



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Akhtar

**Respondent:** Santander UK Plc

**Heard at:** Nottingham      **On:** Thursday 7 January 2021

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

## Representatives

**Claimant:** In person

**Respondent:** Ms G Roberts of Counsel

# RESERVED JUDGMENT

1. The claim of unfair dismissal brought under section 94 and 98 of the Employment Rights Act 1996 has been presented out of time and is struck out under Rule 37 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

2. The claims of discrimination on the grounds of race/religion/sex pursuant to sections 13 and 26 of the Equality Act 2010 (EqA) have been presented within time pursuant to section 123 (1)(b) EqA.

# REASONS

## Background

1. The Claimant was employed by the Respondent as a Select Team Manager from 2010 (the exact start date of his employment is currently in dispute). The date of termination is agreed between the parties as being 20 September 2019.

2. The complaints are set out in a record of a telephone Preliminary Hearing before Employment Judge Dyal on 19 May 2020. The complaints are of direct discrimination under section 13 of the Equality Act 2010 (EQA) and claims of harassment pursuant to section 26 of the EQA. The Claimant identifies himself as a Pakistani, Muslim male and he complains that he was treated unfavourably because of those protected characteristics, namely; his race, religion and sex.

3. The less favourable treatment complained of in summary is as follows: -

3.1 In between October and December 2016 the Claimant had a long-standing practice of making arrangements so that he and other Muslim colleagues could pray together on Fridays. The Claimant would via the Resources Planning Team, arrange for his and his relevant colleagues break times to coincide on that day of the week and at that time. However he complains that is then Line Manager, Mr Webster:-

- a) Objected to that practice by making comments such as "*the work place is not a place to impose religious belief*".
- b) Objected the Claimant's efforts to amend the rota so that colleagues' breaks coincided and they could pray together.

3.2 Between March 2017 and June 2017, which followed a period of three months from the Claimant's absence from work:-

- a) Told the Claimant not to speak to his team because he was in the process of manipulating some of the team to give false evidence against the Claimant to build a disciplinary case against him.
- b) Did not give the Claimant a new team.
- c) Did not give the Claimant work to do.
- d) Did not give/facilitate training on new processes introduced during the Claimant's absence.

3.3 Between July 2017 and September 2019:-

- a) Mr Webster manufactured and pursued false disciplinary allegations against the Claimant.
- b) Jerry Fitzpatrick and/or Mr Webster destroyed evidence which the Claimant had presented to the disciplinary investigation.
  - i) E-mails between the Claimant and Helen Sugarman.
  - ii) Witness statement Mr Karim.
  - iii) E-mails between the Claimant, Mr Ravat and the Performance Excellence Team.
  - iv) Performance action plans from the Claimant and Mr Edwards.

3.4 Dismissal on 20 September 2019.

4. The Claimant also brings a complaint of unfair dismissal under section 94 and 98 of the Employment Rights Act 1996.

### **Previous Preliminary Hearing**

5. At the previous Preliminary Hearing before Employment Judge Dyal both parties agreed that the claims had been presented outside the primary limitation periods. It was agreed therefore that the matter would be set down today to decide whether or not time should be extended.

6. Employment Judge Dyal's record of that previous Preliminary Hearing recorded that part of the Claimant's case is that he was advised by the Respondent's HR function that he needed to wait until his appeal against dismissal had been determined before commencing Tribunal proceedings. Employment Judge Dyal noted that the Claimant had indicated that both he and his trade union representative may have relevant evidence to give on this issue.

7. It was also recorded that the Claimant had indicated that Acas had advised him something similar and that it may be that he obtains the attendance notes from the relevant Acas officers.

### **Today's hearing**

8. The Claimant represented himself today. The Respondent was represented by Counsel.

### **Evidence**

9. The Claimant had produced a witness statement. He had also produced two other witness statements; a witness statement from his trade union representative; Ms Debbie Cor, a representative of the Communication Workers Union (dated 23 June 2020) and a statement from a former colleague Mr Karim (dated 30 September 2019). Neither Ms Cort nor Mr Karim attended today's hearing to give evidence. The Claimant explained that Mr Karim was out of the country and Ms Cort was not returning his calls.

10. The Claimant asked that despite the non-attendance of the witnesses that their witness statements were admitted into evidence. Ms Roberts had no objection to that application although she made representations about the weight that should be attached to Ms Cort's statement given her non-attendance and that was explained to the Claimant and he confirmed he understood. The Claimant also accepted that the evidence of Mr Karim was not actually relevant to the issue of time limits, his evidence relates to issues of liability.

11. The Claimant gave oral evidence and expanded upon his own witness statement and was cross examined by the Claimant.

12. The Respondent provided a witness statement from Ms Pratisha Chavda, Senior Employment Consultant with the Respondent and Ms Chavda was present at the hearing, gave evidence and was cross examined by the Claimant.

13. The parties produced an agreed bundle of 106 pages of documents.

14. Both parties made oral submissions. Ms Roberts had provided a skeleton argument which the Claimant had received the morning of the hearing and had time during an adjournment to consider that document before making his own submissions.

### **Issues**

15. The only issue before the Tribunal today is to determine the issue of time limits and the jurisdiction of the Tribunal.

### **Findings of Fact**

16. The Claimant's evidence is that he submitted an appeal against his dismissal which it is not in dispute, was served on the Respondent on 15 October 2019.

17. The Claimant alleged in his evidence that he had no response to that appeal until 7 November however under cross examination he conceded that that was not quite right and that he had in fact received acknowledgement on 15 October. However, his appeal hearing did not take place until 17 December 2019 and he did not receive the appeal outcome until 18 February 2020. Those facts are not in dispute. It is also not in dispute that the Claimant filed his claim with the Tribunal the day after he received the outcome of the appeal, on 19 February 2020. The parties were in agreement that the claim was filed 23 days outside of the time limit.

18. The Claimant complains about how long the Respondent took to deal with his appeal. The essence of the Claimant's application is that he had waited until the internal appeal process had been dealt with before deciding whether or not to issue his claim and that further he had been led to believe that he was required to do so by members of the Respondent's HR team and indeed by an ACAS conciliation officer.

19. In terms of the length of the appeal process which the Claimant complains about, his evidence was that he understood an appeal outcome should be provided within 14 days. There was no copy of the Respondent's appeal policy within the bundle, however in cross examination he conceded that the appeals policy actually only provides that an acknowledgment is received within 14 days and that the appeal outcome would normally be within 28 days. Emphasis was placed upon the word 'normally' by Ms Roberts however it is not in dispute that it took significantly longer than 28 days to conclude the appeal. There are a number of emails from Ms Cort complaining about the delay. On the 18 November 2019 she wrote;

*"This is very disappointing. Not only are we now in breach of policy but it was particularly important to hold the appeal within 4 weeks, as I am now going to be out of the office on pay negotiations..."*

And on the 14 February 2020;

*"The whole process is taking an inordinate length of time and we're naturally anxious to have the outcome, so that Shahid can plan his next steps".*

20. The Claimant accepts in cross examination that he had understood what

the purpose of today's hearing was and that Employment Judge Dyal had given him an indication regarding the sort of evidence he may wish to produce in support of his claim. It is the case however the witness statement he had produced filed to identify who within the Respondent's HR team had told him that he had to complete the internal process before registering a claim and it does not address when that advice was allegedly given.

### **Advice from Respondent's HR team**

21. During cross examination the Claimant conceded that there was nothing documented in writing to corroborate his account that members of the Respondent's HR team had told him that he must complete the internal appeal process before he issued a claim in the Employment Tribunal. The Claimant was given an opportunity to expand on his witness statement to elaborate on who within the Respondent's HR team had given him the advice and when. When first asked by the Tribunal if he was able to clarify who he had spoken to his initial response was; "*whoever I spoke to on the telephone*". His evidence was that there was only one number for the HR team and that if he did not get through to one member of the HR team he was put through to another. The implication was that he did not know who he had spoken to on the occasions when this advice was allegedly given. However, later when being questioned further by the Tribunal he then volunteered that he believed the first person he had spoken to was Farah Jahanjar, and on the second occasion it would have been Holly Best. He then elaborated further (although this was not evidence contained in his witness statement or evidence he had provided when cross examined on this point), and informed the Tribunal that he had spoken to them on his mobile telephone and that they had answered on their mobile telephones. He could not recall specifically the dates but believed the first conversation was in November 2019, the second was in December 2019 and the third was in January 2020.

22. The Claimant conceded that although he had changed his mobile telephone number since, it may have been possible for him to obtain phone records so that he could more clearly identify the dates that he alleges he had spoken with the HR team (and thus enabled the Respondent to check their own records). He had however not done so.

23. The Claimant confirmed that he had discussed the advice he had received from the members of the Respondent's HR team with his union representative Ms Cort and indeed he went on to clarify in response to questions from the Tribunal (albeit again this was not in his witness statement or came out during cross examination), that Ms Cort had been present during the majority of those conversations when he had received this advice from the HR team.

24. The Claimant alleged that he had explained to Ms Cort why he required a witness statement from her following the Preliminary Hearing and indeed her witness statement post-dates the date of the Preliminary Hearing. However, he could provide no explanation for the fact that Ms Cort's witness statement makes no mention of her being aware of any advice from the Respondent's HR team to the effect that the Claimant could not issue Tribunal proceedings until he had exhausted the appeal.

25. Ms Cort's witness statement refers to the Claimant receiving trade union support during the whole of the company internal process from supervision through to dismissal appeal and that she had encouraged the Claimant "*to initiate*

*the early conciliation process with ACAS whilst the internal appeal was proceeding, so that this was submitted within 3 months of the dismissal date”.*

26. It is clear therefore that Ms Cort appreciated what the time limits were and the importance of them. The Claimant accepted in cross examination that Ms Cort had discussed the time limits with him.

27. The Claimant further conceded in cross examination that from November 2019 he had had the assistance of the trade union and they had given him advice on how to bring a Tribunal claim and that Ms Cort had encouraged him to start the ACAS process while the internal proceedings were still ongoing. His evidence was that Ms Cort had no confidence in the Respondent dealing with his appeal promptly and before the time limit to issue a Tribunal claim.

28. It is to be noted that the Claimant does not allege that he was given any incorrect advice by his trade union representative in respect of the application of the relevant time limits.

29. The Claimant confirmed that the support from his union did not stop at the outcome of the appeal but that another representative, Mr Roberts provided him with support in obtaining documents from the Respondent as late as June 2020.

30. The Claimant conceded in cross examination that despite the alleged advice from the HR team that he could not issue proceedings before he exhausted the internal process, he confirmed that he had not made reference to this advice in any communications with the Respondent. Within the agreed bundle were a number of e-mail communications as between the Claimant and the Respondent with regards to the appeal process including complaints by the Claimant and his union representative about the delay but no reference to any advice about the Tribunal process. The Claimant gave evidence that he did not refer to the issue of bringing an Employment Tribunal claim in communications with the Respondent because he *“had in mind the 2 February as the date”* he was working to in terms of the date by which he needed to issue the claim.

31. Ms Chavda on behalf of the Respondent gave evidence about the Respondent’s case management system called the HR Service Cloud. She explained that this allows the Respondent’s HR employees to make a record of all communications between them and employees.

32. The undisputed evidence of Ms Chavda was that she had personally spoken with Farah Jahanjar, HR Consultant who had been involved with the Claimant’s disciplinary process. Her evidence was that Ms Jahanjar denied any conversation with the Claimant about him bringing a claim in the Employment Tribunal. Her evidence was that Ms Jahanjar had checked her e-mails and there were no e-mails to the Claimant which may have been misconstrued by him.

33. The evidence of Ms Chavda was that she had personally reviewed the HR Service Cloud to see which HR Consultants had dealt with the Claimant’s disciplinary appeal, she had identified those as Holly Best who had left the HR team. Ms Chavda had personally contacted Ms Best who had confirmed that no such discussions about bringing a Tribunal claim had taken place with the Claimant. Ms Chavda’s evidence is that she had also identified that Julie Funnell Hub Partner had dealt with the Claimant’s appeal after Holly Best, and that she had also e-mailed Julie Funnell who had confirmed that her only involvement in the Claimant’s disciplinary appeal was liaising with the disciplinary appeal chair

and issuing the outcome.

34. Ms Chavda's evidence was that, to make sure that no one else in the Respondent's HR function had spoken with the Claimant, she had also carried out a full search of the HR Service Cloud and reviewed all the notes held within it between the beginning of his suspension in May 2017 and the day of his disciplinary appeal outcome. Her evidence was she found no notes or records of correspondence to suggest the Claimant had been advised that he must wait to bring his claim in the Employment Tribunal until he had received his disciplinary appeal outcome.

### **Advice from Acas**

35. The Claimant's evidence is that he had also been advised by the Acas conciliation officer when the parties had agreed to an extension of the conciliation period in November 2019, that he should follow the internal process before issuing the claim.

36. The Claimant indicated that he had sent an e-mail to the Employment Tribunal on 16 June 2020 attaching an e-mail dated 27 November 2019 which supported his claim in relation to what ACAS had told him. I located the email in the Tribunal file which I read out to Ms Roberts (who confirmed that she had not seen a copy of the e-mail). This was an e-mail which simply confirmed that the prescribed period of Acas early conciliation could be extended from one calendar month for a further 14 days, both parties having agreed to the extension and confirming the early conciliation period would end on 27 December 2019. The e-mail did not make any reference to any advice. The Claimant was referred to the advice of Employment Judge Dyal and the reference to the Claimant possibly obtaining the attendance notes of the relevant Acas officer. When asked by the Tribunal whether he had taken that step and spoken to Acas either to obtain their attendance notes or confirmation of what advice they had given him, his answer was that he could not "*recall*", which was an odd response to the question and one which I did not find convincing. The Claimant in his evidence had also referred at one stage to Acas advising him to give the appeal process a "*shot*".

37. The Claimant presented as an intelligent and articulate individual during the hearing. He confirmed during cross examination that he had spoken to his trade union representative about whether he had to go through the internal process and although indicating that the union representative agreed with Acas, he conceded that the union representative had told him that he did not need to complete the internal process before bringing a claim. He then went on to refer back to his allegation about what the Respondent's HR team had told him, he also referred to the process being stressful, he referred to his decision-making abilities at that time not being at their best and also to his health bordering on depression.

38. The Claimant did not however at the Preliminary Hearing before Employment Judge Dyal or in his witness statement raise any issue about his health as having a bearing on time limits. The Claimant did not produce any medical evidence to support any claim about his health and the impact this had on his ability to present his claim earlier.

### **Access to other information**

39. Although the Claimant at first during cross examination stated that he did not have access to the internet to research time limits when he was not in work he then conceded that he did have access via his mobile telephone and therefore could have sourced information via the internet.

40. I now refer to the submissions from each party;

### **Claimant's submissions**

41. The Claimant referred back to what he described as misinformation received from Acas and from the Respondent's HR team and being under immense stress at the time. He also referred to having cooperated with the Respondent and complied with all their deadlines during the appeal process. The Claimant submitted that had he realised the time limits he would have brought a claim straightaway, he was in a position to do so he said, having his 'notes' ready and indeed he did submit the claim the day following receipt of the appeal outcome.

### **Respondent's submissions**

42. In summary; the Respondent's submissions were that the Claimant's evidence with regards to his allegation about the advice from the Respondent's HR team has throughout the hearing been a "*moving feast*", was not reliable and should not be accepted. Ms Roberts referred to the Claimant at the start of his evidence not being able to recall who had given him the advice and then his evidence evolving to an allegation that there had been 3 occasions, and then evolved again to him alleging the presence of his trade union representative during the majority of those calls and then going on to identify individual HR advisers with none of the detail contained in his witness statement.

43. The Tribunal was invited to find that with regards to Acas they would have done no more than tell the Claimant that he should give the internal process "*a shot*" to use the Claimant's words. Ms Roberts invited the Tribunal to find that it is unlikely that he would have been told by Acas that he had to complete the internal process and what is overwhelming Ms Roberts argues, is the silence of his union representative Ms Cort on this issue.

44. Ms Roberts made reference to the factors as identified in **British Corporation v Keeble** and section 33(3) of the Limitation Act 1980. Counsel argued that the Claimant knew he had a cause of action on 22 September 2019 when he was suspended and therefore unarguably he could have issued proceedings at that stage. That the cogency of the evidence is an important point and that it is not just an issue in terms of the delay of 3 weeks but what needs to be taken into account is that his allegations of discrimination relate back to October 2006. Although he had been suspended for 2 years that period had in part taken so long because the Claimant had presented sicknotes and raised a grievance.

45. Ms Roberts argued that the ability to conduct a fair trial and the absence of forensic prejudice is not a decisive factor in favour of an extension on just and equitable grounds making reference to the case of **Miller v Ministry of Justice** UK EAT/0003/15/LA.

46. Ms Roberts referred to the allegations of discrimination pre-dismissal, being historic which she invited the Tribunal to take into account. The Claimant was



suspended in July 2017 and therefore was not at work to be subject to any further alleged acts of discrimination until the act of dismissal on 20 September 2019. That his suspension was protracted due to his sickness absences and the grievance he submitted in September 2017. That the main perpetrator of the alleged discrimination, was Mr Webster who is no longer employed by the Respondent.

47. In terms of the delay in dealing with the appeal, Ms Roberts referred to the delay of a “*month or two*” being due to the Respondent finding an appeals officer but whether the Respondent is culpable in terms of any delay is “*not really relevant*” to whether it is just and equitable to allow the claim. That the Claimant was aware of the alleged discrimination pre-dismissal, from July 2017 when he was suspended.

48. Reference was made to the case of **DCA v Jones** [2007] EWCA civ 894 in that it is for the Employment Tribunal to determine which factors are relevant to the exercise of the discretion.

49. Ms Roberts also referred the Tribunal to **Robertson v Bexley Community Centre** [2003] IRLR 434 that time limits are enforced strictly in the Employment Tribunal.

## **Legal principles**

### Unfair Dismissal: reasonably practicable test

50. 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.*

### Acas – Employment Rights Act 1996

51. *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.*

52. 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...”*

53. 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”*

54. **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”*.

55. 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?”*

### Discrimination Claims

56. 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.*

57. 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.

58. 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.

59. The Court of Appeal **Adedeji v University Hospital Birmingham NHS Foundation Trust [2021] EWCA Civ 231** recently clarified "*that Keeble did no more than suggest that a comparison with the requirements of section 33 might help "illuminate" the task of the tribunal by setting out a checklist of potentially relevant factors. It certainly did not say that that list should be used as a framework for any decision.... 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 and equitable to extend time, including in particular (as Holland J notes) "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*". Although the Adedeju decision was not available at the time of this hearing, it does not create new law.

60. 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**.

## **Conclusions**

61. On a balance of probabilities, I do not find that the Claimant was told by the Respondent's HR team that he had to follow the appeal process before issuing a claim. There is no corroborating evidence to support the Claimant's account. The Claimant had trade union support and there were emails from Ms Cort complaining on his behalf about process and delay. Had Ms Cort been present when such advice had been given by a member of the HR Team, it would be reasonable to expect to see that advice referenced in communications with the Respondent. I find it compelling that Ms Cort made no reference in her witness statement to any such advice. Further, the Claimant conceded that Ms Cort had advised him on time limits and he makes no complaint about the adequacy of her advice. He does not complain that she failed to correct this alleged advice from the Respondent. The Claimant's evidence evolved throughout the hearing when questioned and I did not find it credible. I also take into account the evidence of Ms Chavda.

62. On a balance of probabilities I also do not find that the Claimant was told by Acas that he must go through the appeal process before issuing a claim. He may very well have been told to give it a "shot", however that is very different from being told that he cannot issue a claim before he had been through the appeal process. Again, Ms Cort did not refer to any such advice in her witness statement. Although the Claimant alleged the letter of the 27 November supported his account, it did no such thing.

63. I do not find that the Claimant was prevented from bringing his claim within time due to health reasons. He submitted no medical evidence in support of this contention and in any event, his evidence was that he had prepared notes to assist him in filing the claim and was able to and did in fact, prepare and present it promptly once he had received the outcome of the appeal.

64. I find that, on a balance of probabilities, the most likely explanation for the delay in presenting the claim was that the Claimant, had hoped to avoid having to do so and made a deliberate decision, despite knowing what the time limits were, to wait until the outcome of the appeal.

### **Unfair dismissal claim**

65. It is clear from the Claimant's evidence that he was keen to try and resolve the situation through the Respondent's internal appeal procedure and hoped that his dismissal would be overturned. While that may well be a sensible approach to finding a resolution, there was nothing preventing the Claimant from issuing a claim while that process was ongoing.

66. The Claimant had the benefit of trade union representation during the whole of the internal process from a suspension of over 2 years through to the dismissal appeal outcome. He had also in the later stages, had the benefit of support from another trade union representative, Mr Roberts. He continued to receive that report even after the appeal in assisting him in obtaining documents from the Respondent.

67. The Claimant did not allege at the Preliminary Hearing, in his witness statement or before this Tribunal, that the reason why he had not submitted his claim within time was because he had been given incorrect advice from his union

representative. The Claimant did not attribute any fault on the part of his union officials. The only parties that he seeks to attribute any fault are the Acas conciliation officer and the Respondent's own HR team and I have not found that he was in fact given the advice he alleges he was given.

68. The Claimant presented during this hearing as an articulate and intelligent individual who held a responsible position with the Respondent as part of its management team.

69. The Claimant accepted that he had access to the internet and had no difficulty presenting his evidence at today's hearing and had clearly appreciated that there were time limits and conceded that his Union had given him advice about time limits. Indeed, he had the 2 February he said, in mind to file his claim.

70. The onus of proving the presentation of the claim was in time was not reasonably practicable, rests on the Claimant. It imposes duty on him to show precisely why it was that he did not present his claim in time. However, the Claimant in this case has failed to establish that the reasons he put forward were the genuine reasons for that failure and it is those reasons that he relies upon.

71. The Claimant's case is that he had his Tribunal notes ready to submit and was able to file a Tribunal claim promptly after receiving the appeal outcome and therefore he does not argue that he was not otherwise able for whatever reason (whether due to health or otherwise) in a position to submit his claim in a timely manner.

72. I find that it was reasonably practicable for the Claimant to put in his claim within the time limit in the circumstances. The claim of unfair dismissal cannot therefore proceed and is struck out under rule 37. I now turn to the Claimant's claim of discrimination;

### **Discrimination complaints**

73. Consideration has been given to the length and reasons for the delay.

74. The Respondent argues that the length of the delay is not insubstantial. It is 23 days. The Claimant awaited the outcome of the internal appeal procedure before issuing his claim and I find that this was the reason on the facts presented, for his decision to wait and not issue his claim earlier and not any alleged advice from the Respondent's HR team or Acas that he had to do so.

75. Although there is no general principle that it would be just and equitable to extend the time limit where the Claimant was seeking direct redress through the internal process, it is a factor to be considered.

76. I have also considered the impact on the cogency of the evidence of the delay. The Respondent refers to the claims of discrimination dating back over a significant period of time; 3 or 4 years and although the Tribunal often as to consider disputed events which occurred a substantial period before a claim is issued, the passage of time will inevitably impact on the cogency of the evidence and as part of the exercise of my overall discretion, I have taken that into account. I also bear in mind that the Claimant could have complained of the earlier pre-dismissal acts of alleged discrimination, much earlier, when for example he submitted his grievance. Mr Webster is the main putative discriminatory and is no longer employed by the Respondent. These are not

however decisive factors but something which I have put into the balance.

77. The Respondent did not raise any specific issues around the cogency of the evidence caused by the 23-day delay of itself.

78. I take also into account the Respondent's own evidence that it has a case management system which makes a record of all communications, actions which may need to be taken, day to day management of the case including key steps and important decisions, notes of telephone calls etc. It therefore has a sophisticated HR recording system to assist it. It is also the case that the Respondent carried out a disciplinary process and appeal. The Claimant raised a grievance in September 2017 which was investigated. The Respondent therefore has had plenty of opportunity to investigate and collate relevant evidence relating to the historic events. The Respondent identifies no specific difficulty that the delay of 23 days has caused to the cogency or collation of the evidence it may wish to rely upon and it was not submitted by the Respondent that a fair trial is no longer possible, albeit Ms Roberts did quite correctly point out that this of itself is also not a decisive factor

79. I take into account the steps the Claimant took to get advice and support and that he did act very promptly after receiving the outcome of the disciplinary appeal, he filed his claim the very next day.

80. I have not considered the merits of the claims; the parties did not make representations on the point and they were not invited to do so.

81. Time limits are of course important, and the Claimant I find knew about the time limit. He chose I find, to attempt to find redress through the internal appeal process and wait until the outcome of the appeal, before embarking on legal proceedings and then submitted claim the day after that appeal was unsuccessful.

82. I have also weighed up the relative prejudice that extending time would cause to the respondent on the one hand and to the Claimant on the other. The Respondent asserted no specific prejudice other than the difficulty of having to address historic allegations. The Claimant would however be deprived of the claim in its entirety.

83. I also take into account that the Claimant was attempting to find a resolution through the appeal process and was clearly along with his trade union representative, encouraging the Respondent to hold the appeal hearing sooner and complaining about the failure to hold it within the 28 days set out in the policy. It took over 4 months for the Claimant to receive the outcome of the appeal and the Respondent does not aver that the delay was due to any fault or delay on the Claimant's behalf. Ms Robert touched on the reason for the delay in her submissions, however given the size and resources of the Respondent, difficulty finding an appeal officer does not appear to be a very satisfactory reason for such a delay on the face of it.

84. Taking all the factors above into account, I find that on balance, it is just and equitable to extend time in the circumstances of this case to 19 February 2020, the day after the outcome of the appeal was communicated. The claims have therefore been brought within time based on the last act of discrimination being the dismissal. Whether or not there is a continuing course of conduct such that the acts of discrimination prior to the act of dismissal are within

time, is a matter ultimately for the Tribunal at the final hearing to determine, I make no findings about that.

**Case Management**

85. The case was listed for a 3-day final hearing on 1, 2 and 3 February 2021. The parties had not taken any steps to prepare the case for the liability hearing and following the request of both parties those hearing dates were vacated. Further case management orders will be sent out separately to the parties.

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Employment Judge Broughton

Date 29 January 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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