EMPLOYMENT TRIBUNALS

Claimant: **Mr MD Hafiz Al Ashraf**

Respondent: **Marcus and Marcus Ltd**

Heard at: **Watford** **On: 4 December 2023**

Before: **Employment Judge Bansal**

Representation

Claimant: **Mr S Rahman (Counsel)**

Respondent: **Mr A Small (Counsel)**

RESERVED JUDGMENT

The Tribunal Judgment is that;

(i) the complaint of unfair dismissal was presented out of time and it was reasonably practicable to have been presented it in time. The Tribunal does not have jurisdiction to hear that complaint and it is therefore dismissed.

(ii) the complaint of discrimination was presented out of time. It is not just and equitable to extend time. The Tribunal does not have jurisdiction to hear the complaint and it is therefore dismissed.

REASONS

1. The claimant presented his Claim Form on 24 May 2023 making claims for unfair dismissal and discrimination on the grounds of race and religion. The claimant's effective date of termination was 6 June 2022. The claimant engaged with ACAS on 23 April 2023 (Day A), and was issued with an Early Conciliation Certificate on 3 May 2023. (Day B).

2. The respondent resists the claims, and in particular contends the Tribunal does not have jurisdiction to hear the claims, as these have been presented out of time as the primary limitation period to present the claims expired on 5 September 2022.

3. By Notice of Hearing dated 3 October 2023, this claim was listed for a Preliminary Hearing to be held on 4 December 2023, to determine if any of the complaints were presented outside the time limits in accordance with s111(2)(a) & (b) of the Employments Rights Act 1996 and s123(1)(a) & (b) of the Equality Act 2010.

4. For this hearing I was presented with a disjointed bundle of documents of 182 pages and a witness statement from the claimant, and his wife Mrs A A Popy who did not attend to give oral evidence. The claimant gave oral evidence and was cross examined.

I also asked questions of the claimant for clarification purposes. Both Counsel gave oral submissions.

Findings of fact

5. From the evidence I heard and considered, I make the following findings of fact. References to page numbers is to pages in the hearing bundle.

6. The respondent provides a care service. The claimant, is Muslim, and of Bangladesh ethnic origin. He was employed by the respondent as a Support Worker from 7 December 2018 until he was summarily dismissed for gross misconduct effective from 6 June 2022. The claimant appealed his dismissal and attended an appeal hearing on 4 July 2022. His appeal was dismissed. The claimant denies having received the letter dated 19 July 2022, included in the bundle (p181/182) headed " Confirmation of Outcome Of Disciplinary Appeal Hearing" as disclosed by the respondent. Notwithstanding this, the effective date of termination of 6 June 2022 is not in dispute.

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7. In relation to his complaints of discrimination, the Particulars of Claim, which have been prepared by the claimant's solicitors, state, *" I have faced racial discrimination due to my ethnic origin and religious beliefs. As an ethnic minority, I have experienced discrimination from the ethnic majority at my workplace".* The Particulars of Claim summarise various incidents experienced by the claimant during his employment, but fail to fully particularise each act of less favourable treatment relied upon. There is reference to the refusal to give a day off for the Eid festival in early May 2022 as discrimination based on both race and religion. From some of the documents disclosed in the bundle, it is evident that the claimant raised concerns about colleagues from Bangladesh being treated unfavorably compared to Ghanian employees in respect of the working shifts; their working hours and how they were treated within the workplace. The claimant also raised concerns and submitted a grievance about the Project Manager Dennis Forster, bullying him, and not respecting him because of his race and religion. The claimant does not pleaded that the dismissal and/or the failure to confirm the outcome to his appeal was a discriminatory act or that the incidents complained of amounted to a continuing course of discriminatory conduct extending over a period of time. I therefore take the view that the last act of discrimination as pleaded is the refusal to grant the claimant time off for the Eid Festival, which the claimant raised with Dennis Forster on or about 1 May 2022.

9. In terms of the his health issues, the claimant's position as confirmed in evidence and supported by the documents in the bundle, can be summarised as follows. In April 2022 he was diagnosed with kidney stones. He said this diagnosis coupled with the workplace stress worsened his mental health issues. On 23 May 2022, he had a telephone consultation with his Doctor. The medical note states it was a "Depression interim review". There is no evidence that he was prescribed any medication, (p100) The medical evidence provided in the form of his medical records, show that his next consultation was, some 9 months later, on 10 February 2023, which states "for depression and anxiety disorder" and was prescribed Sertraline. This medication was changed to Citalopram in May 2023 which he continues to take. (p134/139) The notes record the claimant suffering from "depression and anxiety and lots of situational stresses". One of the situational stresses being "unfair dismissal from work".

10. In terms of his personal circumstances, on 17 June 2022, the claimant suffered a road traffic accident on his motorbike, for which he received treatment from his Doctor. On 31 July 2022 his residential tenancy came to an end. He then found temporary accommodation through the local council. On 9 August 2022, his wife joined him in England from Bangladesh. On 16 August 2022, his wife gave birth to their daughter prematurely. Their baby daughter was discharged from hospital on 6 October 2022. During this period they had to regularly attend the hospital. On 1 September

2022, they were re-housed in a Travelodge hotel, until 12 March 2023 when they moved into new Council accommodation. In his witness statement the claimant states that " the culmination of these events has materially delayed my ability to think of filing a case sooner" (Para 29)

11. On 24 February 2023, the claimant talked with this Doctor about him losing his job and wanting to take legal action. The Doctors, response is that *"he could get free legal advice to see if there is anything he could do about it as he feels he was unfairly dismissed."* (p138)

12. On 13 March 2023, following a discussion with his Doctor, he is given detailed information about two organisations with their address and contact numbers, from whom he can seek legal advice, namely St Hilda's Daytime Advice Service, and Elizabeth Davey Solicitor Legal advice Centre. (p137) There is no documentary evidence provided or any oral evidence given by the claimant, to confirm if he contacted either of these organisations.

13. In cross examination and in answer to some of my questions, the claimant, confirmed the following;

(i) After being dismissed, he did not speak to anyone about it until 24 February 2023 when he discussed it with his Doctor.

(ii) Since his appeal hearing held on 4 July 2022, he been waiting for the outcome decision. He has been of the view that he had to wait for this outcome decision before he could to do anything about his dismissal.

(iii) It was his Doctor who told him to seek legal advice in March 2023. He then did speak to a Immigration lawyer, who advised him to contact an employment lawyer or ACAS.

(iv) Sometime in April 2023, he contacted ACAS. He completed an online form, (using his iPhone) following which he had contact with a Conciliation Officer, until he was issued with an Early Conciliation Certificate on 3 May 2023. He was informed by the Officer that his claim was out of time and that he should seek legal advice and was advised to contact the Citizen Advice Bureau. This prompted him to search online and led him to make contact with his instructed solicitors, Lexpert Solicitors LLP, who issued the Claim Form on 24 May 2023.

(v) He was not in a position to bring a claim within the time limits or earlier than he did, because of his personal circumstances and his own mental health issues. In Para 30,of his statement he states, *" ..During this period I was still struggling with my mental health and other issues. I was not in a position to take prompt action or think rationally."* Further, in Para 32 of his witness statement, the claimant states, *" I now understand that there is a long delay to bring my claim to the Tribunal however the delay was through no fault of my own. As I explained above, I have been experiencing various difficulties which incapacitated me to think rationally. I was very naive to believe that my employer would answer my grievance while this is pending, I cannot do anything. If I knew I would not wait this far. As soon as I realised that I could bring my claim to the Tribunal I sought legal advice and brought the claim accordingly."*

The Law

Applicable time limits

14. Subsection 18A(1) of the Employment Tribunals Act 1996 provides that, *"Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter".*

Section 18A(8) provides *"A person who is subject to the requirements in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4)."*

15. Section 207B Employment Rights Act 1996 describes how time limits are affected by early conciliation. In summary;
    (i) where early conciliation commences after the time limit has expired then the time limit is not extended (see Para 16 below);
    (ii) where early conciliation commences before the time limit expires then the claimant will have at least a calendar month from the end of the conciliation ("Day B") to present the claim;
    (iii) in some cases they might have longer than one month from Day B (the period from the day after cancellation starts until Day B is ignored when calculating the time limit).

16. The extension provisions do not apply if by the time the claimant contacts ACAS to request early conciliation the three-month period has already expired. It is too late. ***In Pearce v Bank of America Merill Lynch and others UKEAT/0067/19/LA*** it was held that although time may be extended to allow for ACAS Early Conciliation that is only possible where the reference to ACAS takes place during the primary limitation period.

17. Section 111(2) of the Employment Rights Act 1996, provides that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

18. The burden of proof for establishing that it was not reasonably practicable to present the claim in time is on the claimant. The EAT reiterated in ***Cygnet Behavioral Health Ltd v Britton [2022] EAT 108*** (Para 53) that: *"A person who is considering bringing a claim for unfair dismissal is expected to appraise themselves of the time limits that apply; it is their responsibility to do so."*

19. Section 123(1)(a) of the Equality Act 2010 provides that proceedings on a complaint within Section 120 of the Equality Act 2010 may not be brought after the end of (a) the period of three months starting with the date of the act to which the complaint relates or (b) such other period as the employment tribunal thinks just and equitable.

Reasonable Practicability

20. When a claimant argues that it was not reasonably practicable to present the claim within the time limit, there are questions of fact for the tribunal to decide. The burden of proving that it was not reasonably practicable to present the claim within the time limit rests on the claimant. That imposes a duty upon the claimant to show precisely why it was that he did not present his complaint on time ***Porter v Banbridge Ltd 1978 ICR 943 CA.*** When doing so, the phrase "not reasonably practicable" should be given a liberal interpretation in favour of the claimant. ***(Dedman v British Building and Engineering Appliances Ltd [1974] 1AER 520).***

21. The word' practicable 'is to be given a liberal interpretation in favour of the employee ***(Dedman v British Building and Engineering Appliances Ltd [1974] 1AER 520).*** May LJ described the relevant test in this way: *'We think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done - different, for instance, from its construction in the context of the legislation relating to factories compare Marshall v Gotham Co Ltd (1954) AC 360,HL. In the*

*context in which the words are used in the1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word "practicable as the equivalent of "feasible" as Sir John Brightman did in Singh v Post Office (1973), CR437 NIRC and to ask colloquially and untrammeled by too much legal logic-"was it reasonably feasible to present the complaint to the employment tribunal within the relevant 3 months?"-is the best approach to the correct application of the relevant subsection." (**Palmer and Saunders v Southend-on-Sea Borough Council [1984] ICR at 384,385**). He said the factors could not be described exhaustively but listed a number of considerations which might be investigated including the manner of, and reason for the dismissal, whether the employer's conciliatory appeals machinery have been used, the substantive cause of the claimant's failure to comply with the time limit whether there was any physical impediment preventing compliance, such as illness, or a postal strike, whether, and if so when, the claimant knew of his rights, whether the employer had misrepresented any relevant matter to the employee, whether the claimant had been advised by anyone, and the nature of any advice given, and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.*

22. If ill health is given as a reason although its effects have to be assessed in relation to the overall period of limitation, the weight to be attached to a period of disabling illness varies according to whether it occurred in the earlier weeks or the far more critical weeks leading up to the expiry of the limitation period ***(Schultz v Esso Petroleum Co Ltd (1999) IRLR 488).*** It was also held in that case that :*'when a question arises as to whether a particular step or action was reasonably practicable or feasible, the injection of the qualification of reasonableness requires the answer to be given against the background of the surrounding circumstances and the aim to be achieved. In a case of this kind, surrounding circumstances will always include whether or not the claimant is hoping to avoid litigation by pursuing alternative remedies.'*

23. If ignorance is given as a reason Brandon LJ said in ***Walls Meat Co Ltd v Khan (1978) IRLR 499,*** *"The performance or an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike, or the impediment may be mental, namely the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of 3 months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not to be reasonable if it arises from the fault of the complainant in not making such enquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him."* He went on:' *With regard to ignorance operating as a similar impediment, I should have thought that, if in any particular case an employee was reasonably ignorant of either (a) his right to make a complaint of unfair dismissal at all, or (b) how to make it, or (c) that it was necessary for him to make it within a period of 3 months from the date of dismissal, an [employment] tribunal could and should be satisfied that it was not reasonably practicable for his complaint to be presented within the period concerned. For this purpose I do not see any difference, provided always that the ignorance in each case is reasonable, between ignorance of (a) the existence of the right, or (b) the proper way to exercise it, or (c) the proper time within which to exercise it. In particular, so far as (c), the proper time within which to exercise the right, is concerned, I do not see it can justly be said to be reasonably practicable for a person to comply with the time limit of which he is reasonably ignorant. While I do not, as I have said, see any difference in principle in the effect of reasonable ignorance as between the 3 cases to which I have referred, I do see a great deal of difference in practice in the ease or difficulty with which a finding that the relevant ignorance is reasonable may be made.*

Thus, where a person is reasonably ignorant of the existence of the right at all, he can hardly be found to have been acting unreasonably in not making enquiries as to how, and within what period, he should exercise it. By contrast, if he does know of the existence of the right, it may in many cases at least, though not necessarily all, be difficult for him to satisfy an [employment] tribunal that he behaved reasonably in not making such enquiries. To that extent, therefore, it may, in general, be easier for a complainant to avail himself of the "escape clause" on the ground that he was reasonably ignorant of his having a right at all, than on the ground that, knowing of the right, he was reasonably ignorant of the method by which, or the time limit within which, he ought to exercise it."

24. In ***John Lewis Partnership v Charman [2011] EAT 0079/11*** Underhill J held that a. Para. 9: *"The starting-point is that if an employee is reasonably ignorant of the relevant time limits it cannot be said to be reasonably practicable for him to comply with them…. In the present case the Claimant was unquestionably ignorant of the time limits, whether one considers his own knowledge or that of himself and his father. The question is whether that ignorance was reasonable. I accept that it would not be reasonable if he ought reasonably to have made inquiries about how to bring an employment tribunal claim, which would inevitably have put him on notice of the time limits. The question thus comes down to whether the Claimant should have made such inquiries immediately following his dismissal".*

25. The test for whether it was reasonable for the claimant to be aware of the time limit is an objective one and the Tribunal should consider whether a claimant ought to have known of the correct application of the time limit - ***Avon County Council v Haywood-Hicks (1978) IRLR 118.***

26. Ignorance or mistake *"will further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made"* (as per Brandon LJ in Khan)

27. The EAT ruled in **Bodha v Hampshire Area Health Authority ((1982) ICR 200** that the mere fact that an employee was pursuing an internal appeal was not by itself sufficient to justify a finding that it was not reasonably practicable to present a complaint to a tribunal within the time limit. This was expressly approved in ***Palmer and onr v Southend-on-Sea BC 1984 ICR 372.***

28. If the tribunal is satisfied that it was not reasonably practicable to present the claim within the time limit, then it is necessary to consider whether the period between the expiry of the time limit and the eventual presentation of the claim was reasonable in the circumstances.

The just and equitable test

29. The "just and equitable test" is a broader test than the reasonably practicable test under the Employment Rights Act 1996. The burden is on the claimant to persuade a tribunal that it is just and equitable to extend time. The Tribunal's discretion is broad and it can only be challenged where it is wrongly exercised or perverse.

30. In the Court of Appeal case of ***Robertson v Bexley Community Centre (2003) IRLR 434. Auld LJ*** said, *" The tribunal, when considering the exercise of its discretion has a wide ambit within which to reach a decision. …. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption 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. It is of a piece with those general*

propositions that an Appeal Tribunal may not allow an appeal against the tribunal's refusal to consider an application out of time in the exercise of its discretion merely because the Appeal Tribunal, if it were deciding the issue at first instance, would have formed a different view. As I have already indicated such an appeal should only succeed where the Appeal Tribunal can identify an error of law or principle, making the decision of the tribunal below plainly wrong in this respect."

31. In the case of ***British Coal Corporation v Keeble (1997) IRLR 336 EAT***, it was suggested that in exercising its discretion the tribunal might be assisted by the factors mentioned in section 33 of the Limitation Act 1980. Those factors are consideration of 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; whether the parties sued had cooperated with any requests for information; the promptness with which the claimant acted once he knew or she knew the facts giving rise to the cause of action; and the steps taken to obtain appropriate advice once he or she knew the possibility of taking action. However, a tribunal is not required to go through the matters listed in section 33 of the Limitation Act provided that no significant factor is omitted. ***(London Borough of Southwark v Afolabi (2003) IRLR 220***

32. In ***Adedeji v University Hospitals Birmingham NHS Foundation Trust (2021) EWCA Civ 27*** Underhill LJ said, " the best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just an 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 *British Coal Corporation v Keeble (1997) IRLR 336* well and good; but I would not recommend taking it as the framework for its thinking.

Conclusion

Unfair dismissal

33. The primary time limit for presenting a claim for unfair dismissal expired on midnight on 5 September 2022. The claimant does not benefit from an extension of time under the Early Conciliation provisions because he did not approach ACAS (Day A) until 23 April 2023 by which date the three month time limit had already expired, and he did not obtain the Early Conciliation Certificate (Day B) until 3 May 2023. The claimant presented his claim on 24 May 2023, some 9.5 months (just over 38 weeks) after the limitation date expired.

34. The claimant has accepted the claim has not been presented within the required time limit. He has argued that it was not reasonably practicable for him to have issued proceedings within time because; (i) he was unaware of his rights to make a claim, and the applicable time limits; (ii) that he was not well as he was suffering from depression and stress; (iii) because of his personal circumstances relating to his housing issues and the premature birth of his daughter; and (iv) that he believed he had to wait for the outcome to his grievance before he could do anything further.

35. I do not find that these reasons establish that it was not reasonably practicable for him to bring the claim within time. I deal with each of his reasons in turn, below.

36. (i) He was unaware of his rights to make a claim and the applicable time limits.
I take into account that English is not the first language. There was no impediment to the claimant seeking legal advice; to undertake his own legal research and to contact ACAS. He did have an iPhone which he could have used to make his own enquiries on the internet. He did so in March 2023 when contacting ACAS online and when finding legal representation to present this

claim. Had he sought advice or undertaken his own research, he would have become aware of his legal rights and the applicable time limits. The reason why the claimant was ignorant of the potential to bring this claim is that he took no steps to investigate that and seek advice on his rights during the primary time period, and even then he delayed thereafter until March 2023. The fault lies with the claimant. Accordingly, applying the guidance in Khan above, I consider that this ignorance was not reasonable.

37. (ii) <u>He was unwell suffering from depression and stress</u>

I recognise that the claimant was upset at his dismissal and the treatment he said he suffered during his employment. I also accept that the housing issues he had from early August 2022 onwards are likely to have affected his wellbeing and state of mind. The medical records disclosed show that on 23 May 2022 the claimant had a "Depression interim review", but there is no evidence that he was prescribed any medication or that he was receiving any treatment. The next entry show a consultation with his Doctor, some 9 months later on 10 February 2023, which records depression and anxiety and lots of situational stressors, for which he is prescribed sertraline. The claimant has provided no medical evidence to suggest that his health prevented him for submitting his claim in time. I also note that during the relevant time the claimant was able to lodge his appeal; correspond with the respondent; attend his appeal hearing on 4 July 2022; organise travel arrangements for his wife's arrival in England on 9 August 2022; attend to his wife and baby daughter in hospital; and also deal with his accommodation issues. There was no impairment preventing him from presenting his claim in time.

38. <u>(iii) his personal circumstances relating to his housing issues and the premature birth of his daughter.</u>

While I accept that the claimant was going through a difficult time in June to September 2022, I do not accept that the severity of that was such that he could not have sought to obtain legal advice; made his own enquiries to obtain the necessary information about making a claim, or even submitting his claim on time.

39. (iv) <u>he believed he had to wait for the outcome to his grievance before he could do anything further</u>.

The claimant has accepted that he was very naive to believe that he could not do anything pending the outcome of his appeal. That is the claimant's own failure. Had he made his enquiries timeously as stated above, he would have found that the existence of an impending internal appeal is not itself sufficient to justify a finding that it was not reasonably practicable to present a complaint to a tribunal within the time limit.

<u>Discrimination</u>

40. In respect of the claim for discrimination, I must consider whether it is just and equitable to extend time, taking into account that time limits are to be strictly enforced and the exercise of discretion is the exception rather than the rule.

41. The discretion to extend time for the presentation of a discrimination claim is broader under the Equality Act 2010. I can extend time if it is just and equitable to do so. I must exercise my discretion judicially by weighing all relevant factors. These factors include: (i) the length of the delay; (ii) the reason for the delay: the longer the delay the more cogent the reason is expected to be; (iii) the merits of the case may be relevant; (iv) whether the cogency of the evidence is likely to have been affected by the delay; (v) what advice or information the claimant received or could have sought, and (vi) the balance of hardship.

42. I have weighed each factor carefully, which I explain below;

(i) Merits of claim

On the limited information, it is difficult to assess if the merits are in the claimant's favour to extend time.

(ii) The delay

The delay is lengthy. If the last act of discrimination as pleaded occurred on 1 May 2022, then the last date to issue a claim was on 1 August 2022. The delay in issuing this claim is some 9 months and 3 weeks. This is a significant delay. The claimant has not provided a cogent reason for this delay. Even after he obtained his Certificate, on 3 May 2023 he did not act promptly. By then he was advised by the ACAS Officer that his claim was out of time. He needed to get his claim issued without delay. The claim is not issued until 24 May 2023, some 21 days later from the date of the Certificate. The claimant has not explained why it took him some 3 weeks to issue the claim.

(iii) Cogency of the evidence

The delay in relation to the cogency of the evidence is a factor against extending time The allegations made by the claimant will require the Tribunal to enquire into the minds of the alleged perpetrators. Their oral evidence and recollection of their thought processes will be an important part of the proceedings and might well be, to some extent, impaired by the delay.

(iv) Hardship & prejudice

I acknowledge the prejudice to the claimant in not being able to pursue his complaints, which he considers have merit. On the limited information, it is not possible to assess the merits of the claim. The claimant bore the responsibility for bringing evidence to persuade me that I should exercise discretion. From what I have heard I am not persuaded to exercise my discretion.

43. Consequently, I am not persuaded by the claimant that it would be just and equitable to extend time in respect of this complaint.

44. Accordingly, for the reasons stated the Tribunal does not have jurisdiction to hear the claim and is therefore dismissed.

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Employment Judge Bansal
Date 5 February 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
6 February 2024

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FOR EMPLOYMENT TRIBUNALS