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EMPLOYMENT TRIBUNALS

Claimant: **Mr E Morris**

Respondent: **Conneely Drylining Ltd**

Heard at: **East London Hearing Centre**

On: **30 November 2017**

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

Representation

Claimant: Mr R Robison (FRU Representative)
Respondent: Miss L Hatch (Counsel)

JUDGMENT having been sent to the parties on 19 December 2017 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1 The ET1 claim form in this case was presented on 30 May 2017. It made claims of direct discrimination because of religion or belief and an unpaid wages or money claim.

2 In essence the Claimant's discrimination claim was made on the basis that he was asked to leave a construction site on which he had been working for three days because he was unable to wear a safety helmet. This would have required him to remove his *efad*, which he wore as an expression of his Rastafarian belief and identity. He also claimed as unpaid the money he had earned in respect of the three days he worked, 25 April to 27 April 2016.

3 His claim was initially rejected by the Employment Tribunal because it was out of time. Later the Employment Tribunal allowed him to present his claim as the primary time limit of 3 months was not an absolute bar.

4 The Tribunal asked the Claimant to provide the ACAS Early Conciliation certificate. He ultimately provided not the certificate but the number and on this basis his claim was allowed to be presented, albeit that the Tribunal indicated to him a certificate was required. It is not the case that the Tribunal has accepted that ACAS mishandled the Claimant's case. Today the Early Conciliation certificate still has not been produced but

the parties wished the Tribunal to hear the time issue and they both agreed that Early Conciliation has occurred in this claim because of the conciliation number that the Claimant received.

5 The Respondent presented an ET3 form and argues that the claims are all out of time. It also argues the Claimant was not a worker or an employee in relation to the events he complains of and it was a legal requirement that the Claimant wore a helmet on its construction site and it was for that reason and that reason alone that he was removed from the site. The Respondent relied on the fact that the only statutory exception to the Personal Protective Equipment Regulations is for turban-wearing Sikhs. The Respondent submits that it offered the Claimant payment of £750 in respect of the work he did but that he had not sent bank details in order for them to pay that money.

6 This Preliminary Hearing was ineffective on 4 October 2017 and on that date Employment Judge Brown set out the issues to be determined. The parties have agreed that I should deal at first with issues 1 – 3:

(1) whether the claims of direct discrimination because of religion or belief, breach of contract and/or deduction of wages claims were brought in time and

(2) if not, would it be just and equitable to extend time in relation to the discrimination claim and would it be reasonably practicable to bring the deduction of wages or breach of contract claims in time; and

(3) if so, by how much time should I extend those claims?

Findings of Fact

7 Having heard the evidence of the Claimant and Mr M Cockerton for the Respondent and having read the documents referred to me in evidence I make the following findings of fact.

8 It is not in dispute that the Claimant undertook painting work at a construction site operated by St George for three days 25 – 27 April 2016. The Respondent was a subcontractor on that site undertaking drylining and interior decoration work. It was a large job: 500 odd residential units. The Respondent subcontracted with large number of different people and organisations during the job. Mr O'Sullivan was the site manager. It was a very busy site.

9 There is no dispute that the Claimant and Mr O'Sullivan entered into an oral agreement on 25 April 2016 for him and his partner, Mr Pond, to do painting and decoration work at the site. Nor is there any dispute that on the third day of that work the Claimant was asked to leave the site because he was not prepared to wear a helmet, which would have required him to remove his *efad*, which was contrary to his religion or belief. The Claimant is Rastafarian and wore an *efad* as an expression of that belief. The *efad,* described in this Tribunal as something like a turban. It was not possible to wear both the *efad* and a safety helmet.

10 Nor is it in dispute that the Claimant is not yet been paid for the work he did on site. The Claimant suggested that he should have expected payment a fortnight after the day he left the site, i.e. 11 May 2016.

11 After he was asked to leave the site on such a basis, the Claimant very quickly went to see his local Citizens Advice Bureau to receive advice about what had happened to him. He had a genuine and significant complaint that he was not able to work on the site because he was not able to wear a helmet and that was because of his religion. This genuine complaint was one, understandably, held by the Claimant, causing him understandable concern and, at the least, upset.

12 The Claimant also very quickly after he was required to leave the site went to a law centre at Wood Green and also an employment agency known as Reeds.

13 By reason of the advice given to him by one of those three agencies, he then contacted Acas in respect of his complaint. The Claimant saw those various advice agencies and contacted Acas before 5 May 2016, which was when he wrote a complaint letter to St Georges the overall contractor on the construction site. It is also clear that Citizens Advice told him that he had a possible discrimination complaint. He was also aware at the time that he left the site of the Respondent's asserted reasons: he was required to leave the site because Mr O'Sullivan said something to him along the lines of "well, Sikhs are allowed not to wear helmets but they are the only ones that are exempted from the rule".

14 There is no evidence before me one way or another whether the Citizens Advice, the Law Centre at Wood Green or ACAS gave the Claimant information about time limits for bringing a discrimination claim. I find it likely, however, that one of those agencies did so because it is simple information to impart and certainly the Citizens Advice, the Law Centre and ACAS have that information as part of their expertise and commonly do provide it to members of the public. Certainly there is no evidence before me that the Claimant was not informed of the relevant time limits.

15 The Claimant wrote a letter of complaint to St George, page 54 of the bundle. His complaint is about religious discrimination and he sought a response to it. Mr Perkins, Head of Health and Safety at St George, sent a two-page response acknowledging the Claimant's frustration and giving a full explanation for the reason why he was asked to leave the site. Mr Perkins indicated it was purely and simply a matter of law, which provides a clear and specific exemption from the mandatory wearing of safety helmets on construction sites applicable to Sikhs only. Mr Perkins stated that he was afraid that was how the regulations currently were and there was no such exemption for any other religious group. He referred the Claimant to the relevant law and to HSE guidance. He acknowledged the Claimant's upset at the end of the letter and observed to the Claimant that his complaint was about the current state of the law and not the enforcement of it.

16 The Claimant then chased both St George's and the Respondent for the money owed to him. Early on, St George's informed him that the Respondent was the relevant contractor to seek that money from. I find therefore that the Claimant knew the Respondent was a possible person to sue soon after he made his complaint to St George in other words in about May or June of 2016. I also find that at that first stage of his contact with Acas in about May of 2016 ACAS informed the Claimant about Early

Conciliation and that, from the oral evidence he gave today, he recalls that they told him they would in touch with the employer and they would get back to him. And they did so a few weeks later.

17 The Claimant also says he was in touch with ACAS much later on, in January 2017, once he saw Haringey Law Centre about his complaints. Haringey Law Centre obtained the certificate number from Acas but the certificate itself had been archived.

18 I find that Early Conciliation happened at the early stage in May or June 2016 not at the later stage in early 2017. This accords both with the Claimant's recollection that he gave in oral evidence and what Haringey Law Centre did to obtain the Early Certification number. Had Early Conciliation happened in January 2017, then the certificate would have been available to Haringey Law Centre and there would have been no difficulty with obtaining it from the archives.

19 I reinforce in this finding of fact because the Claimant refers to ACAS contacting the Respondent on page 61 of his letter to the Respondent and then goes on to say more recently which suggests that Early Conciliation was the first contact with ACAS back in May or June 2016 rather than the later contact in early 2017.

20 The Claimant then says that he spent many months chasing the Respondent by telephone and email for unpaid wages. There are no emails from the Claimant to the Respondent until January 2017 and then only two. I find it likely the Claimant did not chase the Respondent by email in the gap between May 2016 and early January 2017. In his letter at page 60 he only refers to the letter he sent to St Georges in May of 2016 not to any other correspondence or intervening emails. I find it likely that the Claimant pursued his complaint by telephone but not as frequently as he suggested to me in evidence. If it had been as frequent and as constant as the Claimant suggested in his evidence, it is likely that those telephone calls would have come to the attention of Mr Cockerton, the Respondent's Finance Director. He was the head of a small team within the Respondent and had given instruction that any request for payment or claim for payment be brought to his attention. While I can understand one or two telephone calls going astray, the number the Claimant says he made is unlikely given that one at least of those would have come to Mr Cockerton's attention, given the system he had set up to make sure he was informed about such complaints. I do not find the Claimant deliberately misled me about this, but on balance his evidence that he made many calls to the Respondent between May 2016 and early 2017 is wishful thinking.

21 As a result of one call made by the Claimant, Mr Cockerton emailed him asking him to send details of the work he had undertaken in order the payment could be processed. The Claimant then sent a long letter to the Respondent dated 22 January 2017 requesting payments and seeing if any arrangement could be made for more work to be offered to him. The Claimant in that letter referred to his legal representative as Haringey Law Centre. He also referred to his knowledge that he could take his claim further.

22 In the Respondent's email of 23 January they confirmed that, by their calculations, they owe the Claimant £750 for the work he had undertaken and requested his bank details so that they could forward that money to him. The Claimant has not sent them bank details because his calculation of the amount owed to him is greater and he did not

want to be paid a lesser sum until the matter was resolved.

23 The Claimant's ET1 form was presented to the Employment Tribunal on 30 May 2017. There has been no explanation for the further delay in presenting the claim from the time that the Claimant instructed Haringey Law Centre in January 2017. There is no suggestion on the evidence, for example, that the Claimant lawyer's delayed in presenting the form. The Claimant's evidence as to when he filled in the ET1 form, which is in his own handwriting his unsatisfactorily vague. I find it most likely to have been completed shortly before it was presented.

Submissions

24 Both representatives provided helpful submissions to me in writing, which they supplemented orally after the evidence was given and I thank them for their work.

25 The most significant point that was argued orally before me concerned the factors in relation to whether I should extend time for the discrimination claim and both parties acknowledged that the merits of the ultimate claim can be a relevant factor in that consideration. There were two matters in relation to merits that Ms Hatch and Mr Robison made submissions about.

26 First, in relation to the Claimant's status. Under section 39 of the Equality Act, Ms Hatch makes submissions that the Claimant was not a worker: he appeared to have contracted with the Respondent under his business name and not just for himself, but for Mr Pond a worker in that business. In contrast the Claimant argued that Section 41 the contract worker and principal section of Part 5 of the Employment Act might be found to apply.

27 The second issue on the merits that the representatives debated before me was the reason of the Claimant's removal from the site. There is no dispute as to Mr O'Sullivan stated reason, namely that safety helmets were required and only Sikhs were expressly excluded from this legal requirement by statute. But, in submissions, Mr Robison argued that a merits hearing the Claimant could cast doubt on whether that was the real reason for removal because the Claimant had already worked two full days on the site with no safety helmet. The Respondent on this particular issue referred me to Section 23 of the Equality Act and argued that the comparison that the Claimant sought to make under the Equality Act was not one open to him. In a discrimination case you have to compare yourself to somebody in the same or not materially different circumstances. Ms Hatch argued that the Claimant was seeking to compare himself to a turban-wearing Sikh who had the express statutory legal exemption under Section 11 of the Employment Act 1989 for wearing a safety helmet and this meant that the Claimant was not comparing himself to a person who was in the same or not materially different circumstances. Turban-wearing Sikhs had an express statutory exemption and were therefore in a different category to those in the Claimant's religion who did not have the advantage of that statutory exemption.

Law

28 I summaries the legal principles here very simply as they are not really disputed

before me at all.

29 For money claims, section 23(4) of the Employment Rights Act 1996 requires that such claims are brought within three months from the act complained of unless it was not reasonably practicable to do so in which case the Tribunal can extend time for a further period that it considers reasonable. Reasonably practicable means whether it was feasible for the Claimant to bring his money claim within three months from the date on which he expected to be paid. If I find it was not feasible for him to do that then I can extend time but only for so long as I consider it was reasonably feasible to do so.

30 Under section 123 of the Equality Act 2010, discrimination claims must be brought within three months starting with the date of the act to which the complaint relates. I can extend that time if I consider it just and equitable to do so. Just and equitable effectively means fair. I can take into account many factors in relation to my discretion to extend time. No single factor is determinative Mr Robison referred me to *Keeble*, which is a useful starting point. The factors set out in *Keeble* are referred to in his skeleton argument. The first is length of and reasons for the delay. The second is to the extent to which the cogency of the evidence is likely to be affected by the delay. The third, the extent to which the party sued has cooperated with any request for information. The fourth, the promptness by which the complainant acted once he knew the facts giving rise to the claim. The fifth, the steps taken by the Claimant to obtain professional advice once he/she know the possibility of taking action. The parties also agreed that there are other factors that I can take into account including the merits of the claim and whether the parties are prejudiced by the delay. Ms Hatch has usefully taken me to an authority that explains what prejudice means and it comes in two kinds. The prejudice in having to meet the claim at all so far as the Respondent is concerned and what is called 'forensic prejudice i.e. whether a party is disadvantaged in producing evidence because of the delay for example the fading of memories, witnesses no longer being available. I also note from the *Derby Law Centre* case that Mr Robison provided, that poor legal advice is not necessarily a factor against extending time. And a lack of explanation for any delay is also not necessarily likely to lead to the extension of time being refused, *Pizza Express* case.

Application of facts and law to issues

31 First in relation to the money claims. Time ran out under the usual three months time limit on about 10 August 2016.

32 Doing the best that I can in relation to Early Conciliation, because it occurred or is likely to have occurred at this early stage, it may well be that time was extended by a month by Early Conciliation. It can be extended by no longer than a month so, taking this into account, time ran out at the latest on 10 September 2016. This is doing the best that I can at this stage on the facts before me.

33 I find that even if time ran out on 10 September 2016 it was reasonably feasible, it was practicable for the Claimant to bring his money claim within before that time expired. I make that judgment because, by then, the Claimant knew he was owed money. He had gone to a number of different advice agencies that were able to help him pursue that money claim. He was aware by then that the Respondent was someone whom he could pursue for that money. There was nothing to stop the Claimant practically from putting in a claim. It was perfectly feasible. Therefore, according to the legal principles I have

identified above, I cannot extend time in respect of the money claim in this case. I dismiss those claims.

34 Turning to the discrimination claim my approach is very different because I must look at a whole variety of factors. Even though the primary time limits of three months plus that additional month for Early Conciliation have expired, I have a discretion under my jurisdiction to extend time if I think its fair - just and equitable - to do so.

35 I do have regard to the primary time limit of three months however. It is a short period of time and it is in place in the legislation it seems to me because public policy demands that usually employment disputes are heard and resolved relatively quickly. In many sectors people move on from employment. Jobs change. Workers and businesses need their disputes to be resolved quickly and that is why the time limits in the Equality Act are as short as they are.

36 Nevertheless I have a broad discretion to extend time where it is fair to do so and I will look at the factors now that I have in mind before I reach my decision.

37 First the length of the delay, 8 ½ to 9 months delay is bearing in mind the primary time limit a long delay and bearing in mind those public policy considerations I have set out above. It is three times longer than the primary limit.

38 What were the reasons for the delay? I take into account that lack of an explanation is not determinative of my decision one way or another but it is one of the *Keeble* factors so I will consider it. There are a lot of gaps in what the Claimant has told me in the period of time from when he left the site to when he presented his claim. I do not expect the Claimant to come with total recall, not at all, but I do have regard to those gaps because they mean that I do not have on the evidence before me a clear explanation or indeed for some of the periods of time any explanation for the delay in bringing this claim.

39 The Claimant certainly acted quickly to get advice and write his primary complaint to St Georges. There is no evidence he received poor advice. ACAS got involved but there was no resolution to his complaints.

40 Early on, the Claimant knew the type of claim he wanted to make - a discrimination claim - and he knew that the Respondent was the potential person to complain against.

41 From May or June 2016 until early January 2017 the Claimant chased St George and then the Respondent for money. It does not appear, however, that he furthered his discrimination complaint during this time. His evidence to me is he made phone calls to try and get his money. I found on the fact that he did not significantly chase the Respondent by email or indeed frequently by telephone and this is not a case therefore where the delay has been caused by the Respondent dragging its feet. There is really no adequate explanation on the evidence before me of the delay after the correspondence in January 2017 until the presentation of the claim at the end of May 2017.

42 I move on to look at other factors. The cogency of the evidence is a further *Keeble* factor given. While it is true that the basic facts in this case do not appear to be

disputed, having heard submissions on the merits, there are two areas in the discrimination claim, which will be helped by hearing further evidence. First, what kind of oral contract and with whom Mr O'Sullivan, site manager entered into with the Claimant. That will help the ultimate Tribunal, if it were to hear this case, decide the status of the Claimant: was he an individual worker or was he on business on his own account or was he a contract worker? Second there is Mr O'Sullivan's reason for requiring the Claimant to leave. His stated reason is not in dispute: that the Claimant was not wearing a safety helmet but the Claimant today cast doubt on whether this was the real reason. I find that the Respondents will be prejudiced to some extent by the delay in presenting this claim: Mr O'Sullivan does not work for them any longer and, while I have not heard that he could not be found or that he somehow cannot attend to give evidence, nevertheless a delay of nine months may well affect the cogency of his evidence if he is asked to recall in evidence why he required the Claimant to leave work or why he allowed the Claimant respectively to work two days before requiring him to leave work. As I have noted in my findings of fact this was a large job he was a site manager on a busy site and it may well be that his memory is dimmed by the passage of time. This is not a significant factor in relation to my discretion today but it is a relevant one and does mean that the Respondent may be faced with some forensic prejudice.

43 *Keeble* suggests another factor is the cooperation of the party sued that has not really been a major factor in the submissions before me. I simply note that once the Respondent knew of the Claimant's money claim it contacted him and asked him to provide details. It seems to me that is not a factor really going one way or another in relation to the discrimination claim.

44 I then look at the next *Keeble* factor: the promptness with which the Claimant acted once he knew of the facts giving rise to the cause of action. I have set this out in my analysis above where I considered the explanation of the delay. I have already found the Claimant knew early on what his claims were. He acted quickly to get advice and go through Early Conciliation. He then did very little to pursue his complaint until early 2017. After that there was a further unexplained delay. Thus, while it is clear the Claimant did take prompt steps to obtain advice there is nothing on the evidence to suggest any advice he was given was incorrect.

45 I then move to the other factors that might be relevant to my exercise of discretion. The merits seems to me evenly balanced in relation to the Claimant's status. There are arguments on both sides and I am not persuaded that either the Claimant or the Respondent has a clear strong case. This does not therefore assist me in the exercise of my discretion.

46 On the reason for removal from the site certainly the stated reason for removal the Claimant recalls is that Personal and Protective Equipment Regulations required him to wear a helmet and there was no expressed statutory exemption for any group except turban-wearing Sikhs. I agree with Ms Hatch that it is therefore arguable that the Claimant's complaint is about that law, not the enforcement of it by her client. The argument that there was another reason for the removal certainly exists because the Claimant was allowed to work on that site for two days and a half without a helmet. But nothing happened in between, so far as I am aware on either case, and this weakens the Claimant's case that Mr O'Sullivan's stated reason was not his real reason for dismissal. Nevertheless it is very difficult for a Tribunal to assess the merits without hearing all of the

evidence and I certainly do not do so. All I say is that the Claimant may not be making a like for like comparison because a turban-wearing Sikh has a specific statutory exemption that somebody in the Claimant's religious group simply does not have on the state of the law as it stands at the moment. So, in relation to my discretion the best that I can say in relation to the merits is that the Claimant's case on the comparison is not a particularly strong one.

47 Finally I look at the relative prejudice. Of course the Claimant will be prejudiced by not being able to pursue his argument before the Tribunal and the Respondent will be prejudiced if I extend time. But the Respondent has some forensic prejudice here it seems to me because of the delay caused by the passage of time in whether Mr O'Sullivan will remember the details of the case as well as the Claimant does given that Mr O'Sullivan was a site manager on a busy site dealing with many subcontractors. While this is not the weightiest of factors, it seems to me that the Respondent will suffer more prejudice than the Claimant if the claim were allowed out of time.

48 Looking at those factors in the round and taking them all into account I have come to the clear conclusion that it would not be just and equitable to extend time in this case. The delay is a relatively long one, it is unexplained: the Claimant sought advice promptly but did not bring a claim promptly and the Respondent will suffer some forensic prejudice by reason of the delay. If I take into account the merits at all the comparison the Claimant is making with turban-wearing Sikhs appeared to me not to be a strong argument given that Turban-wearing Sikhs have a specific statutory exemption in the health and safety regulations. Nor is there any evidence in this case that the Claimant had been wrongly advised. Taking all of that into account it seems to me therefore that fairness does not favour an extension of time in this case and I therefore do not allow the discrimination to be brought out of time. I also dismiss that claim.

49 I put one note at the end of this judgment and about Early Conciliation. I am concerned that I have dealt with this case without having seen an Early Conciliation certificate. The law requires a claim only to be heard if Early Conciliation is undertaken. I have made findings about when it is likely to have occurred without having seen the certificate and therefore if the Claimant can obtain the certificate and he wishes, having seen that certificate, to seek a reconsideration of my decision on the basis of it I state explicitly that he can do so. It seems to me that if there had been Early Conciliation at first stage it would only extend the time by a month and so I have done my best to extend time as far as I am able but I am aware that I have not seen the certificates and therefore make that explicit if it can be found then a reconsideration can be sought if so advised.

Employment Judge Moor

9 January 2018