



IN THE EMPLOYMENT TRIBUNAL (SCOTLAND)

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Judgment of the Employment Tribunal in Case No: 8000133/2023 Issued  
Following Open Preliminary Hearing Heard at Edinburgh on the Cloud Based  
Video Platform on the 9<sup>th</sup> of June 2023

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Employment Judge J G d'Inverno

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Mr Rasheed Adegbola  
Adewusi

Claimant  
In Person

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Ark Housing Association  
Ltd

Respondent  
Represented by:  
Mr Briggs of Counsel

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is:

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(First) That the claimant's complaint of Unfair Dismissal is dismissed for  
want of Jurisdiction by reason of Time Bar.

**(Second)** That the claimant's initiating Application form ET1 first presented on 23 March 2023 contains no recognisable complaint of Race Discrimination such as to engage the Tribunal's discretion under section 123(1)(b) of the Equality Act 2010, to extend time.

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**(Third)** That the Tribunal is not satisfied that it would be just and equitable, in the circumstances presented, to extend time to the 23<sup>rd</sup> March 2023, the date of first presentation of the ET1, in respect of the putative, but in truth non, claim of Race Discrimination, in terms of section 123(1)(b) of the Equality Act 2010, and declines to do so.

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### REASONS

1. This case called for Open Preliminary Hearing, on the Cloud Based Video Platform, at Edinburgh on 9<sup>th</sup> June 2023 at 10 am, for Determination of the Preliminary Issue of Time Bar.
2. The claimant appeared on his own behalf and gave evidence on oath answering questions put in cross examination and questions from the Tribunal.
3. The Respondent Company was represented by Mr Briggs, of Counsel.
4. Both the claimant and the respondent's representative addressed the Tribunal in submissions.

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### The Issues

5. The Preliminary Issues for Determination by the Tribunal at Open Preliminary Hearing were:-

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**(First)** Whether the claimant's complaint of Unfair Dismissal had been brought within 3 months of the Effective Date of Termination of his Employment, and whether the Tribunal had Jurisdiction to

Consider the same in terms of section 111(2)(a) as extended by section 207(b) of the Employment Rights Act 1996 (“ERA”) which failing, in terms of section 111(2)(b) of the ERA; and

5                   **(Second)** Whether the claimant’s complaint under the Equality Act 2010 (“EqA”) had been brought within 3 months of the date of the discriminatory act complained of and, in any event within 3 months let it be assumed which is denied by the respondents that some or all of the acts form part of the continuing act (for the purposes of section 10                   123(3)(a)) of the Act and the last such act being the claimant’s dismissal, whether the claimant’s complaints under the EqA have been brought within 3 months of the date of his dismissal in terms of section 123(1)(a) as extended by section 140B(3) of the EqA, which failing;

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**(Third)** Is it just and equitable to extend time for the presentation of the complaint under the EqA, in terms of section 123(1)(b) of the Act, to the date of first presentation of the initiating Application ET1 on 23<sup>rd</sup> of March 2023.

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### **Findings in Fact**

6.     On the oral evidence presented, and the documentary evidence to which it was referred, the Tribunal made the following Findings in Fact, restricted to those relevant and necessary to the Determination of the Preliminary Issues.

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7.     The claimant was employed by the respondents from 3<sup>rd</sup> June 2013 to 14<sup>th</sup> November 2022 as a Support Worker.

8.     By claim form dated 23<sup>rd</sup> March 2023, the claimant bears to give notice of bringing claims of:-

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(a) Unfair Dismissal; and

(b) Discrimination because of the protected characteristic of Race

9. The Effective Date of Termination of the claimant's Employment was the 14<sup>th</sup> of November 2022, on which date he was summarily dismissed by the respondent for asserted reason of gross misconduct occurring in the course of an incident on 2<sup>nd</sup> September 2022 in respect of which the claimant had been suspended.
10. The claimant entered into early conciliation on the 23<sup>rd</sup> of January 2023 ("date A"). An Early Conciliation Certificate was issued to the claimant on 25<sup>th</sup> January 2023 ("date B"). In terms of section 111(2)(a) as extended by operation of section 207B, both of the Employment Rights Act 1996 ("ERA"), the extended statutory period within which the claimant was entitled to present a complaint of Unfair Dismissal to the Employment Tribunal ended on the 25<sup>th</sup> of February 2023.
11. In terms of section 123(1)(a) as extended by the operation of section 140B(3) of the Equality Act 2010 ("the EqA"), the extended statutory period within which the claimant was entitled to present a complaint under the EqA in respect of any alleged discriminatory act said to have occurred on 14<sup>th</sup> November 2022, expired on the 25<sup>th</sup> of February 2023.
12. The claimant first presented his initiating Application ET1 to the Employment Tribunal on the 22<sup>nd</sup> of March 2023.
13. The Tribunal accordingly lacks Jurisdiction to Consider the claimant's complaint of Unfair Dismissal in terms of section 111(2)(a) of the ERA and separately lacks Jurisdiction to Consider the claimant's complaints of Discrimination in terms of section 123(1)(a) of the EqA.
14. The claimant was shocked by his suspension on the 2<sup>nd</sup> of September 2022. He felt that he was going into depression but did not consult his doctor as he did not wish to be prescribed with any drugs. He decided rather to try to be and that he could be strong with the help and support of his cousin who is a full time student.

15. Some 5 months earlier in June of 2022, the claimant's father had died which resulted in him, in his capacity as eldest son, of taking on a lot of responsibility.
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16. The claimant suffers from dyslexia and dyspraxia.
17. The claimant has access to and makes regular use of the internet, but takes time to process information which he identifies on the internet.
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18. The claimant uses the "Grammarly" app to assist him in composing/ generating documents on his laptop computer.
19. The claimant's impairments result in his considering it necessary to have proof read any document of substance, which composed and generated by him. He generally relies upon his cousin, who is a full time student, to proof read documents on his behalf.
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20. He has the capacity to pay for proof by someone other than his cousin reading in circumstances where it needs to be done at a time when his cousin does not have availability.
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21. The claimant appealed against the decision to dismiss him, submitting Grounds of Appeal within the time period required. He also composed and submitted a response to the SSSC investigator in relation to the incident of 2<sup>nd</sup> September 2022 which led to his dismissal.
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22. The claimant attended an Appeal Hearing on the 1<sup>st</sup> of December 2022.
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23. The claimant received the written outcome of the Appeal on 16<sup>th</sup> December 2022.
24. The outcome of the Appeal was to uphold the original decision to dismiss the claimant.

25. Following his dismissal, the claimant, who was already aware that he had the right to complain to an Employment Tribunal about his dismissal and also about the respondent's conduct towards him, began the process of gathering together information from the internet about proceeding with an application to the Employment Tribunal.
26. From the information which he gathered, the claimant understood that before being able to raise a claim with the Employment Tribunal he required to engage with ACAS for the purposes of early conciliation.
27. The claimant commenced new employment with Falkirk Council as a professional Social Worker on 1<sup>st</sup> of January 2023. That required him to make application for registration with the SSSC.
28. In the process of completing his application form/discussing his application for registration with the SSSC, with his Supervisor in Falkirk Council, on or about the 15<sup>th</sup> of January 2023, his Supervisor, whom the claimant had made aware of his conditions of dyspraxia and dyslexia, suggested to the claimant that he get some assistance with the process of completing his application form ET1.
29. On the 23<sup>rd</sup> of January 2023 the claimant made first contact with ACAS and, on the 25<sup>th</sup> of January 2023 ACAS issued to the claimant an Early Conciliation Certificate and advised him that with that Certificate he was, as of that date entitled to raise his proceedings before the Employment Tribunal.
30. The claimant had 2 conversations at the telephone with an ACAS Conciliation Officer, the first on or about the 23<sup>rd</sup> of January and the second on or about the 25<sup>th</sup> of January.
31. In the course of one or other of the claimant's telephone conversations with a Conciliation Officer, the claimant was informed about the 3 month less 1 day statutory time limit applying to the presentation of his claims to the

Employment Tribunal and was also informed that the effect of his engaging in early conciliation was to “stop the clock” running on that 3 month less 1 day time limit during the period of early conciliation.

- 5 32. The claimant’s position in evidence was firstly that in the course of one or other of his conversations with the Conciliation Officer, he was unable to indicate which, the Conciliation Officer had also expressly told him that the effect of his engaging in early conciliation was that the statutory 3 months less 1 day time limit was extended by another 3 months from the date of  
10 issue of his ACAS Certificate (that is to say a further 3 months from the 25<sup>th</sup> of January to the 25<sup>th</sup> of April 2023).
33. When it was put to him that it was highly likely that the ACAS Officer would have said such a thing because it was wrong both in fact and in law, the  
15 claimant’s position in evidence because that he must have misunderstood what was said such that upon receipt of his ACAS Early Conciliation Certificate he believed that he had an additional 3 months, that is to say until the 25<sup>th</sup> of April 2023 within which to first present his initiating Application to the Tribunal.  
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34. The claimant acknowledged in cross examination that he had access to and accessed the internet and had or would have seen information there about the statutory time limits and the actual effect of early conciliation on them.
- 25 35. Although following his receipt of the Early Conciliation Certificate the claimant could have checked on the internet as to whether his perception that he had a further 3 months from that date to lodge his claim was correct, he chose not to do so. The claimant considered there was so much information on the internet, some of which appeared to him to vary one to another, that he had  
30 decided to be guided by what was said to him by the ACAS Officer as he considered ACAS to be a reliable source.

36. As at the 25<sup>th</sup> of January 2023 the claimant had in his possession all of the information which he required to raise his proceedings in the Employment Tribunal.
- 5 37. On his receipt of the Early Conciliation Certificate the claimant understood that he was then in a position to proceed to raise his claim with the Employment Tribunal.
- 10 38. As at 25<sup>th</sup> January 2023, the claimant had a number of other things/matters going on in his life which also required his attention and he was working hard in his new job at Falkirk Council in what was his first professional post as a Social Worker.
- 15 39. The learning process and “curve” in his new job role was steep including, in particular his need to quickly achieve a working knowledge of the Council’s policies.
- 20 40. He was also dealing with some aspects of his late father’s estate and with wider family relationships.
41. He travelled to Nigeria in December of 2022 for a family gathering returning to the UK on 18<sup>th</sup> January 2023.
- 25 42. Because he mistakenly believed that he had until the 25<sup>th</sup> of April 23 to submit his ET claim, he gave priority to the other matters in his life including his professional duties as a Social Worker and devoted time to composing his ET form only at the weekends.
- 30 43. The claimant began composing his ET1 form at an early stage following receipt of the Early Conciliation Certificate of 25<sup>th</sup> January 23 and had completed the draft ET1 by about one month after he received the Early Conciliation Certificate.



44. The claimant's cousin, who was a full time student and was engaged in his studies, was not immediately available to proof read the claimant's ET1 at the point at which the claimant had finished composing it.
- 5 45. As the claimant mistakenly believed that he had until the 25<sup>th</sup> of April to submit the claim, he decided not to pressure his cousin to proof read the ET1.
46. His cousin eventually proof read the document on or around the 23<sup>rd</sup>/24<sup>th</sup> March and, on the 25<sup>th</sup> of March 2023, the claimant submitted the  
10 ET1 within a day or so of that proof reading.
47. The claimant stated in evidence that if he had known that he did not have an additional 3 months he could have and would have paid someone to proof read the document immediately and would have got it submitted on time.
- 15 48. The claimant further stated in evidence *"I could have done it the same day or the day after I got the Certificate but I thought I had another 3 months"*.
49. The principal and substantial reason for the claimant's failure to present his  
20 form ET1 within the extended statutory time limit, that is by 25<sup>th</sup> February 2023, was his mistaken belief that he had until the 25<sup>th</sup> of April 2023 to submit it.
50. Although the claimant's impairments of dyslexia and dyspraxia meant that the  
25 process of composing his ET1 took longer than it would otherwise have done, but for his mistaken belief as to time limits, the claimant could have and would have prioritised the devotion of time to the exercise of composition and could have and would have paid to have someone proof read the composed draft such as to allow him to present his ET1 timeously.
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### **The Complaint of Unfair Dismissal**

51. Absent his misinterpretation/misunderstanding of what the ACAS Conciliation Officer had said to him regarding the effect of engaging in early conciliation

on time limits, there was nothing which would have prevented the claimant from presenting the complaint of Unfair Dismissal which is contained within his form ET1, within the extended primary time period.

- 5 52. On the claimant's evidence and on the balance of probabilities, the Tribunal is not satisfied, for the purposes of section 111(2)(b) of the ERA that it was not reasonably practicable for the complaint to be presented before the end of the extended statutory period.

### 10 **The Asserted Complaint of Race Discrimination**

53. In his initiating Application ET 1 at page 6 section 8.1, the claimant has placed a tick beside the box which states "*I was discriminated against on the grounds of*" and a further tick in the box against which it states "*Race*".

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54. The Particulars of Claim attached to the initiating Application ET1, in the form of a 4½ page paper apart, contain no express reference to race or discrimination because of the protected characteristic of Race. The Particulars contain nothing from which an inference as to Race or to  
20 Discrimination because of the protected characteristic of Race might be drawn.

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55. In his evidence before the Tribunal the claimant confirmed, in the course of cross examination, that he had ticked the box for race and further confirmed that there was no other mention of race in the Particulars.

56. By way of explanation, the claimant stated in evidence that "*I put in everything that happened in the claim forms*".

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57. On the authority of **Baker v Commissioner of Police of the Metropolis** UKEAT/0201/09 - it is insufficient for a claimant to only tick a box on the ET form if no Particulars of that claim are provided.

58. The claimant's initiating Application ET1 contains no recognisable complaint of race discrimination.
59. No medical evidence was placed before the Tribunal to vouch the claimant's state of mental health or its impact upon his ability to carry out day to day activities in the period from the date of his dismissal up to and including his first presentation of form ET1 on 23<sup>rd</sup> March 2023. The claimant confirmed that no such evidence existed as he had chosen not to consult his doctor.
- 10 60. In the period 14<sup>th</sup> November 2022 up to and including the 23<sup>rd</sup> of March 2023 the claimant's state of health did not, in fact, prevent him from working hard to discharge his onerous professional duties as a Social Worker, nor responding to the SSSC enquiry into the incident of 2<sup>nd</sup> September, nor engaging with ACAS, nor carrying out research on the internet, nor composing (drafting) the terms of his form ET1, nor from travelling to Nigeria for a social family reunion.
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61. On 16<sup>th</sup> April the claimant submitted a Preliminary Hearing Agenda in advance of what was at that time a scheduled Closed Preliminary Hearing (Case Management Discussion).
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62. On the 17<sup>th</sup> of April 2023 the claimant sent an email to the Tribunal in which he stated that he wished to add 3 paragraphs of information to his previously submitted Agenda form.
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63. In the Agenda and supplementing email, when read together, the claimant bears to provide further information about a complaint of race discrimination and bears to identify potential additional complaints which he would seek to include in his claim, one of "victimisation" and of "discrimination arising from disability".
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64. The putative complaints of "victimisation" and or of "disability arising from discrimination" are claims which are not included in the initiating Application ET1, are new causes of action depending upon proof of additional facts not

5 given notice of in the ET1 and, would require to be the subject of an Application for Leave to Amend. No such Application is before the Tribunal as at the date of Open Preliminary Hearing and accordingly although identified as potential complaints in the course of case management conducted at the outset of the Open Preliminary Hearing, fall outwith the scope of the OPH.

10 65. The information given notice of in the Agenda return in relation to the complaint of race discrimination is entirely new information arising from facts and events which are not given notice of in the initiating Application ET1. In circumstances where no averments whatsoever about race or race discrimination appear in the originating form ET1, a complaint of race discrimination based upon those facts would constitute a new cause of action.

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## **Submissions**

### **Summary of Submissions for the Respondent**

20 66. The respondent's representative submitted as follows:-

(a) That the claimant's claims were presented out of time and that accordingly if they were to proceed, the Tribunal would require to be satisfied that it should extend time.

25 (b) That the burden of proof sat with the claimant to satisfy the Tribunal, in the case of his complaint of Unfair Dismissal that it was not reasonably practicable for it to have been submitted within the original extended statutory period and was thereafter submitted within a reasonable time and, in relation to his asserted complaint of Race Discrimination, let it be assumed that the claim form fell to be read as disclosing such a complaint, that it was just and equitable in the circumstances for time to be extended to the date of first submission of the form  
30 23<sup>rd</sup> March 2023.

- 5 67. While accepting that the claimant's impairments of dyslexia and dyspraxia would be factors which would have made it more difficult for the claimant to complete and submit his claim form than for a person who did not have to contend with his impairments, given the length of the delay and the primary and substantial reason disclosed by the claimant in evidence for the delay, the claimant's impairments fell to be regarded, in the circumstances, as neutral factors in the case.
- 10 68. The claimant had confirmed in evidence that the principle reason for his late submission was his mistaken interpretation of what the ACAS Conciliation Officer had said to him in terms of which he formed the view that the effect of early conciliation was to further extend the primary time limit as first extended by an additional 3 months from the date of issue of the ACAS Certificate. He submitted that the claimant's evidence could not support a Finding in Fact that the ACAS Officer had made any such statement to him or anything from which that might reasonably be inferred. He separately submitted it was wholly unlikely that an ACAS Officer would say such a blatantly wrong thing to any party, and he invited the Tribunal to reject as wholly speculative the claimant's contention that such causal connection existed.
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- 25 69. Although the claimant could have checked the accuracy of his interpretation or impression, by accessing the internet and although it appeared on his evidence that he had already obtained information from the internet about time limits, he consciously chose not to do so deciding rather to rely upon his own misinterpretation.
- 30 70. In short, ignorance of the law was not an excuse and, in any event in the circumstances disclosed the claimant's ignorance or more accurately his wrong interpretation of the law was not reasonably formed or held.
71. The other matters which he had referred to; the discharge of his professional duties as a Social Worker, his alleged ill health at or around the time of his suspension in September of 2022, the death of his father earlier in June of

that year, etc, were all matters that had not prevented him from progressing his engagement with the SSSC in relation to the incident of 2<sup>nd</sup> September, or from discharging his duties as a Social Worker, and or from travelling to Nigeria at the turn of the year, all events and occurrences which took place and with which he had time to engage within the primary extended statutory period during which had he chosen to do so he could have also timeously submitted his ET1.

72. To put the matter beyond doubt, the claimant had confirmed in evidence that but for his misinterpretation of the law regarding time limits, he would have and could have submitted his claim form within the extended statutory period.

73. He had also confirmed in evidence that as at the date of receipt of the Early Conciliation Certificate he had all the information he needed to complete his form. He had composed his form within about a month of that date and could have composed it within a day or two had he known that he needed to. Likewise, he had confirmed in evidence that whereas he was waiting for his cousin to become available to proof read the document, had he known that he needed to submit it earlier he could have and would have paid to have it proof read by someone else.

74. It could not be submitted in those circumstances, or held established in fact, on the evidence presented, that it was not reasonably practicable for the claimant to have submitted his complaint of Unfair Dismissal in time and he invited the Tribunal to decline to extend time under section 111(2)(b).

75. Regarding the asserted complaint of Race Discrimination the respondent's representative accepted that the different test applicable in that case, of whether the Tribunal considered it "just and equitable" in the circumstances to extend time, was one under which the Tribunal had a greater and a wide discretion.

76. In his submission, however, the asserted, but in truth non, complaint of Race Discrimination boldly asserted in the ET1 was one which was without merit.

The same in that although the claimant had ticked the boxes at section 8.1 of the ET1 signifying that he was complaining of Race Discrimination, there was absolutely nothing in the paper apart Particulars of Claim or elsewhere in the form, about race. Nor was there anything contained in the Particulars of Claim, or the form, from which any inference of Race Discrimination could objectively be drawn by the respondents or by the Tribunal.

77. In these circumstances the respondent's representative submitted that it would not be just and equitable to extend time in respect of what was in effect a non complaint of Race Discrimination and in respect of a complaint which would remain a non complaint as at the date of first presentation if time were to be extended. That was a factor that the Tribunal was entitled to and ought to take account of in applying the just and equitable test.

78. For that reason in addition to those prayed in aid of the non extension of time in respect of the Unfair Dismissal claim, the respondent's representative urged the Tribunal to decline to extend time in terms of section 123(1)(b) of the EqA the apparent but in reality non complaint of Race Discrimination.

## **Summary of Submissions for the Claimant**

79. In response, the claimant submitted as follows:-

(a) That his conditions (dyslexia and dyspraxia) have a huge impact upon his life

(b) That when he ticked the box for Race Discrimination he was proceeding on the assumption that a first submission of the ET1 was just a document in which he required to give an account of what had happened, just a broad account about what led to his dismissal and that he could add other matters at a later point about his relationship with the respondents if he chose to.

(c) He had subsequently put in his Agenda return some information about Race Discrimination and had done so because of what he considered to be the helpful pro forma layout of the Agenda form which went through a number of matters asking him various questions on consideration of which he was prompted to add information and or give notice of other claims that he had decided, after he had submitted his form, he would now like to include.

80. With regards to the lateness of his submission of the ET1, he stated that he had not deliberately allowed the ET1 to be submitted late. He had thought that he had an additional 3 months from the date of the Early Conciliation Certificate. He had considered that his claim form although drafted by him on or around the end of January 2023, required to be proof read but, because of his mistake about the time limit, he didn't feel pressured to achieve that and therefore prioritised other matters in his life.

81. Regarding his state of health at or about the time of his suspension he stated that he hadn't gone to the doctor because he didn't wish to take a day off sick and wanted to be strong which he had succeeded in being.

82. He confirmed in submission the position that he had set out in evidence namely, that had he known that the extended time limit would expire on the 25<sup>th</sup> of February 2023 he could have, and would have, had the draft ET1 proof read by someone else and could have and would have certainly submitted his ET1 on time.

83. Regarding the application of the just and equitable test he submitted that if his claims stopped at this point because they were out of time it would be a denial of justice because of the way that he had been treated by the respondents, a denial of justice not only for himself but would be the end of everything that he had laboured for. He submitted that he considered that his career would come to an end if he was not able to challenge his dismissal as unfair in the Tribunal. He said in concluding:- *"In a nutshell I am asking the*



*Tribunal to listen to my complaints and allow me to have a fair Hearing about what happened to me."*

### **The Applicable Law, Discussion and Disposal**

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84. The statutory provisions which encapsulate the Tribunal's power to extend time for complaints of Unfair Dismissal and complaints under the Equality Act 2010 are to be found, respectively, in section 111(2)(b) of the Employment Rights Act 1996 ("the ERA") and in section 123(1)(b) of the Equality Act 2010 ("the EqA"). Those provisions are in the following terms:-

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#### ERA

#### **"111 Complaints to employment tribunal**

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(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

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(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

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(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.

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(2A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a).

(3) Where a dismissal is with notice, an employment tribunal shall consider a complaint under this section if it is presented after the notice is given but before the effective date of termination.”

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EqA**“123Time limits**

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—

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(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

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(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

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(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

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(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;

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(b) failure to do something is to be treated as occurring when the person in question decided on it.”

85. In relation to extension under section 111(2) the Higher Courts have indicated that the meaning of the words “reasonably practicable” in section 111(2) lies somewhere between reasonable on the one hand and reasonably physically capable of being done on the other. The best approach is to read “practicable” as the equivalent of feasible and to ask “was it reasonably feasible” to present the complaint to the Employment Tribunal within the relevant 3 month period, as extended, where applicable, by the operation of the early conciliation provisions. (**Palmer and Saunders v Southend on Sea Council** [1984] IRLR 119 CA)
86. Whether it was reasonably practicable, in any case, for a complaint to be presented in time is an issue of fact for determination by the Employment Tribunal. Taking all the circumstances of the given case into account, the Tribunal should consider; the substantial cause of the employee’s failure to comply with the statutory time limit, whether he has been physically prevented from complying with the limitation period, for instance by illness or a post strike or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal. In some cases the Tribunal may have to consider whether there were any misrepresentations about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; of the extent of the advisor’s knowledge of the facts of the employee’s case; and of the nature of any advice which they may have given him. It is also relevant for the Employment Tribunal to consider whether there was any substantial failure on the part of the employee or his advisor which led to the failure to comply with time limits. The mere fact that an employee was pursuing an internal appeal does not mean that it was not reasonably practicable for an unfair dismissal application to be made in time (**Palmer and Saunders v Southend on Sea Borough Council**). There is no presumption in favour of an extension of time under section 111(2)(b) of the ERA, or under section 123(1)(b) of the EqA. In respect of a complaint of Unfair Dismissal the onus of proof sits squarely with the claimant to satisfy the Tribunal, on the

preponderance of the evidence and on the balance of probabilities, that it was not reasonably practicable for an ERA 96 complaint to have been timeously lodged.

5 87. As the Tribunal has found in fact, on the oral and documentary evidence presented, the claimant has failed to discharge the burden of proof in respect of the section 111(2)(a) ERA test. The evidence presented is insufficient to sustain a finding in fact that it was not reasonably practicable and the Tribunal accordingly holds that as at the date of its first presentation the  
10 claimant lacked Title to Present and the Tribunal lacks Jurisdiction to Consider his complaint of Unfair Dismissal, by reason of time bar.

88. The complaint of Unfair Dismissal falls to be dismissed for want of Jurisdiction.

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#### **Extension of Time under section 123(1)(a)**

89. The test incorporated in section 123(1)(b) of the Equality Act 2010, the “just and equitable” test is a less strict test than that encapsulated in section  
20 111(2)(b) of the ERA.

90. The Employment Tribunal has a very wide discretion in determining whether or not it is just and equitable to extend time under the Equality Act 2010 saving provisions. Notwithstanding, time limits are exercised strictly in  
25 employment cases. When Tribunals consider that discretion to consider a claim out of time on just and equitable grounds, there is no presumption that they should do so unless they can justify failure to exercise the discretion. On the contrary, a Tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable to extend time. The exercise of  
30 discretion is thus the exception rather than the rule (**Robertson v Bexley Community Centre** [2003] IRLR 434 CA).

91. Bearing in mind that the purpose of the legislation is to extend rights and not restrict them, the provisions of section 123(1)(b) should be given a purposive construction.
- 5 92. Factors which are almost always relevant to consider when exercising any discretion to extend time and which are relevant in the instant case, are:-
- (a) The length of and reasons for the delay and
  - 10 (b) Whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).
- 15 93. Whether there is any explanation or apparent reason for the delay, and the nature of any such reason, are relevant matters to which the Tribunal ought to have regard.

#### **Factors relevant in the instant case**

- 20 94. The exercise of what is a wide discretion, by the Tribunal, involves a multifactorial approach.
95. An extension of time will not automatically be granted simply because it results in no prejudice to a respondent in terms of a fair trial.
- 25 96. If a claim is brought out of time it is for the claimant to show that it's just and equitable for the extension to be granted.
- 30 97. When deciding whether or not it is just and equitable to extend time for presentation of a discrimination complaint, the merits of the complaint do not require separate consideration but are part of the exercise of balancing the prejudice likely to be suffered by the respective parties should time not be extended.

- 5 98. As the Tribunal has found in fact, the substantial reason for the delay of presentation of the Equality Act 2010 complaint was the claimant's misinterpretation regarding the effect of the application of the early conciliation provisions set out in section 140B(3) of the Equality Act 2010, upon the time limit. On the evidence presented the claimant was unable to establish any causative connection between what was said on the one hand by the Conciliation Officer to him and his misinterpretation of the law, nor that objectively viewed it was reasonable for him to have formed the view that he did.
- 10
- 15 99. Taking the claimant's evidence at its highest it is speculation on his part that his misunderstanding arose in some way out of a telephone conversation which he had with an ACAS Conciliation Officer on or about either the 23<sup>rd</sup> of January or the 25<sup>th</sup> of January 2023, that is to say as at a date still substantially within the extended statutory time period and at a time where there was no insurmountable practical factor which prevented the claimant from raising his complaint timeously. The claimant confirmed in evidence, and the Tribunal has found in fact on that evidence, that had the claimant been aware as at the date of receipt by him of his Early Conciliation Certificate, that his interpretation/impression that the time limits have been
- 20 extended by a further 3 months was an erroneous impression, he could have and would have lodged his ET1 timeously.
- 25 100. What is sought by the claimant in the instant case is an extension of time to the date of first presentation of his claim form ET1 that is, to 23<sup>rd</sup> March 2023, for the presentation and consideration by the Tribunal of the complaint of "race discrimination" encapsulated in the ET1 as at the date of its presentation.
- 30 101. The Tribunal has found in fact that the claimant's initiating Application ET1 contains no recognisable complaint of race discrimination. As the EAT made clear in the case of **Marker v Commissioner of Police of the Metropolis** UKEAT/0201/09, it is insufficient for the purposes of incorporating a claim

within the initiating form for a claimant to only tick a box on the ET form if no particulars of that claim are provided.

- 5 102. Again, as the Tribunal has found in fact that is the position pertaining in the instant case with the effect that the claimant's initiating Application ET1 contains no recognisable complaint of Race Discrimination in respect of which time could competently be extended.
- 10 103. Taking a multifactorial approach and considering the case in the context of its particular circumstances including the reason and explanations for the delay given the Tribunal is not satisfied that it would be just and equitable to extend time, to the date of first presentation of the ET1, 23<sup>rd</sup> March 2023, in respect of an "apparent" but in truth non complaint of race discrimination which would remain such as at the date to which it is sought that time be extended. To do  
15 so would have the effect of placing the respondents in the position of requiring to respond to a claim (an apparent but in truth non claim) which cannot be responded to. On the findings in fact made, there being no complaint of Race Discrimination contained within the ET1, the Tribunal's discretion to extend time in terms of section 123(1)(b) of the EqA is not  
20 competently engaged. Separately on the evidence presented and on the submissions made the Tribunal cannot be satisfied that it would be just and equitable, in the circumstances, to do so. Nor would it be consistent with the Overriding Objective to so extend time; And the Tribunal declines to do so.
- 25 104. As recorded in the Tribunal's Findings in Fact, on the 16<sup>th</sup> and 17<sup>th</sup> of April 2023 the claimant communicated to the respondent's representative and to the Tribunal within a "Preliminary Hearing Agenda" a potential intention to seek to introduce information about a complaint of race discrimination and of identifying, as potential additional complaints which he may also seek to  
30 include, a potential complaint of "victimisation" and of "discrimination arising from disability". None of those potential putative complaints, that is to say; a complaint of race discrimination and or of victimisation and or of disability arising from discrimination [none of those putative complaints] is contained within the initiating Application ET1. If brought forward in accordance with the

Rules they would form new causes of action depending upon proof of additional facts not given notice of in the ET1 and would require to be the subject of an Application for Leave to Amend. No such Application was before the Tribunal as at the date of Open Preliminary Hearing and accordingly, although identified as potential complaints in the course of Case Management conducted at the outset of the Hearing any such potential claims fall outwith the scope of the Open Preliminary Hearing and of this Determination.

105. Any Application for Leave to Amend in respect of the terms of a Proposed Amendment, if considered procedurally competent, will require to be evaluated upon a consideration of all relevant factors, including that of time bar, and upon the balancing of relative injustice and hardship in accordance with the “**Selkent**” principles, the introduction of any such Application for Leave to Amend being effectively equivalent to the presentation of a new Form ET1 as at the date of the making of the Application.

**Employment Judge: J d'Inverno**  
**Date of Judgment: 30 June 2023**  
**Entered in register: 30 June 2023**  
**and copied to parties**

I confirm that this is my Judgment in the case of **Adewusi v Ark Housing Association Ltd** and that I have signed the Judgment by electronic signature.