



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112441/2021

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Held in Dundee (by CVP) on 28 January 2022

Employment Judge B Beyzade

10

Mr. S Gubby

**Claimant
In person**

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James Donaldson & Sons Ltd

**Respondent
Represented by:
Miss V Nicholson,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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1. The judgment of the Tribunal is that:

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1.1 the claimant's claim of disability discrimination submitted by the claimant on 17 November 2021 were presented outside the time limit of 3 months from the date of the last event that occurred on 04 May 2021 set down in s123 of the *Equality Act 2010*. In these circumstances, the Tribunal does not have jurisdiction to hear the claimant's claim and it is dismissed.

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1.2 the claimant's claim of unfair dismissal submitted by the claimant on 17 November 2021 were presented outside the time limit of 3 months from the effective date of termination on 13 April 2021 set down in s111 of the *Employment Rights Act 1996* ("ERA 1996"). In these circumstances, the Tribunal does not have jurisdiction to hear the claimant's claim and it is dismissed.

5 1.3 the claimant's claims of unlawful deduction of wages and breach of contract relating to non-payment of his bonus submitted by the claimant on 17 November 2021 were not presented in accordance with the provisions set down in s23 of the *ERA 1996* and section 7 of *The Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994* respectively. In these circumstances, the Tribunal does not have jurisdiction to hear the claimant's claims and they are dismissed.

10 1.4 The Tribunal records that the respondent is correctly designated as above and directs the Tribunal Clerk that the paper and electronic file records be amended forthwith to reflect the same and that thereafter the respondent be respectively so addressed in correspondence.

15 **REASONS**

Introduction

20 2. The Claimant presented a complaint of unfair dismissal, disability discrimination and breach of contract and unlawful deduction from wages (non-payment of his bonus) which the respondent denied.

25 3. A final hearing was held on 28 January 2021. This was a hearing held by CVP video hearing pursuant to Rule 46 of the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013*. I was satisfied that the parties were content to proceed with a CVP hearing, that it was just and equitable in all the circumstances, and that the participants in hearing were able to see and hear the proceedings.

30 4. The parties prepared and filed a Joint Inventory and Bundle of Productions in advance of the hearing consisting of 50 pages. I also had before me a copy of the Tribunal file containing the ET1 Form, ET3 Form, ACAS Early Conciliation Certificate, Tribunal's directions, and Notice of Hearing dated 23 November 2021 listing this case for a Preliminary Hearing to consider the time

bar issue, Preliminary Hearing Agenda (11 pages), 1 page statement, and copies of seven case authorities submitted by the respondent's representative.

5 5. The claimant confirmed that he were pursuing claims for unfair dismissal, disability discrimination and breach of contract and unlawful deduction of wages (non-payment of his bonus). He specified that his bonus claim related to the financial year 2020/2021 which he said he was entitled to be paid in November 2021. After the conclusion of the hearing, the claimant submitted
10 a copy of a letter relating to his bonus payment sent to him by the respondent on 26 October 2020. The respondent's representative agreed that the claimant could send a copy of this correspondence to the Tribunal (to which reference was made by the claimant during the hearing) after the hearing provided that the respondent had an opportunity to send any written
15 comments to the Tribunal. I gave permission for the claimant to rely on this additional document and I gave directions for a copy of the letter and the parties' submissions on this to be provided to the Tribunal (and directed that parties copy each other also). Therefore, after the the hearing, both parties sent written submissions to the Tribunal, which I read and considered.

20 6. At the outset of the hearing the parties were advised that the Tribunal would investigate and record the following issues as falling to be determined, both parties being in agreement with these:

25 (i) Whether the claimant's claim for unfair dismissal/bonus payment was lodged in time?

(ii) If not, was it reasonably practicable to bring his claim within the time limit and was any additional time taken by the claimant to present his claim reasonable?

30 (iii) Was the disability discrimination claim made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

a) Was the claim made to the Tribunal within three months (plus any applicable early conciliation extension) of the act to which the complaint relates?

- b) If not, was there conduct extending over a period?
- c) If so, was the claim made to the Tribunal within three months (plus any applicable early conciliation extension) of the end of that period?
- 5 d) If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
 - i) Why were the complaints not made to the Tribunal in time?
 - ii) In any event, is it just and equitable in all the circumstances to extend time?

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7. The claimant gave evidence at the hearing on his own behalf.

8. The respondent were represented by a solicitor whereas the claimant represented himself. Both parties made oral closing submissions.

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Findings in fact

9. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine the list of issues –

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Background

10. The claimant was employed by James Donaldson & Sons Limited between 10 May 2005 and 13 April 2021 as a Stock Controller.

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11. The respondent, James Donaldson & Sons Limited, was a private limited company which had its registered offices at Donaldson House Saltire Centre, Pentland Park, Glenrothes, Fife, KY6 2AG.

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12. The nature of the respondent's business included providing services in relation to wood products.

13. On average the claimant worked 40 hours each week.

14. The claimant's pay before tax was £2160.00 and his normal take home pay was £1800 per month.

Bonus

5 15. The claimant was sent a letter dated 26 October 2020 from Mr I Torrance, Managing Director advising him that it is the company's intention to pay him a bonus for the trading year 2019/2020, that the bonus amount was £3,959.00 and that this would be paid to him in his November 2020 pay. This payment of £3,959.00 was for working a full year from April 2019 to the end of March
10 2020, and it was paid to him in November 2020 as the bonus payment was always made later in the year in around the month of November.

Occupational Health Report

16. An Occupational Health Report was obtained by the respondent in relation to
15 the claimant's health on 5 February 2021 which concluded that the claimant reported "...long-term chronic mental health conditions; however, these can be effectively managed with access to appropriate medications and therapy. As with any chronic condition there is always the vulnerability of unpredictable flare ups, and occupational health cannot predict these. However, the conditions themselves when stable are not barriers to returning to work, and
20 it is likely that the routine and structure of work is beneficial as the individual recovers." On 26 March 2021 Dr A Adams, Clinical Psychologist provided an update including assessment scores, background, and a treatment plan, including CBT sessions, following which Dr A Emslie, Occupational Health
25 Physician enquired on 19 April 2021 whether the respondent would like to follow the suggested treatment pathway.

Claimant's dismissal

17. However, on 13 April 2021 the claimant's employment was terminated
30 summarily by the respondent. Following an investigation carried out by the respondent, the respondent advised the claimant at a disciplinary hearing on 13 April 2021 that he had been dismissed by reason of gross misconduct after he had attended work under the influence of a controlled drug (cannabis) during working hours. The respondent's decision to dismiss the claimant for

gross misconduct was confirmed to him in a letter from Mr I Torrance dated 14 April 2021.

Appeal against dismissal

18. The respondent received a copy of the claimant's appeal against his dismissal
5 on 18 April 2021 and sent a letter to the claimant dated 21 April 2021 inviting him to an appeal hearing on 28 April 2021.

19. The appeal hearing took place on 28 April 2021, during which the claimant's
10 points of appeal were discussed. After an adjournment, the appeal hearing was reconvened and Mr D Mansell, Managing Director – MGM advised the claimant that his appeal was not upheld and the previous decision to dismiss him still stood.

20. A letter was sent to the claimant from Mr Mansell dated 4 May 2021 confirming
15 the appeal hearing outcome.

Events between May – November 2021

21. The claimant continued to be unwell following his dismissal and the outcome
20 of his appeal. However, he started applying for new employment about a month after his dismissal. The claimant attended 6-7 interviews, and he was offered three roles.

22. On 25 May 2021 Mandy Cooper, Senior HR Business Partner of the
25 respondent supplied a standard employment reference to Theo James Recruitment on behalf of the claimant.

23. The claimant commenced employment at SIG Plc (roofing merchant) on a full-
time basis as Assistant Branch Manager in July 2021. He worked an initial probation period of 3 months, during which he had taken several days off due to sickness absence. The claimant passed his probation period with his new
30 employer and at the time of the Open Preliminary Hearing, the claimant's employment with SIG plc was continuing.

24. The claimant contacted ACAS for Early Conciliation purposes by telephone on 14 October 2021. Although the claimant knew about the requirement to

contact ACAS (he was advised that he needed to start ACAS Early Conciliation several months prior to bringing a Tribunal claim by a trade union representative albeit he was not a member of the union), he only discovered the deadline for bringing a Tribunal claim when he contacted ACAS on 14 October 2021. The claimant's ACAS Early Conciliation Certificate was issued on 20 October 2021.

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25. The claimant presented his ET1 Claim Form to the Tribunal on 17 November 2021. The claimant explained on his ET1 Form "*I could not appeal within the time limit as I had a mental breakdown due to bullying in the workplace, being victimised because of my mental health problems and constructively being sacked.*" He further set out that his mental health became worse in the period of five months after his dismissal, and he continued to suffer from depression, anxiety, and OCD. He described his symptoms and his doctor changing several of his medications.

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26. A letter was sent from Dr R Cook at Scoonie Medical Practice dated 20 January 2022 advising "*I can confirm that this man struggles with mental health. This was particularly an issue during the first half of last year between April and July, although he continues to struggle.*"

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27. The claimant had worked a full year from April 2020 until the end of March 2021, and he expected the bonus payment for that year to be paid to him in the November 2021 payroll. He did not receive his bonus payment in November 2021. He presented his claim to the Tribunal one week before the respondent's normal payroll date, which was 24 November 2021.

Observations

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28. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the list of issues –

29. On the whole I found the claimant to be a credible and reliable witness who gave his evidence in a clear manner. He was clearly affected by the events leading up to the matters he complains of and thereafter, he found it difficult to obtain advice and assistance and he relied on advice from a trade union representative in relation to ACAS, and the ACAS Conciliator to advise him and provide him with assistance making his claim. However, despite contacting ACAS and being aware of the deadline for bringing his Tribunal claim by 14 October 2021 it was clear that the claimant did not commence his claim until 17 November 2021. The claimant did not take any further steps to progress his claim until 17 November 2021, despite being aware of the deadline. There was no evidence that the claimant sought to inform himself of the deadline for bringing a Tribunal claim prior to contacting ACAS on 14 October 2021 either by contacting a Citizens' Advice Bureau, a law centre or by researching their websites or other online resources.

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Relevant law

30. To those facts, the Tribunal applied the law –

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Unfair dismissal

31. Section 94 of the Employment Rights Act 1996 (“ERA”) provides that an employee has the right not to be unfairly dismissed by his employer.

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32. Section 111 (1) of the ERA sets out that a claim may be made to a Tribunal against an employer by any individual that he was unfairly dismissed by his employer.

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33. Section 111 (2) of the ERA provides that “*an employment tribunal shall not consider a complaint under the 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 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”.

34. Section 97 (1) (b) identifies the “effective date of termination” in relation to an employee whose contract of employment is terminated without notice, as meaning the date on which the termination takes effect.

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35. In *Trevelyan (Birmingham) Ltd. V Norton [1991] ICR 488* the Employment Appeal Tribunal (“EAT”) held that where an applicant sought an extension of time in which to make an unfair dismissal claim a detailed enquiry had to be made by the Tribunal into whether it was not reasonably practicable for the complaint to be made within the time limit. The longer the period of delay, the less likely an applicant could show he had no knowledge of his right to claim unfair dismissal but where he had that knowledge the obligation was on him to seek information or advice, and if he received faulty advice that was not a good excuse.

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36. The burden rests on the claimant to persuade a Tribunal that it was 'not reasonably practicable' to bring a claim in time (*Porter v Bandridge Ltd [1978] ICR 943, CA*) at 948).

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Unlawful deduction from wages

37. Section 13 of the ERA provides that an employer shall not make a deduction from a worker’s wages unless this is authorised by statute, a provision in the worker’s contract or by the previous written consent of the worker.

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38. Section 23(2) states that the Tribunal shall not consider a complaint of unlawful deduction of wages unless it is presented within 3 months of the date of payment of the wages. Where there are a series of deductions then s23(3) of the ERA states that the time limit runs from the last deduction in that series.

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39. The Tribunal has discretion under s23(4) of the ERA to hear a claim outwith the time limit set in ss23(2) and (3) where they consider that it was not reasonably practicable for the claim to be presented within the 3-month time limit and it was presented within a further period that the Tribunal considers to be reasonable.

40. In *Coors Brewers Ltd v Adcock* [2007] I.C.R. 983 (at paragraph 56), the Court of Appeal (“CA”) held that the unlawful deduction from wages provisions were designed for “straightforward claims where the employee can point to a
5 quantified loss”. In that case, the CA held that as the payment due could not be quantified, the employees’ remedy was a claim for breach of contract in the county court, not a claim for unlawful deductions in the Tribunal.

41. In *Arora v Rockwell Automation Ltd*, UKEAT/0097/06 the EAT considered
10 time-limits in unlawful deductions cases and noted (at paragraphs 10-12):

“10...where there is complete non-payment, not a shortfall payment such as occurred in this case, and it is perhaps worth clarifying an earlier judgment of the Employment Appeal Tribunal in this context. In *Group 4 Nightspeed Ltd v Gilbert* [1997] IRLR 398, Colin Smith
15 J, in the judgment of the Tribunal said:

“It is only when an employer fails to pay a sum due by way of remuneration at the appropriate time, i.e. at the contractual time for payment, that a claim for an unlawful deduction can arise.”

In that case it had been argued that the unlawful deduction had been
20 made at an earlier date than the date when, under the contract of employment, the payment would have been due.

11. I consider that it would be wrong to apply that construction to the current situation and to say that time begins to run when the contractual obligation arises. The reason for that is that in the Group
25 4 case the Tribunal were concerned with identifying the moment in time when the deduction became unlawful and held that it was not unlawful until the contractual date had passed. But that does not, it seems to us, detract from the wording of the statute which in circumstances where there has been an actual deduction, or a
30 shortfall, makes it clear that it is only when the payment has been made to which the deduction has been applied, that time starts to run.

12. Accordingly, the position appears to be as follows: where there has been an actual deduction in breach of contract, the time for the
35 complaint to start to run is the date when that deduction is made, or the payment from which the deduction is made has been tendered. Where all that happens is that the employer pays too little and there is a shortfall the same principle applies, time starts to run from the

moment when the reduced payment is made. However, where there is no payment, time may start to run in effect at an earlier date; it will start to run at the time when the contractual obligation to make a payment arose.”

5 *Breach of Contract claim*

42. Article 3 of *The Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994* (“the Order”) provides:

“3 Extension of Jurisdiction

10 *Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—*

(a) the claim is one to which (s 3(2) Employment Tribunals Act 1996) applies and which a court in Scotland would under the law for the time being in force have jurisdiction to hear and determine;

15 *(b) ...*

(c) the claim arises or is outstanding on the termination of the employee's employment.”

20 43. The time limit for bringing a claim under Article 7 of the Order is set out as follows:

“Time within which proceedings may be brought

7. An employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented—

25 *(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or*

(b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or

30 *(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.”*

44. Once again, the burden rests on the claimant to persuade a Tribunal that it was 'not reasonably practicable' to bring a claim in time (*Porter v Bandridge Ltd* [1978] ICR 943, CA) at 948).

5 '*Not reasonably practicable*' test

45. The Tribunal will often focus on the 'practical' hurdles faced by the claimant, rather than any subjective difficulties such as a lack of knowledge of the law or an ongoing relationship with the employer. In the case of *Dedman v British Building and Engineering Appliances* [1973] IRLR 379, per Scarman LJ who
10 held that practicability does not always mean "knowledge". Where a claimant states a lack of knowledge as to the time limits, Scarman LJ found that the Tribunal should ask ([1974] ICR at 64): "*What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would be
15 inappropriate to disregard it, relying on the maxim "ignorance of the law is no excuse". The word "practicable" is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance'.*"

20 46. Tribunals should consider all the surrounding circumstances and reach clear factual findings as to the nature of any illness and the extent of its impact on the claimant's ability to embark on litigation (see *Ebay (UK) Ltd v Buzzeo* UKEAT/0159/13).

25 47. In the case of *Asda Stores v Kauser* UKEAT/0165/07/RN Lady Smith stated at paragraph 24 in respect of the time limit issue in that case: "*The Tribunal appears to have relied, for that part of their considerations on her ignorance of time limits and her being very stressed; whilst I note that the Tribunal takes the view that the Claimant "must have been in some turmoil", the finding in
30 fact is as I have stated it. The former does not, however, answer the question of why she did nothing at all. The latter is very general. There is no finding of illness or incapacity. The circumstances are not comparable, for instance, to those of the Claimant who fell ill seven weeks into the three month period, in*

the case of Schulz v Esso Petroleum Co Ltd [1999] ICR 1202. It cannot be sufficient for a Claimant to elide the statutory time limit that he or she points to having been “stressed” or even “very stressed”. There would need to be more.”

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48. I also referred to the case of *Norbert Dentressangle Logistics Limited v Hutton UKEATS/0011/13/BI* where it was held that the claimant had brought his claim six weeks late because he was unable to function properly and could not bring himself to do it was accepted as reasonably practicable. This was notwithstanding the fact that he entered into detailed correspondence and pursued a grievance in respect of the matters during the time. The EAT expressed reservations but held that the conclusion was one of fact and it could not be said to be perverse.

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Equality Act 2010

49. Section 123 of the Equality Act 2010 (“EA”) provides for time limits in respect of the presentation of complaints by reference to the protected characteristic of disability.

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50. The Tribunal had regard to the provisions of Section 123 of the EA and considered the provisions of Section 140B of the EA which serve to extend the time limit under Section 123 to facilitate conciliation before institution of proceedings.

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51. Subsection (1)(b) of Section 123 of the EA provides that notwithstanding not being within the three-month time limit stipulated in Subsection (1)(a) a complaint may be presented within “*such other period as the Employment Tribunal thinks just and equitable.*”

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52. The Tribunal has reminded itself of the developed case-law in relation to what is now Section 123 of the EA. That has included a group of well-known judgments setting out the underlying principles to be applied in this area, together with recent occasions on which those principles have been applied and approved by later courts and Tribunals.

53. Particular attention has been paid to the historical line of cases emerging in the wake of the case of *Hutchinson v. Westwood Television*, [1977] ICR 279, the approach adopted by Smith J. in *British Coal Corporation v. Keeble*, [1997] IRLR 336, the comments in *Robinson v. The Post Office*, [2000] IRLR 804, the detailed consideration of the EAT in *Virdi v. Commissioner of Police of the Metropolis et al*, [2007] IRLR 24, and, in particular, the observations of Elias J. in that case, as well as the decision of the same body in *Chikwe v. Mouchel Group plc*, [2012] All ER (D) 1.
54. The Tribunal also notes in passing the guidance offered by the CA in the cases of *Apelogun-Gabriels v. London Borough of Lambeth & another*, (2002) IRLR 116, *Robertson v. Bexley Community Centre (t/a Leisure Link)*, [2003] All ER (D) 151 (in particular by reference to the comments made by Auld LJ), and observations made by Mummery LJ in the case of *Ma v. Merck Sharp and Dohme*, [2008] All ER (D) 158.
55. The Tribunal has additionally taken note of the fact that what is now the modern section 123 EA provision contains some linguistic differences from its predecessors – which were to be found in various earlier statutes and regulations – concerning the presentation of claims alleging discrimination in the employment field. However, the case law which has developed in relation to what is now described as “*the just and equitable power*” has been consistent and remains valid. The Tribunal has therefore taken those authorities directly into account in its consideration.
56. In relation to the circumstances of the present case a basic starting point is the important proposition that time limits in employment matters (especially those concerning discrimination) are matters which normally are exercised strictly. Authority to that effect is to be found in the judgment of Auld LJ in the CA case of *Robertson v. Bexley Community Centre (t/a Leisure Link)*, [2003] All ER (D) 151. That case was decided shortly after Lindsey J, the then President of the EAT, had observed in the case of *Robinson v. The Post Office*, [2000] IRLR 804, at paragraph 32, that: “*It is to be borne in mind that*

time limits in employment cases are in general strictly enforced". In other words, the time limit provisions are there for a purpose, so that it is the exceptional case, rather than the normal case, that they will be departed from.

5 57. The discretion to extend time is broader than under the "*not reasonably practicable*" formula (*DPP v Mills 1998 IRLR 494*), and the Tribunal's power to extend time on the basis of what is just and equitable entitles the Tribunal to take into account anything which it judges to be relevant (*Hutchison v Westward Television Ltd 1977 IRLR 69*).

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58. It is also a generally received starting proposition that it is for the claimant who has presented his or her claims out of time to establish to the satisfaction of the Tribunal that the "*just and equitable*" discretion should be exercised in the particular case. That obligation is not just a matter of the burden of proof. It also raises the question of what the standard of proof is to be established in order to persuade the Tribunal that a period other than the normal three months should be applicable.

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59. Whilst not mandatory, the list of factors contained in section 33 of the Limitation Act 1980 is a useful checklist of relevant factors (*British Coal Corporation v Keeble 1997 IRLR 336*), namely:

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1. Prejudice;
2. The length of, and reasons for the delay;
3. The extent to which the cogency of evidence is likely to be affected by the delay;
4. The extent to which the party sued has co-operated with requests for information;
5. The promptness with which the claimant acted once he knew the facts giving rise to the cause of action; and
6. The steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

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60. The CA in *Southwark London Borough Council v Afolabi* [2003] ICR 800 confirmed that, while that list provides a useful guide for Tribunals, it need not be adhered to slavishly. While it is important that the Tribunal does not leave out of account any important factor, the s33 factors should not be

5 elevated into a legal requirement. The CA went on to suggest that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent.

10 61. The CA in *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23 recently confirmed that a rigid adherence to what have become known as the *Keeble* factors is to be discouraged when dealing with what is a very broad general discretion on the just and equitable question.

15 **Parties' submissions**

62. Parties made detailed written and oral submissions which the Tribunal found to be informative. The Tribunal read both the claimant's and the respondent's representative's submissions and referred to the authorities cited therein. References are made to essential aspects of the submissions and authorities

20 with reference to the issues to be determined in this judgment, although the Tribunal considered the totality of the parties' submissions and authorities.

Discussion and decision

25 63. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

Unfair dismissal

64. The Tribunal finds that the claim for unfair dismissal was not presented within

30 the relevant time limit under s 111(2) of the ERA. The claimant's employment was terminated on 13 April 2021. The primary time limit for lodging his claim expired on 12 July 2021. The claimant contacted ACAS to commence Early Conciliation outwith the primary time limit; the case was in Conciliation for 6

days on 14 October 2021 and so the primary time limit was not extended. The Tribunal claim was lodged on 17 November 2021, which was 128 days after the expiry of the primary time limit.

5 65. The Tribunal considered whether it would exercise its discretion under s111(2)(b) ERA to hear the claim out of time. For the reasons set out below, the Tribunal considered that it would not do so.

10 66. The Tribunal concluded that it was reasonably practicable for the claim to have been presented in time. Whilst the Tribunal has the utmost sympathy with the position in which the claimant found himself with having little knowledge of his legal rights and obtaining advice and assistance from a third party (ACAS), it was clear that the claimant was able to contact ACAS to seek advice and he later engaged with the Early Conciliation process. He could
15 equally have engaged with the process for lodging his Claim Form promptly (and within the primary time limit) and providing the prescribed information including the ACAS Early Conciliation number.

20 67. Further the claimant was aware that there was a short time limit for lodging the claim in the Tribunal (he became aware of this in October 2021 although he could have made enquiries to find out the deadline sooner) so there is no question of ignorance of the time limits during the totality of the period in which it took the claimant to present his claim to the Tribunal (which, in any event, does not normally provide a valid excuse for lodging a claim late).

25 68. The claimant failed to take any steps to progress his claim between 13 April 2021 and 14 October 2021. This is a rather lengthy period during which no steps appear to have been taken. Additionally, the claimant did not take any steps to start his claim between 20 October 2021 and 16 November 2021.
30 There was no evidence that the claimant sought alternative advice and assistance other than from ACAS on 14 October 2021 and earlier advice from a trade union representative in relation to time limits. It is for the claimant to seek advice or information about his right to claim unfair dismissal before the

Tribunal. Furthermore, the claimant had access to ACAS's telephone advice service and website, and he could have taken steps to inform himself about the relevant time limits either by contacting ACAS earlier, or by consulting a Citizens' Advice Bureau or Law Centre or by researching information on their websites.

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69. I also considered the claimant's ill health from the date of his dismissal on 13 April 2021. I accept the claimant's evidence that from around the time of his dismissal (and prior to this) he was anxious about both the manner of his treatment at the hands of the respondent, the appeal process and thereafter the Employment Tribunal process. I also accept that the claimant was going through a difficult time and that he was genuinely unwell following his dismissal. The letter from Dr Cook dated 20 January 2022 refers to the claimant's "mental health" in broad terms and he states that there was particularly an issue between April and July 2021, and the claimant continued to struggle, albeit no specific details are provided. It is clear from his own evidence that the claimant was capable of dealing with the respondent's appeal process in April/May 2021. I am satisfied that the medical evidence submitted by the claimant does not go far as to say that he was suffering from any form of depression or other mental impairment to the extent that it adversely impacted on his ability to deal with these matters. He was able to contact ACAS to seek Early Conciliation on 14 October 2021 and to complete his ET1 Form on 17 November 2021. I remind myself that the burden of showing that it was not reasonably practicable for the claimant to present his claim within the statutory time limit rests with the claimant.

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70. Having carefully considered all the facts in this case, I am not satisfied that the claimant has discharged the burden of showing that it was not reasonably practicable for his Claim Form to have been presented within the three-month time limit.

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71. For these reasons, the Tribunal considered that it was reasonably practicable for the claimant to have lodged his Claim Form in time.

72. Even if the Tribunal found that it was not reasonably practicable for the claimant to have lodged his Claim Form within the primary time limit, the Tribunal would have decided that the further 128 days that the claimant delayed in terms of lodging his claim was not reasonable in all the circumstances.

73. In these circumstances, the claim for unfair dismissal being lodged out of time and the Tribunal not being willing to exercise its discretion to hear the claimant's claim out of time, the Tribunal does not have the jurisdiction to hear the claimant's claim for unfair dismissal dated 17 November 2021.

Unlawful deduction from wages and breach of contract

74. The Tribunal finds that the claim for unlawful deduction of wages was not presented in accordance with s23 of the ERA.

75. During the Preliminary Hearing, the claimant produced a letter (dated 26 October 2020) relating to the FY2019/2020 bonus he was paid whilst in employment with the respondent. The claimant was paid this bonus in his November 2020 pay. The claimant appeared to be asserting that he was entitled to be paid a bonus in relation to the Financial Year 2020/2021 in November 2021. The claimant submitted that the respondent's normal payroll date was one week after the date he presented his Tribunal claim, 17 November 2021, and the respondent states that its November 2021 payroll date was on 25 November 2021. In my findings of fact, in the absence of a payslip or any other evidence showing to the contrary, I accepted the claimant's evidence which suggested that the respondent's normal payroll date was on 24 November 2021 (albeit the slight variance is not material).

76. The Tribunal referred to sections 23(2) and 23(4) of the ERA which are set out above.

77. The respondent's submissions state that despite asserting during the Preliminary Hearing that he believed he was due a bonus of around 10% of

his salary, the respondent's position is that he has no basis for making this assertion in relation to FY2020/21 and as such the claimant has not, and cannot, properly point to a quantified loss. The respondent's representative further submits that the claimant's claim for unlawful deduction of wages was submitted prematurely, and that had such a bonus been due and payable to him, it would have been paid to the claimant as part of the November 2021 payroll, the latest date for payment in terms of this payroll being the November 2021 payroll date. The respondent referred to the EAT's decision in *Arora v Rockwell Automation Ltd*, UKEAT/0097/06.

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78. The claimant acknowledged in his submissions that if any bonus payment had been due this would have been payable in the November 2021 payroll and that his Tribunal claim was made one week before this date.

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79. I concluded that had the claimant been entitled to a bonus, this payment could have been made to him by the respondent at any time up to 24 November 2021. It was only once that date had passed that it could be said that the respondent was refusing to pay money allegedly due under his contract of employment (which the respondent denied) and so it was only after this date that there could be said to be an unlawful deduction from which the time limit for presenting a claim began to run. The claimant failed to present a Tribunal claim on or after 25 November 2021 in respect of unlawful deduction from wages.

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80. In terms of the claimant's breach of contract claim and section 3 of the *Employment Tribunals Act 1996* and Article 7(a) of the Order, a breach of contract claim must be presented to an Employment Tribunal within three months beginning with the effective date of termination of the contract giving rise to the claim. Under Article 3(c) of the Order the claim must arise or be outstanding on the termination of an employee's employment. For the reasons set out above, the claimant's breach of contract claim did not arise nor was it outstanding on the termination of the claimant's employment. On the facts relied on by the claimant, the respondent was not in breach of the obligation to pay the claimant's bonus payment until after 24 November 2021 and no

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claim was presented by the claimant to the Tribunal following the respondent's failure to make the bonus payment (on 24 November 2021).

5 81. In any event, if I am wrong, and the claimant's breach of contract claim remained extant as at the effective date of termination, his claim would have been presented outwith the time limit set out in Article 7(a) of the Order. The claimant was dismissed with effect from 13 April 2021, which is the effective date of termination of his employment contract. Accordingly, the primary time limit for him to present a claim for breach of contract would have expired on 10 12 July 2021. His claim would therefore have been brought more than 4 months after the expiry of the original time limit. The Tribunal would have considered that it was reasonably practicable for the claimant to have lodged his claim in time. Even if the Tribunal found that it was not reasonably practicable for the claimant to have lodged his claim within the primary time limit, the Tribunal would have decided that the further period in excess of four 15 months that the claimant delayed in terms of lodging his claim was not reasonable in all the circumstances.

20 82. In these circumstances, the Tribunal does not have the jurisdiction to hear the claimant's claims for unlawful deduction of wages and breach of contract in respect of non-payment of his bonus.

Disability discrimination claim

25 83. The Tribunal finds that the claim for disability discrimination were not presented within the relevant time limit under s123 of the EA. The claimant claims that his dismissal on 13 April 2021 and the respondent's failure to uphold his appeal which was confirmed to him in writing on 4 May 2021 amounted to direct disability discrimination (section 13 EA) and/or discrimination arising from disability (section 15 EA). The claimant's 30 complaints related to events that took place between 13 April 2021 and 4 May 2021, which I considered to be conduct extending over period. The primary time limit for presenting his claim in respect of the last event expired on 3 August 2021. The claimant contacted ACAS to commence Early Conciliation

outwith the primary time limit; the case was in Conciliation for 6 days on 14 October 2021 and so the primary time limit was not extended. The Tribunal claim was lodged on 17 November 2021, which was in excess of 3 months after the expiry of the primary time limit.

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84. The Tribunal considered carefully whether it would exercise its discretion under s123 of the EA to hear the claim out of time. For the reasons set out below, the Tribunal considered that it would not do so.

10 85. The Tribunal considered that it was not just and equitable for the time limit to be extended. Whilst the Tribunal has the utmost sympathy with the position in which the claimant found himself with having little knowledge of his legal rights and obtaining advice and assistance from a third party (from ACAS in October 2021 and from a trade union representative prior to this), it was clear that the
15 claimant was able to contact ACAS to seek advice, he engaged with the Early Conciliation process in respect of this claim, and he was aware that there was a time issue in relation to his claim which was clear from the content of his ET1 Form. The claimant was able to commence ACAS Early Conciliation on 14 October 2021. He could equally have engaged with the process for lodging
20 his Claim Form and providing the prescribed information. He could have taken further steps to seek advice and support, including from online sources.

86. There was also a period of time between the claimant obtaining his ACAS Early Conciliation Certificate on 20 October 2021 and the presentation of his
25 claim during which there was no evidence that the claimant had taken any steps to progress his claim. There was no explanation in terms of the further delay during that period of time. The claimant had explained that he was made aware by ACAS of the time limit for presenting a claim on 14 October 2021.

30 87. Further the claimant was informed by a trade union representative prior to this that he was required to contact ACAS to start Early Conciliation, but he did not do so until 14 October 2021 as he said he did not feel well enough before this.

88. The respondent's representative submitted that the cogency of the respondent's evidence is likely to be affected by the period of delay. It was submitted that the extent of delay may affect its witness evidence and that this was a particularly important matter in discrimination cases. The claimant did not act promptly once he knew of the facts giving rise to any causes of action, he did not contact ACAS until 14 October 2021, and he failed to provide any satisfactory explanation for not seeking advice sooner.
89. The Tribunal balanced the prejudice that would be suffered by the respondent and its witnesses in relation to the delay in terms of the claiming bringing the proceedings. The events complained of relate to events that started almost a year ago. The claimant could have presented his claims earlier thereby obviating any prejudice to the respondent and the respondent's witnesses.
90. The claimant invited me to consider his ill health and that he was not able to bring his claim sooner. The claimant's medical evidence of his condition and ability to participate in proceedings that was presented to me at this hearing, did not contain any specific details which showed that the claimant was not capable of starting the ACAS Early Conciliation or his Tribunal claim during the primary limitation period or any period of time thereafter.
91. The Tribunal was not furnished with any adequate details of the personal circumstances of the claimant such that it could conclude that the claimant faced an impediment in terms of bringing his claim under consideration today. The case law emphasises that the burden of proving it is just and equitable to extend time is on the claimant. The claimant has failed to satisfy this burden of proof.
92. For these reasons, the Tribunal considered that it was not just and equitable to extend time. The claim is out of time. The Tribunal does not have jurisdiction to hear the claim. The claim for disability discrimination is dismissed.

Conclusion

93. The claimant's claims for unfair dismissal, unlawful deduction from wages and breach of contract, and disability discrimination were presented outwith the relevant statutory time limits, the Tribunal does not have jurisdiction to hear those claims, and the claimants' claims are therefore dismissed.

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15	Employment Judge:	B Beyzade
	Date of Judgment:	07 March 2022
	Date sent to parties:	08 March 2022

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