practicable for the complaints to be submitted on or before 2 April 2020, the Tribunal considered whether it was reasonably feasible for the claimant to have done so, noting that the onus was on the claimant to demonstrate this. The Tribunal considered the explanations for the late submission of the claim which the claimant advanced and reached the following conclusions in relation to each

25 (i) **The claimant's stance on patient care during the Covid-19 pandemic.** The claimant's position was that she strongly believes in the value of the NHS and that she felt it would be wrong to tax resources while the NHS was struggling to cope with the pandemic. Bringing a claim against the NHS would take money away from patient care at a time of pressing need. The claimant resigned on 3

January 2020. National lockdown measures were not put into place until 23 March 2020, less than two weeks prior to the expiry of the primary time. In submissions for the claimant it was noted that her moral stance on the pandemic and the effect it had on patient care
5 *'does not have any relation on whether it was reasonably practicable to bring a claim in time'*. The Tribunal noted that the claimant felt able to bring a claim in February 2021, notwithstanding the fact that there remained significant pressure on the NHS at that time, as a result of the pandemic. The Tribunal concluded that any views the claimant
10 had in relation to this did not render it not reasonably practicable for her to bring her claim in time.

- (ii) **Ignorance regarding the process of bringing a claim.** The claimant stated that she was not aware that she could bring a claim without incurring financial risk or costs, how to bring a claim, or that
15 there were time limits for doing so. The Tribunal accepted that, prior to the expiry of the primary time limit, the claimant was ignorant of these matters. The Tribunal considered whether that ignorance was reasonable (*Wall's Meat Company Ltd v Khan*) or whether she ought to have known about her rights earlier (*Porter v Bandridge*).
20 The Tribunal concluded that the claimant's ignorance was not reasonable and that she ought to have known about her rights earlier. The claimant accepted that she was aware of the existence of Employment Tribunals during her employment and that she was aware that one of her colleagues was 'suing' the respondent in
25 relation to his employment with them. She could have discussed matters further with her colleague, but did not do so. She is intelligent and highly educated. She works in IT. She could have conducted research in relation to her ability to bring a claim and the time limits for doing so, but did not. She has not demonstrated that it was not
30 reasonably practicable for her to bring her claim within the requisite time limit as a result of her ignorance regarding the process of bringing a claim.

(iii) **Mental ill health.** The Tribunal noted that the mere existence of a medical condition does not, of itself, demonstrate that it was not reasonably practicable for a claimant to have brought their claim in time; the claimant must establish that the medical condition rendered it not reasonably practicable to bring the claim in time. Medical evidence is normally required to do so. The Tribunal noted that the claimant had been signed off work due to illness for 13 days from 10-22 December 2019. She then returned to work. On 31 December 2019, she informed her GP that she was feeling better, attributing this to attending the gym rather than prescribed medication, which she indicated she would not be taking again. She stated that she was looking forward to starting her new job. Her employment with the respondent terminated on 3 January 2020 and she started a new role on Monday 6 January 2020. On 9 January 2020 she informed Chalmers that her health had improved since starting her new job and that she felt emotionally stable at that time. She did not consult her GP in relation to mental health issues after 31 December 2019. She was not taking any antidepressant medication and was not absent from work in the period from when her employment terminated to when the primary time limit expired on 2 April 2020. Whilst the Tribunal accept that the claimant continued to have symptoms of depression during this period that, of itself, does not mean that it was not reasonably practicable for her to bring a claim. No medical evidence was produced suggesting that her condition inhibited her ability to bring a claim in any way, or that she was unable to seek advice or conduct research in relation to Employment Tribunal claims generally as a result of her medical condition. Indeed, the medical evidence produced stated that the claimant was feeling 'emotionally stable' on 9 January 2020. No medical evidence was produced indicating that that position changed, or that there was any deterioration in the claimant's medical condition in the period from then to 2 April 2020. Given all the circumstances the Tribunal found that the claimant did not demonstrate that it was not reasonably

feasible for her to lodge a claim in the period 3 January and 2 April 2020, as a result of her medical condition.

58. In light of the above, the Tribunal concluded that it was reasonably practicable for the claimant to have lodged her claim within the initial three month time limit. The Tribunal accordingly does not have jurisdiction to consider the claimant's complaints of unfair dismissal and breach of contract.
59. Whilst it was not necessary for the Tribunal to go on to consider the second element of the test, the Tribunal record that, even if it had not reached the findings it did in relation to the first element, and leaving aside any consideration of the period from 3 April to 30 December 2020, the Tribunal concluded that the delay from 31 December 2020 to 4 February 2021 was, of itself, not reasonable. The claimant was aware, from 31 December 2020, of the process for bringing a claim and the time limits for doing so, having been expressly informed of them that day. She resolved on that day to raise a claim. She did not however then take any action for 5 weeks, until 4 February 2021, when she commenced early conciliation. Ignorance was no longer a factor and no evidence was led regarding any change in relation to the claimant's medical condition or views regarding the pandemic during the first 5 weeks of 2021. Whilst it was asserted in submissions that the claimant's dyslexia was the reason for the delay, her clear evidence to the Tribunal, and the finding in fact made as a result, was that she did not start drafting her ET1 form until after receipt of the early conciliation certificate, which she received on 5 February 2021. The Tribunal accepted that delay of just under a week (here from 5-11 February 2021) would have been reasonable given the claimant's dyslexia, as she required extra time to draft the ET1, check her grammar, spelling and sentences, and to obtain assistance from her former colleague and parents. That does not however excuse the delay of 5 weeks from 31 December 2020 to 4 February 2021, throughout which no action was taken, notwithstanding the fact that the claimant was, by her own admission, fully aware of the time limits for raising claims and the process for doing so. Accordingly, even if the Tribunal had concluded that it was not reasonably practicable for the claimant to raise her claim within the initial three month

period, it would have concluded that the claim was not submitted within such further period as was reasonable.

Just and Equitable Extension

5 60. The Tribunal then considered whether the complaints of discrimination and less favourable treatment were brought within such other period as was just and equitable, noting that the onus was on the claimant to demonstrate this.

61. As stated above, the claimant's complaint under the FTE Regulations was brought over 22 months after the expiry of the relevant time limit for complaints of that nature and the complaints under the EqA were brought over 10 11 months after the expiry of the relevant time limits for complaints under that Act. In relation to both complaints, the delay is considerable. The claimant attributes the delay in raising these complaints to three factors, as follows:

- (i) The claimant's stance on patient care during the Covid-19 pandemic;
- (ii) Ignorance regarding the process of bringing a claim; and
- 15 (iii) Mental ill health, which she stated was the principal reason.

62. The Tribunal considered each of these in turn.

63. The Tribunal did not accept that the claimant's stance on patient care during the Covid-19 pandemic was genuinely a factor which contributed to the delay in her raising her claim. The complaints under the FTE Regulations arose in 20 October/November/December 2018. The Covid-19 pandemic was not an issue at that point. The complaints under the EqA arose in the period from December 2018 to October/November 2019. Again, the pandemic was not an issue at that time. In any event, when the claimant did raise her claim, in 25 February 2021, the country was again in lockdown and the NHS in danger of being overwhelmed. The claimant's assertion that she could not raise her claim because the Covid-19 pandemic prevented her from doing so prior to February 2021, but that she felt able to do so at that point, is not credible as a result.

64. The Tribunal then considered the claimant's position that she was ignorant of her rights and the process of bringing a claim. ***Mensah v Royal College of Midwives*** outlines that, in relation to the issue of prior knowledge, Tribunals are entitled to ask the following questions:

5 (i) When did the claimant know or suspect that they had a claim for discrimination?

(ii) Was it reasonable for them to know or suspect that they had a claim earlier?

10 (iii) If they did know or suspect that they had a claim, why did they not present their claim earlier?

65. The Tribunal considered the questions posed in ***Mensah*** about the claimant's prior knowledge. The claimant knew of the existence of Employment Tribunals while she was employed by the respondent. She knew of the facts giving rise to her potential complaints from when they occurred. She took no steps to investigate matters however until 2021. It was clear to the Tribunal that the claimant knew or suspected that she had a complaint for discrimination/less favourable treatment by May 2020. Her evidence was that she had thought about her experience with the respondent and whether she should bring a claim at that time. She had a discussion with her former colleague at that time
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about the claim he was bringing, but decided that she was not in a position mentally or financially to pursue a claim against the respondent herself: her health was improving, but she did not want to take any steps which may jeopardise that; and she could not afford legal fees.

66. The claimant's position was that she was prompted into action by a discussion with her former colleague on 31 December 2020, during which he explained the process he had undertaken in bringing his claims to the Employment Tribunal and he addressed her questions about costs and processes, reassuring her that complaints were taken seriously by the Employment Tribunal. The Tribunal concluded that the claimant could have had this discussion with her former colleague at a much earlier stage, for example
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when she discussed his claim with him while she was still employed by the respondent, or in May 2020. She did not however make further enquiries of him at that time. She stated that she conducted no research whatsoever in relation to any potential claims, or how she may bring these, prior to 2021. She is intelligent and highly educated. It was not reasonable for her not to investigate these matters prior to 2021.

67. In light of these factors, the Tribunal concluded that the delay in raising her claim, as a result of the claimant's asserted ignorance of her rights and her ability to bring a Tribunal claim, was not reasonable. The claimant did not act promptly once she knew of the facts forming the basis for her potential claim.

68. The Tribunal also noted that no explanation was provided as to why it took the claimant 5 weeks from the discussion with her former colleague on 31 December 2020 to 4 February 2021, when she initiated early conciliation. This delay was not, in itself, reasonable. The claimant did not act promptly following the discussion on 31 December 2020.

69. The principal ground asserted by the claimant as to why she did not bring a claim until February 2021 was mental ill health. The Tribunal accepted that this was a significant factor throughout 2019, while the claimant was employed by the respondent. The evidence presented showed a clear decline in her medical condition throughout 2019. The Tribunal accepted significantly impacted her ability to raise a claim. By the start of 2020 however she reported to her GP that she was feeling better and to Chalmers (who in turn reported to her GP) that she felt 'emotionally stable'. She started a new job on 6 January 2020 and was not absent due to illness from the point of starting her new role to when she lodged her Tribunal claim. She did not consult her GP in relation to mental health issues after 31 December 2019 and did not take any medication for any mental health issues after that date. No medical evidence was produced suggesting that her condition inhibited her ability to bring a claim in any way, from 1 January 2020 onwards, or that she was unable to seek advice or conduct research in relation to Employment Tribunal claims generally as a result of her medical condition at that time. The Tribunal

accordingly did not accept that the claimant's mental health caused or contributed to her not raising her claim in the period from 1 January 2020 to 11 February 2021.

5 70. The Tribunal took these findings, in relation to the length of and reasons for the delay into account, as well as the balance of prejudice between the parties in the claim proceeding at this stage, when determining whether these complaints were brought within such other period as was just and equitable. The Tribunal concluded that no satisfactory explanation was advanced for why the complaints were not brought sooner, particularly where it was clear
10 that the claimant suspected she had claims for discrimination/less favourable treatment at an earlier stage. The claimant has not established that there was any impediment to the claimant raising her claim in the period from 1 January 2020 to 11 February 2021, or that it was reasonable for her to delay until 11 February 2021 to do so. Whilst the Tribunal is aware that the claimant will be
15 unable to pursue her complaints if discretion is not exercised in her favour, the Tribunal is also mindful that the respondent would be prejudiced if the claims were allowed to proceed at this stage. There is no doubt that the cogency of the evidence, which would require to be led in relation to events which took place in 2018 & 2019, will be adversely impacted by the delay in
20 the claim being raised.

25 71. For these reasons the Tribunal did not find that the claim was brought within such other period as was just and equitable. It is not persuaded by the claimant that it would be just and equitable to extend time in her favour. The Tribunal accordingly does not have jurisdiction to hear the claimant's complaints under the FTE Regulations or the EqA.

Employment Judge: Mel Sangster
Date of Judgment: 20 September 2021
Entered in register: 23 September 2021
and copied to parties