RM/MF

THE EMPLOYMENT TRIBUNALS

Claimant: **Mr A Hannan**

Respondent: **Mercedes-Benz Retail Group Limited**

Heard at: **East London Hearing Centre**

On: **18 July 2019**

Before: **Employment Judge Jones**

Representation

Claimant: Ms S Chan (Counsel)

Respondent: Mr P Wilson (Counsel)

JUDGMENT ON PRELIMINARY HEARING

1 The complaints of disability and race discrimination were not presented within the relevant time limit (the date of the last act complained of being 14 September 2018 and the claims being issued on 29 January 2019). These complaints were not part of a continuing act.

2 It is just and equitable to extend time. The Tribunal can consider the complaints of disability and race discrimination.

3 The Claimant has leave to amend his claim to include a complaint that his dismissal was contrary to section 103A Employment Rights Act 1996 because the reason or the principal reason was that he had made protected disclosures.

4 The Claimant's application to amend his claim to add a complaint Tribunal that his dismissal was for something arising in consequence of his disability, specifically not keeping up with his excessive workload; is refused.

5 Case Management Orders are set out below for the further conduct of this matter to a final hearing.

REASONS

1 The Tribunal apologises to the parties for the late promulgation of this judgment and reasons. This is due to pressure of work on the Judge and her ill-health.

2 This hearing was to consider whether the Tribunal had jurisdiction to hear his complaints given the time limit issues involved and also to consider the Claimant's application to amend his claim.

3 At the preliminary hearing in May EJ Ross decided that the Claimant's existing complaints were of direct disability discrimination, disability discrimination by failure to make a reasonable adjustment, disability discrimination by harassment, race discrimination by harassment and direct race discrimination. The Claimant had ticked unfair dismissal in his claim form but EJ Ross determined that the allegation of discriminatory dismissal under section 15 Equality Act 2010 and of automatic unfair dismissal under section 103A of the Employment Rights Act 1996 (ERA); which the Claimant included in his List of Issues had not been pleaded in the ET1 or in the Grounds of Claim and would therefore need to be subject to an application to amend before they could be considered as part of his claim. The Claimant had not worked for the Respondent for the minimum period (2 years) set out in section 108 ERA, which meant that he could not exercise the right not to be unfairly dismissed, which is set out in section 94 of the same Act.

4 This Tribunal therefore had to consider whether the Claimant can proceed with his discrimination complaints as they were issued out of time and whether he can amend his claim form to add the following: -

a. A complaint of automatic unfair dismissal under section 103A Employment Rights Act 1996; and

b. A complaint under section 15 Equality Act 2010 that the Respondent treated the Claimant unfavourably by dismissing him for not being able to cope with a workload alleged to be excessive.

5 The Claimant gave evidence and the Tribunal had a bundle of documents as well as cases submitted by the parties.

6 The Claimant agreed at the start of the hearing that both his unfair dismissal complaint and his complaints of race and disability discrimination had been presented out of time.

7 The discrimination complaints had been filed approximately 21 days late as they ought to have been filed by 8 January 2019.

8 The dismissal complaints were submitted on 15 May and were therefore 177 days out of time as they should have been brought by 12 November.

Law on time limits – discrimination complaints

9 In relation to the discrimination complaints, the time limits are set out in section 123 of the Equality Act 2010. Subsection (1) states that proceedings on a complaint may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or subsection (b) some other period as the employment tribunal thinks just and equitable.

10 The starting point for the tribunal is that the presumption is against an extension of time as time limits are to be strictly applied in the employment tribunal. (Auld LJ in the case *of Robertson v Bexley Community Centre* [2003] IRLR 434). He stated that it was for the Claimant to show good reasons why exceptionally, time should be extended in their favour. Mr Wilson for the Respondent reminded the Tribunal that the exercise of the discretion by the court is the exception rather than the rule and that in the main, time limits should be enforced and maintained.

11 The Claimant relied on the case of *The Department of Constitutional Affairs v Jones [2007] EWCA CIV 894* in which there was a discussion on the guidance in the case of *British Coal v Keeble* [1997] IRLR 336 EAT. The tribunal considered the following five factors: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had cooperated with any requests for information; (d) the promptness with which the claimant had acted once he or she had known of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she had known of the possibility of taking action. The Court of Appeal stated that the guidelines expressed in *Keeble* were a valuable reminder of factors which may be taken into account. Their individual relevance depends on the facts of the particular case.

12 The Claimant referred the Tribunal to the case of *Accurist Watches v Wadher UKEAT/0102/09/MAA*. In that judgment, the Employment Appeal Tribunal stated that it would be good practice for a tribunal, having gone through the checklist of factors such as that provided in *Keeble* to stand back and identify what in the end had been the decisive factors in the conclusion which the tribunal has reached.

13 As Mr Wilson submitted during the hearing, it is only if the Tribunal extends time on a just and equitable basis in relation to the discrimination complaints that it can then proceed to consider whether to allow the Claimant to amend his claim and include the complaints of automatically unfair and discriminatory dismissal contrary to sections 103A Employment Rights Act 1996 and 15 of the Equality Act 2010.

Law on amendments

14 The balance of injustice and hardship test is set out in the case of *Selkent Bus Co v Moore* [1996] ICR 836 which was an EAT case in which the tribunal had to decide on a proposed amendment seeking to add a new cause of action and new facts to an existing claim. The EAT set out general practice and procedure governing the approach a tribunal should take when considering amendments to existing claims. Mummery J stated that the relevant circumstances to be taken into account by the tribunal in balancing the injustice and hardship of allowing the amendment as against

refusing it includes; the nature of the amendment, the applicability of time limits whether there should be any extensions and the timing and manner of the application.

15 The "nature of the amendment" requires the tribunal to consider whether the claimant seeks to add new facts to existing allegations or to put new labels on facts already pleaded i.e. whether it is simply a re-labelling exercise; or whether the claimant is making entirely new factual allegations which change the nature of the existing claim. The tribunal needs to consider whether the amendment sought is minor or represents a substantial alteration, pleading a new cause of action.

16 The Respondent submitted that it would also be pertinent in relation to the complaint of automatic unfair dismissal to look at the issue of whether it was reasonably practicable for the Claimant to have issued his claim in time.

The Law on time limits – Unfair Dismissal

17 Section 111 (1) of the Employment Rights Act 1996 (ERA) gives a former employee the right to bring a complaint of unfair dismissal against his former employer. Subsection (2) states that an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal –

(a) Before the end of the period of three months beginning with the effective date of termination, or

(b) Within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to have been presented before the end of that period of three months.

18 Section 207B (3) of the ERA deals with the effect of the ACAS conciliation process on the statutory time limits for bringing claims. It states that in working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. Subsection (4) states that if a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

19 Subsection (5) states that where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

20 In relation to its assessment of whether it was 'reasonably practicable' for an unfair dismissal claim to have been brought it time, the Tribunal was referred to the case of *Palmer v Southend-On-Sea Borough Council [1984] IRLR 119.* In that case, Lord Justice May referred to the Court of Appeal decision of *Walls Meat Co Ltd v Khan* [1979] ICR 53 in which this concept was discussed. Lord Justice Brandon stated *"The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits such performance. The impediment may be physical, for instance the illness*

of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable". It was the Claimant's submission that his mental illness, depression and anxiety was sufficient impediment to prevent him and did prevent him from issuing his complaint on time.

21 The Claimant also referred to the case of *Marks & Spencer v Williams-Ryan [2005] EWCA CIV 470* which was also a Court of Appeal case related to a complaint of unfair dismissal. In that case the claimant had been given incorrect advice by her former employer and because of that and an omission from the advice she received from the Citizens Advice Bureau (CAB), she was of a mistaken belief as to when the time limit would expire for submitting her complaint. In that judgment, the Court of Appeal stated that section 111(2) of the Employment Rights Act 1996 (ERA) should be given a liberal interpretation in favour of the employee. The judgment also referred to Lord Denning's statement in *Wall's Meat Co v Khan* that the question could be simply put this way: "*Had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights – or ignorance of the time limit – is not just caused or excuse, unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault and he must take the consequences".*

22 The Court of Appeal in *Palmer* concluded that the liberal construction of the relevant clause was easier to state than to apply in practice and proposed a test of 'reasonable feasibility'.

23 Some possible factors that the tribunal may wish to consider when dealing with a question of whether it had been reasonably feasible/reasonably practicable to have issued in time were listed by May LJ in that case such as the manner of, and reason for the dismissal; whether the employer's conciliatory appeals machinery had been used; the substantial cause of the claimant's failure to comply with the time limits; whether there was any physical impediment preventing compliance, such as illness, or postal strike; whether, and if so when, the claimant knew of his rights; whether the employer had misrepresented any relevant matter to the employee; whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his advisor which led to the failure to present the complaint in time.

24 In the case of *Shultz v Esso Petroleum Ltd [1999] IRLR 488* the claimant had been dismissed for long term absence due to his depression and the question was whether it had been reasonably practicable for him to have presented his claim in time in circumstances where although he was physically capable of giving instructions to his solicitor for the first 7 weeks of the three-month period, he was too ill to do so for the last six weeks. The matter reached the Court of Appeal in which it was stated that the tribunal failed to consider the surrounding circumstances and the end to be achieved in the particular context of the case. It was not correct to give a period of disabling illness at the end of the period similar weight as the delay at the beginning of the three-month process while the claimant tried to appeal in order to avoid litigation. The overall period

is to be considered although attention will in the ordinary way, focus upon the closing rather than the early stages of that period of time.

25 If the tribunal considers that it was not reasonably practicable for the claimant to have issued in time, the claimant is expected to make the application as quickly as possible once the obstacle that has prevented him from making the claim in time, has been removed. The length of time that will be permitted will depend on the circumstances. In *Walls Meat Co Ltd v Khan*, the claimant took a further four weeks after he discovered the error in his understanding as to how the Industrial Tribunal process worked before he presented his complaint. This was held to be a reasonable time, considering the fact that the period straddled the two-week Christmas break which meant that the claimant found it difficult to find a solicitor to deal with the matter.

26 In *Biggs v Somerset County Council [1996] IRLR* the Court of Appeal stated that it was not just the claimant's difficulties that had to be considered but also the prejudice to the respondent as an extended period of time may be unreasonable if the employer were to face difficulties of substance in answering the claim.

27 Generally, the question of what is or is not reasonably practicable is essentially a question of fact for the tribunal to decide. The tribunal must address its mind to the question of reasonableness and practicability and not simply state that it had a discretion to extend time. It must make a precise finding of the nature of the complaint in question and the relevant starting date of the limitation period governing it before proceeding to consider whether an extension of time is appropriate.

28 After hearing evidence from the Claimant, the Tribunal drew the following conclusions.

Findings of fact

The Claimant's mental health

29 The Claimant has suffered from depression and anxiety since 2010 following an accident at a different place of work. He was described in Dr Ravi Shah's letter dated 19 July 2017 as having a diagnosis of Post-Traumatic Stress disorder, anxiety and persistent depressive disorder. The Claimant was referred to the local psychological therapies service for counselling in 2017 as he was having several panic attacks per day.

30 In March 2018 at a depression review at the GP, it was recorded that the Claimant had a history of anxiety and depression and that he had been unable to sleep over the past few weeks. He was having a lot of stress with a manager at work and could not face going in to work. He was worried about conflict at work and reported hearing voices. He was not experiencing thoughts of self-harm or harm to others and was eating okay.

31 His GP notes also contain a few entries noting that he had a habit of failing to attend the surgery for appointments. His evidence was that one of the symptoms of his condition was that he sometimes failed to attend appointments which resulted in him

missing out on the services or assessments that would have assisted him in addressing his mental ill-health. There are failed appointments noted on his GP notes in January, March, April and May 2018.

32 There are also three appointment letters showing that appointments had been made for him to see a psychiatrist in April/May 2018, all of which he failed to attend. It is likely that this was a symptom of his mental ill-health.

33 He received 17 sessions of cognitive behavioural therapy (CBT) which started sometime in the beginning of 2018 and ended around 31 May 2018 as he had just started working for the Respondent and found it difficult to arrange appointments outside of work time. He also did not want to start a new job by asking for time off to attend therapy sessions during office hours. The discharge letter from the clinical psychologists confirmed that the Claimant had been experiencing moderately-severe levels of depression at the start of their work together and that his scores remained relatively high throughout the sessions. It was noted that the sessions ended prematurely as the Claimant had secured new employment and wanted to focus on that. They worked on some strategies that he could use in the future if he found himself faced with triggering situations again. He was not discharged from the CBT sessions because he was no longer suffering from depression.

34 The Respondent has conceded the issue of disability and agrees that the Claimant was a disabled person for the purposes of the Equality Act 2010 at the time of his employment.

35 In the letter to the Claimant's GP the treating psychologist confirmed that the Claimant should be re-referred to a psychiatrist as it was likely that he would benefit from that support and that an appointment should be made to review his medication with him.

36 The treating psychologist confirmed that the Claimant had a habit of missing appointments and that what she had found that worked was that if he was sent a reminder by message to his phone rather than by letter, then he was more likely to attend an appointment.

37 At the time that the Claimant was discharged from the psychological services the Claimant was still suffering moderate to severe levels of depression and anxiety.

38 In December 2018, the Claimant spoke to his GP surgery and asked for a telephone call or text messages to be sent to him to remind him about appointments. The Claimant preferred this to receiving an alert message. There was a note in his records that he had made a complaint about the service he had received from the surgery.

39 The Claimant did have an appointment with a psychologist in June 2018. It was his evidence that the psychologist advised him that he may benefit from seeing a psychiatrist. At the time of this hearing, the Claimant had yet to see a psychiatrist.

40 The Claimant confirmed that some of the entries in his medical notes were made by locum doctors who were not his usual GP and who would not necessarily have known the background to his health and the previous services that he accessed or other facts about his life. That meant that the notes did not always make sense or recorded obviously inaccurate information.

41 An example of that is the entry on 14 February 2019 which referred to the Claimant having started new employment. It was the Claimant's evidence that he did not do so until April 2019. It is likely that the GP was talking a history of the Claimant's condition as the note went on to refer to the employment being for a short period, the Claimant having been dismissed from that employment and that the matter had gone to tribunal. This was a likely reference to the employment with the Respondent, rather than more recent employment.

42 In February 2019, the Claimant was re-referred for CBT. He indicated to the GP that symptoms of anxiety had returned. He referred to his employment with the Respondent and his belief that he had been dismissed unreasonably. The Claimant confirmed in the hearing that he had attended his GP surgery a few times asking to be referred to the psychology team.

43 A GP at the Claimant's surgery, Dr Okun, wrote a letter confirming his condition dated 17 April 2019. The letter confirmed that the Claimant suffers from persistent depressive order, anxiety and PTSD for which he is taking anti-depressants. Dr Okun confirmed that the Claimant is on Mirtazepine at night, Venlafaxine in the morning and Tramadol during the day. It is likely that these are anti-depressants. He confirmed that the Claimant has been on several anti-depressants between January 2018 and when the letter was written. Although there may have been gaps, the Claimant confirmed in the hearing that he had been consistently on anti-depressants since August 2018. Dr Okun referred to the Claimant hearing voices and the constant impact of his anxiety and PTSD. He stated that the Claimant's condition has affected his ability to attend clinic and hospital appointments and that "*given his condition, the Claimant will also default even court deadlines".*

What happened

44 The Claimant's summary dismissal was on 18 July 2018 with immediate effect. The Claimant has made various allegations of discrimination relating to his short employment with the Respondent between 29 May and 18 July 2018.

45 Around 16 July, the Claimant wrote a long letter to the Respondent. The letter is coherent, organised and logical. His letter of appeal against dismissal dated 24 July 2018 was similarly long, spread over 12 pages, went through in detail the allegations of misconduct that had been made against him and set out why he felt his dismissal was unfair. It was also coherent and organised. The Claimant gave a list of the customers to whom he considered he had provided good quality service and who could vouch for him. He referred to examples of the behaviour that he considered to be bullying and/or unacceptable from colleagues that were tolerated by the Respondent and provided a list of the systems that he had learnt or gained experience on while with the Respondent.

46 This accords with his evidence that at the time of his dismissal he was clear that he was unhappy with it and wanted to challenge it as he felt that it was unfair.

47 The Tribunal finds that in the early days following his dismissal, the Claimant was told by his union representative that he had three months less one day in which to issue his complaint. He was clear that he wanted to take up a case, if his appeal against dismissal was not successful. He also read up online about the fact that entering into the ACAS conciliation process stops the clock in terms of time for issuing proceedings. He referred to this in correspondence with the Respondent.

48 In an email dated 13 September, the Claimant confirmed that he had been advised by the union to be very careful about the Tribunal/ACAS deadline as they are very strict and his case could be struck out if he failed to follow it. He was clearly aware of the time limit and wanted to keep within it.

49 It is his allegation that on 14 September, due to his mental ill-health, he asked the Respondent whether it was prepared to allow him to have assistance from a mental health advocate (from the NHS Trust/Mind) with his appeal which the Respondent refused. He alleges that that this was the Respondent's failure to make reasonable adjustment for him. It is also his allegation that on 14 September, the Respondent confirmed that it would not appoint a more senior officer to conduct the appeal but would go ahead with someone on the same level as the previous manager who dismissed him. These are his latest allegations of discrimination against the Respondent.

50 The Claimant was invited to an appeal hearing on 27 September 2018. In contrast to the earlier letters, there was an email written by the Claimant to the Respondent dated 24 September (page 114) in which he referred to the Respondent's recent refusal to give him a copy of its whistleblowing policy. The email was referred to in today's hearing and was a little incoherent in the text and demonstrated that the Claimant's thinking was beginning to be affected by his circumstances and depression and anxiety. It stated as follows:

> *"In order for us to continue with this case, the policy is required as well as your other policies when a complaint is to be heard by ET for point of reference. I believe when my whistleblower's rights was exercised without a policy to hand, unfair treatment was taken place at MB Startford (sic) I now need this policy to comply going forward in my efforts with this statutory right.*"

51 It also demonstrates that as early as September the Claimant had begun to see this as related to him making protected disclosures.

52 On 25 September, the Claimant wrote to the Respondent by email (121) which again demonstrated that he was not thinking/writing as clearly as before. He stated as follows:

> *"I do not believe HR has played a supporting role for me but for the Appeal Officers/Companies defence only as confirmed above by HR statements. I do not therefore have reasonable amount of confidence you will be able to conduct*

> *this in fair & just manner. It is now this shift of responsibility from the company to ACAS to support in this area presently. Please also note it is ACAS guidelines "that internal company processes does not give right to delay engaging/complying and prolonging acas process." For these said reasons, I do not see a direct positive outcome from near future internal company processes. I would therefore recommend you stop any internal process immediately on this matter, which is resourceful time and dedicate this time for the interest of ACAS conciliation. To date, I have not received confirmation, if MBRG is engaging or made reasonable effort to receive contact from ACAS for conciliation. It has now almost 5 days out of 1 month, where this delay is taking place due to HR committing time to internal process of this matter rather than dedicating to conciliation. I want to use early conciliation & remain optimistic about this, but cant see this from the company yet? If you do not want to engage in early conciliation? can you please let me know, so we can inform ACAS and move this along as its been 5 days out of 1 month now?"*

53 These communications from the Claimant show the deterioration in the clarity of his thinking and expression and possibly his mental health around the time of the appeal and immediately thereafter.

54 The Claimant attended the appeal hearing and the minutes of the appeal hearing were in the bundle. He was accompanied by his trade union representative.

55 He stopped using the trade union representative shortly after the appeal hearing as he concluded that the individual representative was known to the Respondent's managers and the HR director. He lost trust in the union representative. He was not in touch with the union when he submitted his claim to the Employment Tribunal.

56 The Claimant contacted ACAS on 20 September 2018 to begin conciliation, which ended on 16 October 2018. His evidence was that the Respondent did not communicate with ACAS and that he found the process to be disappointing.

57 It was his case that around the time that he received the conciliation certificate his mental health deteriorated and he was suffering from anxiety and depression at a level that was worse than ever. He found this difficult to cope with without the support of CBT and he was also dealing with the added consequences of his dismissal in terms of its effect on his finances and his confidence. He submitted that he had been hopeful that the appeal would be successful and he would be reinstated but during the appeal process it became apparent that the appeal was not working and he felt that he had reached a brick wall. It was around that time that he experienced sleep disturbance and stopped socialising, doing individual household tasks and began avoiding people like family friends and going out in public. He also stopped looking after himself as regards personal hygiene.

58 The Claimant remembered receiving the conciliation certificate from ACAS on 16 October by email and he knew that the next step was to issue the claim in the Employment Tribunal. He started to draft the claim about 4 - 5 weeks later. He agreed today that writing out the claim would have required some concentration and focus. It is likely that he found it difficult to maintain that concentration and focus as it took him a

while to complete the grounds of claim which he created as a separate Word document which he then uploaded onto the form.

59 He created an ET1 form online. He remembered saving it a few times before he actually completed it. He remembered having issues with the online form and having trouble to find it again after he had saved it. This included losing the reference number. It is likely that he struggled to complete the ET1 form.

60 His evidence was that after he received the ACAS certificate he did not know when the new deadline was, taking into account that the clock had stopped for a period of time. He was unable to calculate the new deadline, without any assistance and did not have anyone to give him that assistance as he was no longer in touch with the union representative. That created a mental block that he found difficult to get around.

61 As he could not work out what the new deadline was he focussed instead on completing the form and submitting it to the tribunal as soon as he could. He concentrated on completing the form to the best of his ability given the condition of his mental health. He found that to be a difficult process. He did not submit the form until 29 January.

62 His mental health difficulties and the way in which it affected his cognitive abilities can be seen in the ET1 form. He ticked the box to indicate that he was still employed and did not insert a termination date. This was despite the clear decision from the Respondent months earlier that the appeal had failed and that he had been dismissed. The Claimant referred to '*Modern Slavery*' in his ET1 and referred to 'Justice - *To prevail injustice, Truth – To prevail Falsehood'* in the section that asked him for details of the remedy he was seeking by bringing the claim.

63 It was his evidence that he completed the form on the day he submitted it, on 29 January.

64 Around the end of December, the Claimant's GP notes show that they called him to remind him of an appointment but were unable to get him. He emailed the surgery to cancel the appointment. The Claimant's evidence in the hearing was that his GP surgery were thinking of discharge him from the surgery because of the number of missed appointments so he sent an email to stop them from doing that and to keep his place. He did not attend the surgery until 14 February, as already stated above, to ask to be re-referred for psychological therapies. Once the claim was submitted at the end of January he was able to focus on his health again and requested to be re-referred for CBT as he found that to have been the most helpful protocol for him.

65 As far as the whistleblowing complaints were concerned, it was the Claimant's evidence that the substance of his whistleblowing allegations was in the narrative in the Grounds of Claim although he accepted that he had not referred to them in the document as disclosures or as 'blowing the whistle'. He considered that the document was already quite lengthy and thought that he would have an opportunity later on to provide more details. He believed that he had included whistleblowing in his claim form.

66 Once an ET1 claim form is submitted a form is generated on the system which is sent to the person who completed it. It is called '*Check your claim'* and sets out the details that were inserted into the claim form. The system does not allow a claimant to keep a copy of the form he just completed and submitted.

67 In the ET1 form he completed, the Claimant ticked the box that stated *'If your claim consists of, or includes a claim that you are making a protected disclosure under the Employment Rights Act 1996 (otherwise known as a 'whistleblowing' claim), please tick the box if you want a copy of this form, or information from it, to be forwarded on your behalf to a relevant regulator…..'.* Because of that, the '*Check your claim'* form that was sent to him afterwards, stated that his claim included a whistleblowing claim. The Claimant also ticked the '*unfair dismissal'* box but did not provide details of his unfair dismissal complaint in the narrative box.

68 The Claimant submitted on 15 May 2019, in his particulars of protected disclosures that there were 5 alleged disclosures and that they were to be found in paragraphs 2, 3, 5, 6, 16, 46, 57 and 82 of the Grounds of claim.

69 Looking at those paragraphs in detail, the Tribunal finds that: - Paragraph 2 referred to fraud and the alleged practice of signing, by a non-claims administrator*, "on warranty work claiming financial ultimate from a third-party insurance company*". Paragraph 3 referred to *"management instructing/advising team to issue end of month invoices to incorrect accounts for unauthorised transactions; to achieve labour sales target for the previous month thereby creating fabricated labour sales figures and achieving a bonus for branch staff".* Paragraph 5 referred to management indirectly encouraging the team to change customer email addresses so that the positive and negative customer service scores would be misdirected. This it stated would create a false or fabricated customer satisfaction result which could result in staff getting '*unethical'* bonuses.

70 Paragraph 6 contained the Claimant's allegation that staff were encouraged to lie to customers to get good scores over the telephone on feedback calls.

71 In Paragraph 16 he referred to concerns about Health & Safety at work being totally ignored, where there has been breach of H&S, PPE, and a possibility of a COSHH. He stated that this remained an outstanding health concern at the branch.

72 The Tribunal did not have possession of a document with paragraphs 46, 57 or 82 but from the further details provided by the Claimant in his particulars of protected disclosure document, it is likely that those paragraphs referred back to the allegation of fraud in relation to the signing of warranties, which was already pleaded in Paragraph 2.

73 The Claimant relies on a conversation he had on 12 July as the protected disclosure which triggered his suspension and subsequent dismissal. It is on this potential disclosure that his complaint of automatic unfair dismissal would therefore rely. This was apparently a conversation around the issue raised in paragraph 2. The Tribunal did not hear any evidence on whether the parties agreed that there had been a conversation on that day or what had been said during it.

Analysis in relation to the discrimination complaints

74 The Claimant made complaints of disability discrimination by failure to make a reasonable adjustment, Direct disability discrimination, disability discrimination by harassment, race discrimination by harassment, and direct race discrimination by his claim form submitted on 29 January 2019.

75 The last alleged act of discrimination is the Respondent's alleged refusal to allow the Claimant to be accompanied by someone from Mind/NHS Trust at the appeal hearing which the Claimant referred to as having happened on 14 September 2018.

76 Time starts to run in relation to his discrimination complaints from 14 September 2018. He began early conciliation on 20 September; Day A was therefore 21 September. The conciliation certificate was issued on 16 October 2018 which was therefore Day B. There were 26 days between Day A and Day B which added to the primary time limit would make the end of that time limit, 8 January 2019. The Claimant does not get the benefit of the section 207B(4) extension as the revised limitation date is already more than one month after Day B. The Claimant's ET1 complaint form was accepted by the Tribunal on 29 January 2019 making the discrimination complaints 21 days out of time.

77 The Claimant suffered from significant mental impairment during the time following his dismissal and during the time when these claims should have been filed. His condition deteriorated in stages. It was submitted that he should have referred himself to his GP and that as he had less recorded visits to his GP around this time that was proof that he was simply careless about his application. That presupposes that a deterioration in mental health is a linear experience that can be tracked and that a person would be aware of and could catch before it became debilitating. It would appear from the Claimant's experience that it is not so. The Claimant clearly considered that he could manage the claim form on his own but then found it difficult to get his head around completing the Grounds of Claim, navigating the ET1 form and the website and working out the revised time limit for submitting the form.

78 At all times the Claimant wanted either his job back or to bring a complaint at the Employment Tribunal. He was clear about that from the date of his dismissal and asked the trade union representative about it at that time. He remembered that the time limit was for three months, less one day and that is noted in his correspondence with the Respondent.

79 In considering whether it is just and equitable to extend time in this matter, the Tribunal considered the prejudice to the Claimant of not extending time.

80 The Claimant would have nowhere else to take the discrimination complaints if time were not extended. His failure to get the claims in on time relate to significant deterioration in his mental health at the time of the failure of his appeal and the ending of the ACAS conciliation process.

81 The Tribunal also considered that the prejudice to the Claimant outweighs that to the Respondent in allowing the claims to go ahead as since the Respondent has

known about these since the grievance was issued, although there would be prejudice as it would have to defend claims it otherwise would not have, that is outweighed by the prejudice to the Claimant. The Tribunal is not able to assess the strength of the complaints because we did not go into the allegations themselves at the hearing.

82 It was not that the Claimant did not know that he had a cause of action because he knew and was acutely aware of the comments that he says were made in the office and the Respondent's treatment of him which he considers to be discriminatory. The difficulty was the mental impairment which he suffered from and which is likely to have worsened at the time of his dismissal and upon receipt of the notification of the appeal outcome and the failure of the ACAS conciliation process. It is likely that this why the claims were issued late rather than any deliberate failure on his part to pursue his complaints or of him being reckless in completing forms on time. The Claimant did take action. He began to complete the ET1 form a few weeks after receipt of the conciliation certificate in October. He was not laid back about it. It was not simply a case of him failing to take action. It was that, given his difficulties with thinking clearly, understanding, cognition and his lack of knowledge in terms of the time limits, his low mood, lack of sleep, anxiety and medication - he found it extremely difficult to take action in a timely manner.

83 Therefore, in this Tribunal's judgment, considering all the relevant factors and in particular, the Claimant's mental ill-health at the end of 2018; it is just and equitable to extend time to allow the disability and race claims to be considered.

Amendment application

84 The Tribunal then proceeded to consider whether the claim should be amended to allow the Claimant to add complaints that his dismissal was automatically unfair contrary to section 103A of the Employment Rights Act because it was on the ground or principally on the ground that he made protected disclosures and/or for something arising in consequence of his disability, specifically, not keeping up with his excessive workload.

85 Firstly, was it reasonably practicable that he could have brought the section 103A claim in time?

Analysis – Dealing firstly with the complaint of unfair dismissal

86 It is clear to this Tribunal that the Claimant has been unwell and suffering from mental health impairment since 2010. The Claimant was finally diagnosed with PTSD, persistent depressive disorder and anxiety and was in receipt of CBT which was helping him in late 2017/early 2018. That came to a premature end when he secured employment with the Respondent in May 2018.

87 Unfortunately, symptoms of his condition re-emerged or became more pronounced during this employment and it is likely that those increased on his dismissal. The Claimant was able to advocate for himself as part of his appeal – with the assistance of his union representative - and also while at work and during his dismissal. That suggests that his mental health was better at that time. He had what

turned out to be false hope that his appeal would be successful and/or that the ACAS process would result in his returning to work. When neither of those were successful, his mental health deteriorated and contributed to his confusion about the revised deadline for issuing his claim and even thinking through the process of getting assistance with working that out. He did not have any assistance and felt unable to access help, which resulted in him struggling to complete his ET1 form for around three months. At the end of that period, on 29 January 2019, his claim was submitted to the tribunal service.

88 The delay in the claim being submitted stems from the Claimant's mental ill-health. In relation to the automatic unfair dismissal complaint – the issue is that having ticked the box to indicate that he wanted to complain about unfair dismissal and that he wanted his claim form sent to the authorities dealing with whistleblowing claims and having raised the issue of whistleblowing with the Respondent in correspondence, he failed to refer to '*whistleblowing'* in the narrative of the Grounds of claim.

89 However, the Grounds of complaint do refer to the substance of the disclosures he now relies on although they are not labelled as such. It was submitted on his behalf that he was likely under the impression that he had made a whistleblowing claim. It is likely that he considered that the reference to fraud in paragraph 2 of the Grounds of Claim and ticking the box to indicate that the form should be sent to the authorities were sufficient to raise the claim.

90 However, in the claim form he does not refer to speaking to anyone. He makes no allegation that he made a disclosure on 12 July. That is a detail provided in the particulars provided on 15 May 2019.

91 Looking at the factors identified in *Keeble* it is this Tribunal's judgment that the Claimant had not been misled by the Respondent and had been in no doubt of the date of his dismissal or that his appeal and the ACAS conciliation process had failed. He knew that he wanted to bring a complaint alleging that his dismissal was related to him blowing the whistle as he had already asked the Respondent for the policy and considered that the Respondent had taken against him for raising the issue while at work. In his correspondence with the Respondent he referred to the close proximity of his suspension after the last alleged disclosure of 12 July.

92 The Claimant was always aware of the three-month deadline and had been so aware from the date of his dismissal. He initially sought advice from the union but did not seek advice thereafter.

93 Allowing this amendment would not be simply a relabelling exercise. Further details would be required to paragraph 2, 3, 5, 6 and 16. The complaints the Claimant wants to bring are very different to his existing claims as there is a different statutory basis for them. As the Claimant had not been employed for 2 years with the Respondent, the Tribunal would not have considered his dismissal with the claim as presently drafted. Allowing this amendment would require the Tribunal to have to determine whether there had been protected disclosures and if so, whether the dismissal was on the grounds of any of those disclosures.

94 As already stated, the Claimant initially delayed issuing the claim as he was pursuing his appeal with the assistance of the union and hoped that it would be successful and he would regain his employment with the Respondent. He was keen to get his job back. At the time that he pursued his appeal against dismissal and entered into the ACAS conciliation process, he was hopeful that he would be able to return to his employment. When it became clear that he would not be allowed to return to the Respondent he found this difficult to accept. He had devoted all his time and effort to resolving the situation with the Respondent. Once he was realised that that was never going to happen, his evidence was that his state mind at the time became really negative and that he did not have a lot of positive in him or around him at the time. I conclude that his mental ill-health deteriorated further once his appeal against dismissal failed and the ACAS process failed to reach a compromise which would have seen him returning to work.

95 Dr Okun commented on the effect of the Claimant's deteriorating mental health on his ability to meet deadlines and to keep appointments. This effect can be seen in his inability to get his head around the revised deadline for issuing his claim form.

96 It is likely that at the beginning of the three-month period following the date of his dismissal he was keen on returning to work and possibly optimistic about that. He would have been less so towards the end of the period. The appeal outcome was given to him by letter dated 27 September 2018. He then pinned his hopes of returning to work on the ACAS process. Once that failed in October, the Claimant would have been clear that there were no further processes that could see him return to work for the Respondent and that adversely affected his mental health further. It is likely that his depression worsened and he was unable to complete the remaining tasks of completing his ET1 and submitting it within the time limit.

97 Even when he did submit his ET1, he did not indicate clearly that he wanted to bring a complaint of whistleblowing and that his dismissal was automatically unfair because of his making protected disclosures.

98 As already stated, the Claimant's ET1 complaint form was accepted by the Tribunal on 29 January 2019 but although the unfair dismissal box was ticked an identifiable unfair dismissal complaint was not made out until the Claimant submitted the application to amend to allege automatic unfair dismissal in breach of section 103A Employment Rights Act on 15 May, 178 days out of time.

99 Since it is more likely than not that the Claimant was suffering from significant mental impaired during the period of October to January, it is this Tribunal's judgment that it was significant enough to make it difficult for him to have issued his automatic unfair dismissal claim within the revised time limit which ended on 8 January. It would not have been reasonably practicable for him to have done so.

100 The Tribunal had less information from the Claimant on the period January to May 2019.

101 The question for the Tribunal was whether the Claimant should be allowed to amend his claim to include the automatic unfair dismissal complaint.

102 The balance of prejudice would weigh heavily against the Claimant if he were not allowed to bring this complaint as there would otherwise be no consideration of the termination of his employment and how it related to these issues he raised with the Respondent's managers, if indeed he did raise them. The Tribunal makes no judgment on whether they are protected disclosures and we did not discuss in the hearing whether the Respondent accepts that these issues were raised at the time. The Claimant did ask for the Respondent's whistleblowing policy in correspondence so the Respondent would have been aware that he was thinking about whistleblowing sometime before he issued the claim.

103 The prejudice to the Respondent is that it would have to respond to a claim that it had not faced before this amendment. The Respondent will be given time to respond in detail to the complaint as set out in the Claimant's further particulars filed on 15 May 2019.

104 On consideration that the Claimant always intended to bring a complaint of automatic unfair dismissal on the grounds that he had made protected disclosures; that he had been suffering from increased mental impairment at the time that that the time limit expired in January and that he thought he had brought a whistleblowing claim because he had ticked the box and referred to the substance of the disclosures in the narrative of the claim form; this Tribunal grants the Claimant permission to amend the claim to add the claim to add the automatic unfair dismissal complaint.

105 The Tribunal has not considered whether all the alleged disclosures that the Claimant seeks to rely on could or would be disclosures. The main disclosure relied on seems to be that made in the conversation on 12 July. The Respondent will have some time to respond to them. The Tribunal has already stated that it did not have any potential disclosures in paragraphs 46, 57 or 82 of the ET1 Grounds of Complaint but the Respondent will need time to respond to those potential disclosures discussed above and referred to at paragraphs 2, 3, 5, 6 and 16.

Analysis - the section 15 Equality Act 2010 - discriminatory dismissal complaint

106 Unlike the complaint regarding protected disclosures which the Claimant attempted to put in the claim form, there was no hint of the section 15 discriminatory dismissal complaint in the existing claim form.

107 In the claim form the Claimant discussed his concerns about discriminatory comments and practices at the Respondent as well as the practices he saw at work which gave him cause for concern and which he said that he tried to raise with his managers. It is his case that he was dismissed because of raising those concerns.

108 At the hearing before EJ Ross the Claimant submitted that the complaint was contained within paragraph 18 of the Grounds of Complaint attached to the ET1 claim form. That paragraph referred to the Claimant being given around 18 jobs to do, without warning on the day after the Croatia v England football match. He complained that this was done without adequate system training, or adjustment to his display screen and that he had not been allowed a reasonable period of time to get used to a new role. He then went on in paragraph 20 to discuss racism.

109 EJ Ross stated that he found nothing in paragraph 18 that suggested that section 15 Equality Act was being relied on. This Tribunal agrees.

110 I considered the balance of prejudice in allowing or not allowing this complaint to proceed. I considered that if it was not allowed to proceed the Claimant would still have opportunity to have his complaints of discrimination on the grounds of his disability considered by the Tribunal. I considered that the allegation that his dismissal was on the grounds of his disability seemed to be an afterthought as it is not hinted at or referred to even obliquely in his grounds of complaint or in his correspondence with the Respondent after his dismissal. I considered that his complaint that his dismissal was unfair because it was connected or on the grounds that he had made protected disclosures was stronger and although not set out clearly in the ET1 was in his mind at the time he drafted the documents. The section 15 claim does not appear to have been.

111 On this occasion, in this Tribunal's judgment the prejudice to the Claimant is outweighed by that to the Respondent of allowing this complaint to proceed when it is entirely new and not something the Claimant considered until much later.

112 In those circumstances, the application to amend the claim to include it is refused.

113 The Claimant's following complaints will proceed to a final hearing. Complaints of:

a. Disability discrimination by failure to make reasonable adjustment (section 20 – 21 Equality Act 2010 (EqA))

b. Direct disability discrimination (section 13 EqA)

c. Disability discrimination by harassment (section 26 EqA)

d. Race discrimination by harassment

e. Direct race discrimination

f. Automatic unfair dismissal in breach of section 103A ERA

ORDERS

Employment Tribunal Rules of Procedure 2013

1. The parties are to agree a list of issues and send those in to the Tribunal with a list of dates to avoid for the period to 1 September 2020. They are to do this by **15 January 2020**.

2. The Tribunal will list this matter for a 5-day hearing once it has received dates to avoid from the parties. Parties can comment on whether they consider that this is an appropriate listing for this matter.

3. The Tribunal will also list a telephone case management hearing to consider what further case management orders are required to manage this case to the hearing and to make necessary orders.

Employment Judge Jones

Date: 31 December 2019