



EMPLOYMENT TRIBUNALS

Claimant: Ms A Radlinska-Bartnik
Respondent (1): Mach Recruitment Limited
Respondent (2): Clipper Logistics Plc
Heard at Leeds and by CVP (Hybrid) **On:** 8 September 2022

Before: Employment Judge Rogerson

Representation

Claimant: Mr Tomasz Gracka (Brookfields Law Limited)(CVP)
Respondent (1): Mr D Flood (Counsel)
Respondent (2): Mrs J Dodd (Solicitor)

RESERVED JUDGMENT

1. The complaint of an alleged failure to pay holiday pay was presented out of time in circumstances where it was reasonably practicable to present it in time. Accordingly, the Tribunal has no jurisdiction to hear that complaint.
2. The complaint of direct race discrimination was presented out of time in circumstances where it was not just and equitable to extend time. Accordingly, the Tribunal has no jurisdiction to hear that complaint.
3. The complaint of agency worker discrimination was presented out of time in circumstances where it was not just and equitable to extend time. Accordingly, the Tribunal has no jurisdiction to hear that complaint.
4. All the complaints made in claim 1801671/2022 are therefore dismissed.

REASONS

The applicable law

Working Time Regulations 1998

1. Regulation 30(2) provides that an employment tribunal **shall not** consider a complaint under this regulation unless it is presented:
 - (a) Before the end of the period of three months beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or as the case may be, the payment should have been made ..
 - (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.

Agency Worker's Regulations 2010

2. Regulation 18 provides that an employment tribunal **shall not** consider a complaint under this regulation unless it is presented:
 - (4) (a) Before the end of the period of three months beginning with an alleged infringement of a right conferred by regulation 5,12 or 17(2) with the date of the infringement,
 - (5) a tribunal may consider any such complaint which is out of time **if, in all the circumstances of the case, it considers that it is just and equitable to do so.**

Equality Act 2010

3. Section 123(1) provides that proceedings on a complaint within section 120 **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.**

Meaning of 'reasonably practicable'.

4. Reasonably practicable means "reasonably feasible" (**Palmer and Anor v Southend on Sea Borough Council [1984] ICR 372**) and is a question of fact for the tribunal to decide based on the explanation/evidence provided by the claimant to explain the delay. If the claimant satisfies the tribunal that it was not reasonably feasible to present the claim in the primary time limit it must then go on to decide whether the claim was presented within such further period as the tribunal considers is reasonable.
5. In **Asda Stores Limited v Kauser EAT 0165/07** the meaning of 'reasonably feasible' was explained in the following way:

"the relevant test is not simply a matter of looking at what was possible, but as to whether on the facts of the case as found, it was reasonable to expect that which was possible to have been done."

Just and equitable extension of time

6. The 'just and equitable' provision in the statutes provides a much wider discretion to extend time than is provided under the 'reasonable practicability'

test. However, it still requires that I have some material upon which I can properly exercise my discretion and it is for the claimant to persuade me it is just and equitable to extend time not for the respondent to persuade me it is not.

7. The approach to be adopted to time limits in employment tribunal claims was considered in the Court of Appeal by Leggatt LJ in **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] ICR at paragraphs 18 to 20:

“18. First, it is plain from the language used (“such other period as the employment tribunal thinks just and equitable”) that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see *British Coal Corporation v Keeble* [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see *Southwark London Borough Council v Afolabi* [2003] EWCA Civ 15; [2003] ICR 800, para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998: see *Dunn v Parole Board* [2008] EWCA Civ 374; [2009] 1 WLR 728, paras 30-32, 43, 48; and *Rabone v Pennine Care NHS Trust* [2012] UKSC 2; [2012] 2 AC 72, para 75.

19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

20. The second point to note is that, because of the width of the discretion given to the employment tribunal to proceed in accordance with what it thinks just and equitable, there is very limited scope for challenging the tribunal's exercise of its discretion on an appeal. It is axiomatic that an appellate court or tribunal should not substitute its own view of what is just and equitable for that of the tribunal charged with the decision. It should only disturb the tribunal's decision if the tribunal has erred in principle – for example, by failing to have regard to a factor which is plainly relevant and significant or by giving significant weight to a factor which is plainly irrelevant – or if the tribunal's conclusion is outside the very wide ambit within which different views may reasonably be taken about what is just and equitable: see *Robertson v Bexley Community Centre t/a Leisure Link* [2003] EWCA Civ 576; [2003] IRLR 434, para 24.”

8. In **Robertson** the Court of Appeal also reminded Tribunals that the “exercise of discretion should be the exception rather than the rule”.
9. In **Southwark London Borough Council v Afolabi [2003] ICR 800 CA** it was confirmed that while the checklist of factors in section 33(3) of the Limitation Act 1980 provides useful guidance for employment tribunals it does not need to be adhered to ‘slavishly’. The Court of Appeal there are always two factor which are almost always relevant when considering whether to extend time the length of and reasons for delay and whether the delay has prejudiced the respondent (for example by preventing or prohibiting inhibiting it from investigating the claim while matters are fresh).
10. The factors identified in section 33(3) are:
- The prejudice which each party would suffer as a result of the decision reached.
 - 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 is co-operated with any request for information
 - The promptness with which the claimant acted once she knew of the facts giving rise to the cause of action
 - The steps taken by the claimant to obtain appropriate advice once she knew of the possibility of taking action.
11. In **Adedeji v University Hospital Birmingham NHS Foundation Trust [2021] ICR** the Court of Appeal upheld an Employment Judge’s decision to refuse to extend time for a race discrimination claim which was presented three days late and confirmed “*the best approach for a tribunal in considering the exercise of discretion is to assess all the factors in the particular case it considers relevant, including in particular the length of and reasons for the delay.*”

What material did the claimant and her representative provide to persuade the Tribunal it should extend time?

12. I heard evidence from the claimant’s representative Mr Gracka who attended the hearing remotely by CVP. He is currently experiencing back and neck problems and had provided the Tribunal with a GP fit note confirming he was assessed as ‘unfit to work’ from 6 August 2022 to 13 September 2022.
13. The hearing had been listed as an attended in person hearing in Leeds which was why the respondents had attended and why a polish speaking interpreter had also attended at expense to the HMCTS in order to translate the claimant’s evidence about delay and the reason for it.
14. Mr Gracka told me he was not expecting the claimant to attend because they had agreed that only he could explain why the claim was presented out of time. He was given time to speak to the claimant to explain that I was

expecting the claimant to give evidence to explain the whole of the delay in presenting the claim, not just the period when Mr Gracka became involved in February/March 2021. The period started with the alleged unlawful treatment on 17 November 2021 and ended with the date the claim complaining about that treatment was presented by post received on 30 March 2022. It was agreed that by that date the claim was presented 13 days after the time limit for presenting the claims had expired. Mr Gracka was asked to explain to the claimant, the risk of waiting until you are close to the expiry of the time limit is that if something goes wrong the claim the claim will be presented out of time. Only the claimant could explain the whole period and the reasons for the delay.

15. After the adjournment, Mr Gracka confirmed that he had spoken to the claimant at length and had taken her instructions. He confirmed that the claimant would not be attending the hearing. She was content for the hearing to proceed in her absence and for the Tribunal to decide whether to extend time solely on the evidence and representations made by Mr Gracka because the claimant agreed that “*only he could explain what happened and what went wrong*”.
16. Mr Gracka confirmed he had also exchanged some text messages with the claimant to confirm her instructions. He had asked her: “Do you want me to inform the Tribunal that you do not want to take part in the proceedings personally?” Her reply was “I confirm”. He confirmed that he was also instructed to convey the following information on the claimant’s behalf for the Tribunal to consider.
 - Mr Gracka had only been contacted by the claimant in February 2022 and he had assisted the claimant in contacting ACAS.
 - The claimant had instructed another person before she instructed Mr Gracka who had “*proved to be incompetent*”.
 - Mr Gracka had informed the claimant he would only be available from 1 March 2022 at the earliest and could not take her instructions before then.
 - The claimant had gathered the documents from her previous representatives so that she was ready to go. The first draft of the claim was sent to the claimant on Wednesday 2 March 2022. It had to be translated and then was amended by the claimant. The final draft of the claim was sent to the claimant on Friday 11 March 2022 and was approved by her with some minor amendments.
 - On 14 March Mr Gracka made the amendments. He then checked the ET1 to be ready to submit online on 15 March 2022.
 - Mr Gracka believed the deadline for presentation of the claim was 16 March 2022 and that by submitting the claim online on 15 March 2022 he had given himself enough time to deal with any problems that might occur.
17. In addition, Mr Gracka relied upon his statement, his written representations and two documents. The respondents have jointly provided a bundle of documents for use at this hearing containing the pleadings and tribunal correspondence.

18. Mr Gracka gave his evidence by way of affirmation. He confirmed that the contents of his statement were true. He also answered some questions asked by the respondent's representatives and by me. He also made further oral representations before leaving the hearing just before the lunch adjournment. He left on the understanding that he would not hear the respondent's representations would not be able to respond to them or to answer any queries that may arise before I deliberated.
19. Mr Gracka confirmed he understood the consequences of leaving the hearing early but decided he would not be participating for the remainder of the hearing. He was offered a longer lunch break or any other adjustments to enable him to participate remotely for the remainder of the hearing. He declined and confirmed that he was content for the Tribunal to decide jurisdiction based on the information provided. He again confirmed that only he could explain the delay in presenting the claim and he had done that before he left the hearing.
20. After lunch, I heard oral representations from Mr Flood on behalf of the first respondent and from Mrs Dodd on behalf of the second respondent. Having considered all the material before me I made the following findings of fact.

Findings of fact

21. The ET claim was presented by post and was received on 30 March 2022. The claimant is a Polish national who was an agency worker recruited by "Mach Recruitment Ltd" (the agency/ first respondent) to work for "Clipper Logistics Plc" (the hirer/ second respondent).
22. Her complaint of direct race discrimination and less favourable treatment as an agency worker is in relation to a decision made by Clipper Logistics Plc on 17 November 2021 to end her engagement. She alleges that Mach Recruitment Ltd, inaccurately reported to Clipper that she had an absence record of 20 days which was not true. It is not in dispute that the excessive (albeit inaccurate) absence record was the reason why the claimant's engagement was terminated. The claimant complains that decision was less favourable treatment by the agency and by the hirer, because she is a Polish national (direct race discrimination contrary to section 13 Equality Act 2010) and less favourable treatment by the hirer in relation to her basic working and employment conditions compared to the terms and conditions ordinarily included in the contracts of employees of the hirer (an alleged infringement of regulation 5 Agency Workers Regulations 2010).
23. The claimant has not identified any comparator for the direct race discrimination complaint. A hypothetical comparator would be a non-Polish national with a reported absence record of 20 days. Would that hypothetical comparator in materially the same circumstances as the claimant have had their engagement terminated? I had some difficulty understanding how the claimant would answer that question when she appears to accept the reason why her engagement with the hirer was terminated was because the agency provided an inaccurate excessively high record of her attendance. It was not

clear how on the asserted facts the claimant put her case of unlawful direct race discrimination complaint.

24. The alleged less favourable treatment of the claimant as an agency worker compared to a permanent employee of the hirer was also unclear from the claim form because no terms of the claimant's contract of employment have been identified or compared with the corresponding term of the comparator (an employee of the hirer engaged in similar work to the claimant) to show a difference in treatment. For these two discrimination complaints the 'just and equitable' extension discretion applies under the statutory provisions identified at the start of these reasons.
25. The final complaint is made against Mach Recruitment Ltd of a failure to pay accrued holiday pay upon termination of her engagement. The claimant has not set out the amount of holiday pay outstanding or how it has been calculated. Mr Flood was able to confirm today that the first respondent has checked its pay records, which (he is informed) are very reliable. He can confirm that no holiday pay is outstanding. Unfortunately, Mr Gracka had left the hearing and could not be questioned about this or any part of the other claims to clarify them. For this complaint any extension of time is decided on the narrower 'reasonable practicability test'.
26. ACAS early conciliation certificates were issued against both respondents on 15 February 2022 (day A) with early conciliation ending on 17 February 2022 (day B).
27. The primary time limit for the complaints ended on 16 March 2021. With early conciliation extension it was agreed that the last day for presentation of the claim was 17 March 2022 (day B plus one month). The claim was in fact presented by post received on 30 March 2022, 13 days out of time.

Claimant's compliance with case management orders

28. On 21 June 2022, the tribunal wrote to the claimant's representative to request the claimant explain in writing by 6 July 2022, why she was late in submitting her claim. That was the first request made for the claimant to provide an explanation for the delay in submitting her claim.
29. The claimant failed to provide any information. On 8 July 2022, time was extended to 20 July 2022 for the claimant to comply with the order. That was the second request made by the tribunal for the claimant to provide an explanation for the delay in submitting her claim.
30. The claimant failed to provide any information. On 3 August 2022 time was extended again to 17 August 2022, for the claimant to provide reasons for her late submission of the claim. That was the third request made by the tribunal for the claimant to provide an explanation for the delay in submitting her claim. On each occasion the claimant failed to provide any information in writing.
31. This hearing was then listed to decide jurisdiction. On 6 September 2022, Employment Judge Lancaster directed that a letter was sent to the parties requiring the claimant's representative to make an application supported by medical evidence if he could not attend and confirming that the claimant was expected to attend the hearing in person to explain the reason for delay. The letter confirms that:

“the claimant has still not provided any information to explain the reason for delay. This was first required by 6 July. That date was extended to 20 July and again to 17 August 2022. She will now have to attend and through an interpreter explain the delay. That explanation is long overdue. The representative may make written submissions for consideration. Alternatively, the Tribunal may consider an application from him to join the hearing remotely by CVP link to make representations” (all highlighted text in these reasons is the Tribunal’s emphasis)

32. The Tribunal had made it clear before this hearing that the claimant was expected to attend this hearing to explain the reasons for delay having failed (3 times) to provide any explanation in writing.
33. On 7 September 2022 Mr Gracka sent the Tribunal his written representations on jurisdiction and applied to join the hearing remotely, providing a fit note to support the application. He did not request any other adjustments. He also provided two documents to support an extension of time.
34. The first document was dated 4 March 2021 and was a ‘returned claim form notice’ sent from the Leeds Employment Tribunal sent to the claimant, Ms A Radlinska-Bartnik. This relates to a previous employment tribunal claim made by the claimant which was rejected because it was not presented correctly. Unfortunately, Mr Gracka was unable to provide any further explanation about this earlier claim and confirmed it was a document the claimant had provided. The letter confirms that the claimant has had prior experience of making claims in the employment tribunal claim and knows how to validly present and that a claim will be rejected if it is not validly presented. The letter confirms *“there are only three prescribed methods of presenting an Employment Tribunal claim form (ET1) which are stated below. The claim has been presented in the incorrect manner, if the claim is submitted in the correct way they should include an explanation – (1) online by using the online submission service provided by HMCTS accessible at www.gov.uk/employment-tribunals/makeaclaim ; (2) by post to the Employment Tribunal’s central office England and Wales at PO Box 10218 Leicester, LE1 8EG and (3) by hand to a designated Employment Tribunal office within business hours (Monday to Friday excluding public holidays – see overleaf for designated offices). The attached claim form has not been presented using one of the prescribed methods. It therefore cannot be accepted and is returned to you accordingly.”*
35. If the claimant had attended the hearing, she could have explained why the letter was included and what she intended the letter to show other than her previous knowledge of making a claim not using a valid method of presentation and the consequences of that process (rejection of the claim).
36. The second document that the claimant’s representative relies upon is an email dated 15 March 2022 which was sent at 23:24 on **15 March 2022** from his company ‘Brookfields Law Limited’ to the Leeds Employment Tribunal and to London Central Employment Tribunal. The subject heading is: “ET1 claim Ms Agnieszka Radlinska-Bartnik v Mach Recruitment Limited and Clipper Logistics Plc”. The email states:

“Dear Sirs,

*Please find attached new ET1 claim with a kind request to accept its submission and service. I attach also a rider to the ET1 with the claimant's statement of claim. I act as the claimant's pro bono representative and in that capacity, I attempted to submit the claim online using the online application at <https://www.governmentuk/employment/tribunals/makeaclaim>. Unfortunately, the website did not work in the evening of 15 March 2022. **The process is well known to me as I have used that website a number of times.** I tried on different computers and mobile phones and only this website does not work. I suspect some maintenance work is being completed on the website.*

*Since today is the day when the deadline passes and its already 11pm I **have no other choice but to submit the by an email to Leeds Employment Tribunal** and just in case to Central London ET as well. I therefore decided to fill in the paper version of the ET1 claim form as I cannot access the online version of the said document.*

*I have submitted a claim **in that manner several years ago and it was accepted by the Tribunal.** It is my best understanding this way of submitting the claim is still accepted by the Tribunals and in any event, I have no other choice. I also have to submit the claim by email to have some proof that I took all reasonable steps I could that the claim was ready and I could not submit it the usual way due to **technical difficulties and malfunction of the online ET1 claim form.** I would also submit the claim using the online form once it starts working again. This may be tomorrow morning. I would refer to this email in the claim and would assist the Tribunal go avoid a situation when we would have two claim forms being considered at the same time."*

*I believe the claimant took all reasonable steps to submit the claim on time. **Only due to malfunction of an online ET1 claim form we were not able to submit the claim that way on time.***

Kind regards

Thomasz Gracka LLB (Hons) MA (Hons) Law LPC G Dipp Law

*Director Brookfields Law Limited, **Employment Tribunal Advocates,** Polish lawyer's, legal consultants, translators and interpreters. Affordable legal and language solutions for you and your business*

Mr Gracka confirmed he holds all the qualifications listed in the email. His MA was a qualification obtained and recognised in Poland his the other qualifications were obtained and recognised in England.

37. Mr Gracka submitted that he did not personally believe the claimant had done anything wrong by leaving it to him to submit her claim. In accepting her instructions in early March 2022, he took into account the time that would be required to prepare the claim and believed there was enough time left to submit the ET1 before the time limit deadline expired. He had never experienced any previous problems submitting claims online and he had previously always submitted claims online. On 15 March 2022 he believed the final day for presenting the claim was 16 March 2022, and he had not left it to late if anything went wrong. He has mobility/health problems which prevented

him from submitting the claim in any other way but online. He did try to submit it by email, but the claim was rejected and was then submitted by post which is how the claim came to be presented late on 30 March 2022.

38. In answer to the questions Mr Flood and Mrs Dodd asked the following further information was elicited from Mr Gracka. He is the sole director of 'Brookfields Law Limited' a company offering legal services marketed in particular to the polish speaking community. Mr Gracka specialises in employment tribunals and describes himself as an experienced advocate in this area of law. The company does not have any professional indemnity insurance in place. He described it as a 'dormant company'. Following a car accident, Mr Gracka says he has experienced back pain, sciatica and neck pain and on occasions experiences flare ups of pain which affect his mobility. The only medical evidence he has provided to the Tribunal is the GP fit note covering the period 4 August 2022 until 13 September 2022 to support his application to attend this hearing remotely by CVP.
39. Mr Gracka accepted that in so far as his written statement suggests he had no involvement in the claim before March 2022, it is incorrect, because he had been involved in February 2022. He provided his services to the claimant on a 'pro bono' basis on the condition she signed a 'disclaimer' in the event of any negligence. The claimant had initially contacted him on 7 February 2022. He discussed with her the urgency of contacting ACAS. He was asked whether he had made it clear to the claimant on 7 February that he would not be able to work on her claim until 1 March 2022. He said he had told the claimant "*from 1 March I would definitely be able to work on her case and that would be sufficient time.*" From 1 to 11 March 2022, he had worked on the details of claim to prepare a final draft. He was in his words "*working slowly and diligently making sure everything was translated so that she could understand every single word in her statement*". On 13 March 2022 the claimant confirmed she was content for the claim to be presented in the form drafted. It was as far as he was concerned "*ready to go*". He did not try and submit the claim on the 13 or 14 March 2022, because he wanted to look at it again with "*fresh eyes*" on 15 March 2022. On 15 March 2022 at about 11am he tried to submit the claim online but was unsuccessful. When he found he was unsuccessful in submitting the claim online he checked his internet connection and his computer which were working fine. He says he was then making attempts every half an hour for the rest of that day without any success.
40. He lives in Nottingham. He accepts he made no attempt to contact the Tribunal to report the problems he says he was having with the host system or to seek their assistance in using alternative methods of presentation. The online submission form confirms that if online submission receipt has not been confirmed the employment tribunal should be contacted for assistance. Mr Gracka only attempted to contact the Tribunal by email at 23:24 on 15 March 2022, at a time when he knew, or ought to have known the office would be closed and no one would respond.
41. He said that he sent this email because he thought he could present a claim by email having done so previously. He now accepts he could have contacted

the tribunal office on 15 March 2022 to ask for assistance and accepts it was something that with the benefit of hindsight he should have done. He accepts that he could have posted the claim on 15 March 2022 or asked someone else to post it or submit it online for him. He told the claimant that he had submitted the claim via email inferring that if there was a problem with the submission the tribunal office would call him. He said he was being as honest as he could be now and genuinely believed the claim would be accepted by email because he has used that method before. He did not tell the claimant he was having any difficulties presenting her claim online because he thought that his email of 15 March 2022 would support his late submission of the claim.

Respondent's Representations

42. Mr Flood suggested Mr Gracka's evidence was not credible and was self-serving. If he had genuinely believed the claim could be submitted by email on 15 March 2022, there would be no reason at all for him to have tried to submit it online (on his account every ½ hour for over 12 hours from 11 am to 11:24 pm). Additionally, Mr Flood submits that Mr Gracka should be able to provide some evidence to support his practice if email presentation was used and had been accepted. The reason he has not done so is because he knows it was not a valid method of presentation. His evidence was simply not credible. In addition, Mr Gracka had not provided any evidence to support his assertion that the online system was down on 15 or 16 March 2022. If it had been many claimants would have been affected by it and evidence would have been available because it would have been reported by someone. During this hearing Mr Flood carried out some online research which shows that any simple search on the internet confirms that email presentation was not a valid method of presentation of a claim.
43. Mr Flood submits that Mr Gracka was not giving a truthful account in his email of 15 March 2022 or in his evidence at this and was using the email as a cover for his failure to present the claim on time. Mrs Dodd relied upon the same points confirming that the online search does makes it clear that service by email is not a valid method of presentation and has not been a valid method of presentation for many years.

Explanation and reasons for the delay

44. I agreed with the respondent's representations and find Mr Gracka's evidence explaining the delay was unreliable and was not credible. While at times he has very honestly admitted to his mistakes his evidence about email presentation was not credible. I agreed Mr Gracka sent the email on 15 March 2022 to create a paper trail to fit with the narrative he gave the claimant rather than admit to her he had made a mistake. He was holding himself out as someone who was an experienced advocate in employment tribunals in circumstances where he had described the claimant's previous advisers as 'incompetent'. The claimant was confident to instruct him to deal with her claim having sought advice previously and knowing time was running out.

45. The claimant knew Mr Gracka would not be working on her claim until 1st March 2022 leaving just over 2 weeks left before the time limit expired. The claim was drafted it was amended and approved by the claimant on 13 March 2022, leaving 4 days for the claim to be presented in time. Despite the urgency of the situation Mr Gracka left it to the last day 15 March 2022 (on his calculation) to present the claim running the risk the claim could be presented out of time if as was the case he experienced any difficulties.
46. He now accepts that as soon as he was experiencing difficulties with the online system from 11am onwards on 15 March 2022, the next reasonable step, he could and should have taken after his first few unsuccessful attempts was to contact the employment tribunal offices during office opening hours to explain his difficulties and seek assistance. He could have done that any time from 12 noon onwards. If he genuinely believed the problem was with the online system and not with his internet access, then contacting the office was the only effective way of resolving the problem. Instead of taking that reasonable step, for the rest of that day, every ½ hour he continued to try submitting it online, knowing his attempts were failing. Mr Gracka waited until 11:24 pm on 15 March 2022 26 minutes before he believed the time limit would expire, to send an email to the employment tribunal office knowing no assistance or response would be provided. He then did nothing to check on the 16 or 17 March 2022 and waited for the claim to be rejected before taking any further action.
47. It was clear to me that it was reasonably feasible for the claim to have been presented on 13 March 2022 when it was ready to go. I do not find there was any temporary technical malfunction of the host system on 15 March 2022 which prevented the claim being submitted online. If Mr Gracka believed that to be true, he could have produced some evidence to support his account when that evidence would have existed and would have been available. I agreed with Mr Flood that an online failure of the type described by Mr Gracka would have had much wider impact, would have been reported and recorded. As soon as Mr Gracka realised his attempts to submit the claim online were not working, he should have sought assistance. There was a substantial part of that day when Mr Gracka could have taken the most obvious easy and effective step of contacting the employment tribunal office to seek assistance or forwarded the claim to the claimant to submit online or ask someone else to submit it online or present it in person on his behalf.
48. Furthermore, and more damaging to Mr Gracka's credibility is the false assertion he makes that he believed email was a valid method of presentation. I agreed with Mrs Dodds that email presentation has not been a valid method of presentation for many years, it is not a recent change. The claimant and her representative would have known that because of their previous experience presenting tribunal claims. As recently as March 2021 the claimant had been informed by the Leeds Tribunal that there were only three prescribed methods of presentation, online, by post and in person (see paragraph 32). I agreed with Mr Flood's submission that the explanation for the delay given by Mr Gracka was inconsistent with his subsequent conduct. If he had genuinely believed that email service of the claim was valid presentation, he would have had no need to then post the claim received by

the ET on 30 March. Unfortunately, I agreed with Mr Flood that the email sent late on 15 March 2022 was an attempt to cover up his mistake.

49. Given the difficulties Mr Gracka now says he faced for 12 hours that day attempting every ½ hour to submit the claim online, it makes it even more surprising that he did not take any other step to deal with the problem either on 15 March or 16 March 2022 or 17 March when the claim could have still been in time. Instead of taking any of the reasonable steps he could have taken he continued taking the unreasonable step of continuing to use a method he knew was failing with the risk and consequence of the claim being presented out of time. In those circumstances I find that it was reasonably feasible for the claim to be presented in time and the claim for unpaid holiday pay made against the first respondent is dismissed because the Tribunal does not have jurisdiction to hear it.

Just and equitable extension

50. That leaves the complaints of direct discrimination and agency discrimination against the first and second respondent. I have a wider discretion and as well as the findings I have made above as to the reasons for the delay the length of the delay and that it was reasonably practicable for the claim to be presented in time, I can consider other factors including the prejudice to the respondents if time is extended for a claim which would otherwise not be heard.
51. Looking at the reasons for the delay, the length of the delay the findings of fact that I have made when weighed in the balance do not go in the claimant's favour. I considered the prejudice to the parties, the cogency of the evidence and any prejudice to the respondents if time was extended and the discrimination complaints were allowed and the claimant if the claim was not allowed to proceed. Very honestly and fairly Mr Flood accepted that the first respondent cannot argue that there is any impact to it in respect of the cogency of evidence, although he does rely on the fact that extending time on just and equitable grounds is the exception not the rule and the claimant has had the whole period from 17 November 2021 not just the few weeks before the statutory time limit expired to bring her claim.
52. Mrs Dodd confirmed that if I extended time and allowed the claim to proceed it would cause prejudice to the second respondent because one of the key witnesses that the claimant has referred to in her claim form in relation to her discussions about the termination of her engagement is Ms M (a supervisor employed by the second respondent). Ms M is no longer employed by the second respondent and will not therefore be available to give any evidence to challenge the claimant's account. Over time the recollection of other witnesses for the respondent about these matters will also be less reliable. The short point she makes as I see it, is that if time is extended, the respondent will have the risk of defending the claim making serious allegations of discrimination without its key witness. If time is not extended the claim cannot proceed and it has no litigation risk. While it is true that there is always a risk that a particular witness might not be available to give evidence and that forms part of the overall litigation risk a party must accept,

the risk for the second respondent only exists if I exercise my discretion to allow the claim to proceed on just and equitable grounds.

53. I started by considering the factors which are always relevant to consider when deciding whether to exercise its discretion to extend time: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).
54. As to the length of the delay, it is agreed the claim was presented 13 days late, not the longest of delays but one which must be viewed in the context of the full period of time the claimant has had to bring her claim from the alleged unlawful acts which occurred on 17 November 2021 to the date of presentation on 30 March 2022. The primary time limit would have ended on 16 February 2022 and was extended by 1 month for ACAS conciliation to 17 February 2022 giving the claimant 4 months in total to present the claim.
55. The claimant is familiar with the employment tribunal process having brought a claim in March 2021 prior to any of the alleged unlawful conduct of November 2021. In relation to this claim she had instructed a different adviser before she instructed Mr Gracka in February/March 2022 knowing that he would not be working on her claim until very close to the deadline. Mr Gracka holds himself out to be someone who is an experienced employment law practitioner. Both the claimant and her representative have experience of bringing a complaint in the employment tribunal.
56. At the beginning of this hearing, I identified the risk a claimant runs if they wait until the end of the period to bring the claim, that if that claimant encounters any difficulties in presenting their claim it may not be presented in time. The claimant/her representative made an informed decision to risk waiting the end of the period to present the claim.
57. The claimant has had 4 opportunities (3 in writing by complying with the case management orders) and 1 at this hearing (at HMCTS expense) to explain the reason for delay and to persuade me that time should be extended if there were any material circumstances I should consider. The claimant and her representative are content to provide no explanation to explain the delay in the period 17 November 2021 to early March 2022 and a very limited explanation for the period from March 2022 to 30 March 2022 when the claim was presented. I have been given a very small part of the story not the full story.
58. The inference that I have made based on my findings of fact is that since November 2021 the claimant has made informed decisions about when, who and how her claim was to be presented. In making those decisions she has the benefit of her own experience and her representative's experience of bringing a claim, time limits and methods of presentation and the consequences if any of those things are not correctly done. Balancing the length of and reason for the delay and the prejudice to the 2nd respondent, these were all factors which go against the claimant in persuading me to exercise my discretion. While the claimant is also prejudiced if time is not

extended because her claim comes to an end that is the consequence only after a '4' month delay in bringing her claim much of which remains unexplained. I am therefore not persuaded it is just or equitable to extend time in relation to the agency and direct discrimination complaints. The Tribunal therefore has no jurisdiction in relation to any part of the claim which is dismissed in its entirety.

Employment Judge Rogerson

Date 18 October 2022