Case number: 2600629/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr A J Goscinny

Respondent: Boots Management Services Limited

Heard at: Nottingham **On:** 30 July 2018

Before: Employment Judge Dyal (sitting alone)

Representation

For the Claimant: In person

For the Respondent: Mr C Rae, Solicitor

JUDGMENT UPON PRELIMINARY HEARING

1. The claim of unfair dismissal, but only the claim of unfair dismissal, shall proceed to trial:

   1.1 The claim presented in 2013, which was rejected for the non-payment of a fee and then, following *R (Unison) v Lord Chancellor* [2017] ICR 1037, given the claim number 2600629/2018 ('the Original Claim'), is not *res judicata*.
   1.2 Upon reconsideration, the judgment sent to the parties on 18 August 2015 in claim 2600549/2015 ('the 2015 Claim') is confirmed. However, the finding of fact at paragraph 19 of the written reasons is varied. The first sentence of that paragraph is varied to read *"The tribunal finds as a fact that the Claimant presented the first claim on 4 November 2013."*
   1.3 The complaint of unfair dismissal contained in the Original Claim was presented out of time. However, it was not reasonably practicable to present the claim in the primary limitation period and it was presented in a reasonable period thereafter.
   1.4 A fair trial of that unfair dismissal claim is possible.
   1.5 The complaints of race discrimination in the Original Claim are limited to complaints that the Claimant was treated less favourably because of race as follows:
      1.5.1 The Claimant was given a final written warning on 23 January 2013 on the erroneous basis that he had been under the influence of alcohol at work in November 2012 and that allegation was not investigated properly.
      1.5.2 Mr Stewart commented in January 2013 that he did not like Poles.

1.6 The said complaints of race discrimination were presented out of time and it is not just and equitable to extend time.
1.7 The complaint of disability discrimination in the Original Claim is withdrawn and dismissed upon withdrawal.

REASONS

Introduction

1. This litigation has the most unfortunate of procedural histories and it is necessary to set some of it out just in order for the issues I have to resolve today to be understood.

2. It is no exaggeration to say that this case is a sad example of the delay, injustice and now complexity occasioned by the fee regime that was quashed and disgraced by the Supreme Court in *R (Unison) v Lord Chancellor* [2017] ICR 1037.

3. In the autumn of 2013 the Claimant presented a claim following his dismissal on 31 July 2013 ('the Original Claim'). That claim was ultimately rejected because the Claimant was assessed as not qualifying for fee remission and he did not pay the issue fee which then became due. In 2015, the Claimant brought a further claim, case no. 2600549/2015, based on the same facts ('the 2015 Claim'). Limitation issues arose in relation to the 2015 Claim which were heard by me at a Preliminary Hearing (PH) as long ago as 17 July 2015.

4. In a judgment with reasons sent to the parties on 18 August 2015, I decided that all complaints within the 2015 Claim had been presented out of time and that the tests for extending time were not met. The 2015 Claim was dismissed in that judgment but purely for jurisdictional reasons that did not in any way traverse the merits of the claims.

5. In the course of deciding the 2015 Claim I found as a fact that the Original Claim had been presented in time. The fact of the Original Claim came to my attention and to the Respondent's attention for the first time during the course of the PH of 17 July 2015. There was no record of it on the 2015 Claim's tribunal file and the claim had not proceeded far enough for it to be served on the Respondent. During the course of that hearing I made such inquiries as a I could of the tribunal staff and the tribunal records they keep. The fruits of those inquiries were limited but were put before the parties. The only records available at that time were two employment tribunal case logs (now at pp.29 – 30 and 31 of the hearing bundle) which confirmed the existence of the Original Claim but not the date on which it was presented. The Claimant's oral evidence on 17 July 2015 was that he had presented the Original Claim within three months of his dismissal on 31 July 2013. I accepted that evidence in my findings of fact at paragraph 19. The Respondent now seeks to reopen that finding for reasons that will become clear.

6. On 24 November 2017, HMCTS wrote to the Claimant, notified him of the *Unison* decision and asked whether he wanted his claim (the Original Claim) reinstated. He replied by a letter dated 18 December 2017, indicating that he did. The tribunal replied with a letter in standard form dated 12 March 2018 stating: "*your claim has been accepted*". It was given the case number 2600629/2018. The claim presented in 2013 and claim 2600629/2018 are thus one and the same thing in that the latter is simply

the claim number now assigned to the claim made in 2013. I will therefore continue to refer to claim 2600629/2018 as the Original Claim.

7. The matter then came before REJ Swann on 4 May 2018 at a case management Preliminary Hearing. At that hearing the Respondent took a number of points (some of which are set out in a skeleton argument that was put before the REJ) and generated the following issues for me to resolve today. I did my best to explain these in lay person's terms to the Claimant at the outset of this hearing:

    7.1. *Res Judicata:* is the Original Claim, which is based on the same facts as the 2015 Claim, res judicata by reason of the judgment dismissing the 2015 Claim?
    7.2. *Reconsideration*: should the judgment of 18 August 2015 and/or the reasons for it, be confirmed, varied or revoked, upon reconsideration pursuant to rule 70? For instance, there is now further evidence about the date on which the Original Claim was presented which, the Respondent says, shows it was presented more than three months after the date of dismissal. Should the finding of fact that the claim was presented within three months of dismissal therefore be varied?
    7.3. *Limitation:* If the Original Claim was presented out of time, should time be extended?
    7.4. *Fair trial:* the Respondent contends that aside from any limitation issue, the claims should not be allowed to proceed because a fair trial is not possible in light of the passage of time and the implications of that.

The hearing

8. The Claimant's first language is Polish and he has limited English language skills. He and the tribunal were assisted throughout by a Polish language interpreter, Ms Johnson, who was appointed by the tribunal. The tribunal pays tribute to Ms Johnson who did an excellent job.

9. The Respondent prepared a hearing bundle in accordance with REJ Swann's orders. On 15 May 2018 the Claimant delivered a substantial bundle of his own - it was not ring-bound or paginated or entirely in chronological order - to the tribunal but not to the Respondent. I scanned through the Claimant's bundle as best I could in the morning before the hearing began. It appeared to repeat much of the documentation in the hearing bundle and to contain some documentation that did not seem to take matters further. I did however, notice that there was a Form ET1, date stamped 29.10.2013 by the Nottingham Employment Tribunal Service and 04.11.2013 by Arnhem Support Service, in the Claimant's documents. This was not contained in the Respondent's bundle (the Respondent had never seen it or had a copy of it). I arranged for this document to be copied and it was added to the hearing bundle as p12a and following. At the outset of the hearing I asked the Claimant whether there were any other documents among those he had delivered to the tribunal that he thought it was important for me to consider or to be added to the hearing bundle. He said there were not.

10. The Claimant also delivered a lengthy witness statement in the form of a letter dated 10 May 2018 to the tribunal (but not the Respondent) on 15 May 2018. This document was copied, distributed to the parties and stood as the Claimant's evidence in chief.

11. I adjourned the proceedings for Mr Rae to read these new documents. The Claimant then gave oral evidence under oath and was cross examined. The parties both made oral submissions.

The res judicata point

12. Mr Rae asked me at the outset of the hearing 'what my position was' in relation to the res judicata point. I had not formed any final view of the matter but asked for a view I was content to tentatively express one. My provisional view, and I expressed it as that, was that the judgment dismissing the 2015 Claim did not act as a bar to the Original Claim. I indicated that it was my understanding that no cause of action estoppel could have arisen by my judgment on the 2015 Claim because it was not a judgment on the merits. I decided the jurisdictional point before me without traversing the merits of the complaints in any way and my understanding therefore was that the Original Claim was not *res judicata*. In terms of issue estoppel, it seemed to me that what I had decided in 2015 was principally that the 2015 Claim had been presented out of time and that the tests for extending time in relation to that claim were not met. I had decided very little about the Original Claim and the little I had decided did not of itself seem to me to necessarily preclude the Original Claim now proceeding. In essence, I had decided that the Original Claim was presented within three months of the Claimant's dismissal. But that finding was at least in part favourable to the Claimant since it appeared to put his unfair dismissal claim as raised in the Original Claim in time. If any other claims raised in the Original Claim were out of time then the issue of extension of time remained at large. My provisional view was therefore that no issue estoppel rendered the Original Claim *res judicata* either.

13. Mr Rae considered the matter further in the course of the day and by the time he made his closing submissions it was his position that there was no *res judicata* issue. I am content to adopt that position.

Reconsideration (judgment and reasons of 18 August 2015)

14. I note that no objection was made to REJ Swann's order that I reconsider my judgment and reasons of August 2015. But in case it is of relevance, I should say that I consider that it was right and proper to reopen the issue of the date of presentation of the Original Claim. There is some important further evidence that sheds light on that point and I am satisfied that this is evidence which the Respondent cannot be blamed for not referring to at the PH in July 2015: it did not have this new evidence at that time nor ought it to have had it at that time.

15. The key new documentary evidence is:

    15.1. A claim form stamped *'29.10.2013, Nottingham Employment Tribunal Service*' and also stamped '*Arnhem Support Centre*, *04.11.2013'*;
    15.2. A claim form in almost identical terms stamped, *13.11.2013, Arnhem Support Centre.*

Further findings of fact

16. I make the following further findings of fact on the balance of probabilities. They supplement and in one respect will cause a variation of those made in the reasons sent to the parties on 18 August 2015.

17. On 23 January 2013, following a short period of suspension, the Claimant was given a final written warning. The reason for the warning is disputed. The Respondent says it was because the Claimant had attended work under the influence of alcohol in

November 2012. The Claimant says he did not attend work under the influence and that the warning and that the allegation that he did was not properly investigated. He says race was a factor.

18. On 29 July 2013, the *Employment Tribunals (England & Wales) Presidential Practice Direction – Presentation of Claims, 29.07.13* came into effect ('the Practice Direction'). This Practice Direction set out some rules in relation to the presentation of claim forms to the employment tribunal. In summary, claims could be presented:

    18.1. Online;
    18.2. By post (but not by hand) to the Employment Tribunal Central Office in Leicester, PO Box 10218, Leicester, LE1 8EG ('Central Office'). The Central Office was also known as Arnheim House and Arnheim Support Centre.
    18.3. By hand (but not by post) to one of a handful of employment tribunal offices, including the Nottingham Employment Tribunal Office .

19. The Claimant was summarily dismissed on 31 July 2013. He was at all times a man of limited financial means and his financial situation deteriorated significantly following his dismissal.

20. The Claimant did seek some professional advice in August 2013 but he was very limited in this regard by his finances. He briefly instructed ELSG Ltd who wrote a letter on his behalf on 27 August 2013. He was unable to continue instructing ELSG Ltd and they ceased to act for him.

21. The Claimant did then try to get some assistance from the Citizens Advice Bureau but he was told that they did not assist with this sort of claim.

22. The Claimant was also impeded to some extent by the language barrier. English is his second language and although he had some English, there was real difficulty in him researching English employment law/practice because of his limited ability to read in English. The tribunal accepts that the finer points of employment law / practice, such as the distinction between it being permissible to present a claim by hand to the Nottingham Tribunal Office but impermissible to do so by post were beyond the Claimant without the assistance of an interpreter / translator. The Claimant did not have the assistance of an interpreter / translator and could not afford one. He was therefore unable to read and properly understand freely available sources of legal advice or guidance documentation issued by the Employment Tribunal itself.

23. In those circumstances, the Claimant came to draft his claim form and submit it on his own, without assistance. He was completely unaware of the Practice Direction or its content. He was therefore unaware that his claim could not be presented by post to the office of the Nottingham Tribunal Service which is unfortunately what he did. The claim arrived, by post, on 29 October 2013. The Claimant found the address by looking up the employment tribunal on Google. It seemed entirely logical to him to submit the claim form by post to his local employment tribunal: it was local both to him and to the place that he worked.

24. I asked the Claimant whether he had additionally posted the claim form to the Central Office. He was clear that he had not. He did not know how the claim form he posted to the Nottingham office ended up at the Central Office and assumed it must have been posted there by the Nottingham Tribunal Service. I think that explanation is probably

right and in the absence of any better evidence I accept it. It is clear that the claim form was received by the Central Office because it was date stamped *4 November 2013, Arnhem Support Centre*.

25. On 13 November 2013, the Claimant re-submitted the claim online. The information contained in the claim form was identical in all respects save that in the online version, the Claimant ticked the box indicating that he was complaining of disability discrimination. Asked why he had submitted the claim form online given that he had, days previously, posted it, the Claimant said he had simply been trying to make sure the claim form was received. The tribunal accepts that: it was an exercise in 'belt and braces'.

26. At all relevant times, the Claimant was aware that there was such a thing as the employment tribunal where he could complain of workplace issues and aware that there was a limitation period. But his understanding of limitation was unsophisticated: he understood limitation simply to mean three months from the date of dismissal. I infer that he did not perceive there to be any reason to submit a claim more swiftly than that if it related to a matter that predated dismissal.

27. The Original Claim was ultimately rejected because the Claimant was judged not to qualify for remission and he did not pay the fee. That was in March 2014. By that time he had no income other than some basic state benefits and I am satisfied that he was in financial hardship. He could not afford to pay the fee.

When was the Original Claim presented?

28. Rule 8 (1) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules") is in the following terms:

> *Presenting the claim*
> *8.—(1) A claim shall be started by presenting a completed claim form (using a prescribed form) in accordance with any practice direction made under regulation 11 which supplements this rule."*

29. The wording of the rule is mandatory ('shall') and I take that to mean that a claim is not presented unless and until it is presented in accordance with the applicable practice direction. As set out above, the Practice Direction required claims to be presented:

    29.1. Online;
    29.2. By post (but not by hand) to the Employment Tribunal Central Office in Leicester, PO Box 10218, Leicester, LE1 8EG ('Central Office');
    29.3. By hand (but not by post) to one of a handful of employment tribunal offices, including the Nottingham Tribunal Office.

30. Although the claim was received by post at the Nottingham Tribunal Office on 29 October 2013, that was not one of the acceptable methods of presentation. The Respondent's submission is that the claim was not presented until 4 November 2013 when it was received by the Central Office. I accept that submission.

31. The claim was also presented, online, on 13 November 2013. It is arguable that technically the claim presented online was a fresh/different claim to the one presented in the post. However, both parties submissions today have proceeded on the basis that

there was a single claim in 2013, albeit that the claim was presented once by post and once online. I am content to adopt that analysis since it is shared and has much to be said for it, especially as no claim number was assigned to either the posted claim form or to the online claim form. In any event, I do not think it makes any substantive difference and I would have reached the same substantive conclusions on the issues I have to decide today even if I had concluded that the posted claim and online claim were distinct claims.

Reconsideration

32. The finding of fact that the Original Claim was presented within three months of 31 July 2013 in the reasons of 18 August 2015 needs to be varied because technically it is not right. The claim was presented on 4 November 2013. This is important because it is material to the analysis of limitation in respect of the Original Claim.

33. However, for the avoidance of doubt, I do not see any reason to revoke or vary the *judgment* itself of 18 August 2015. The variation to my findings of fact, i.e., that the claim form was presented a few days later than previously thought, is not a basis for altering the judgment that time should not be extended *in relation to the 2015 Claim*. Further:

    33.1. So far as the complaint of unfair dismissal is concerned the 2015 Claim is otiose because it is my view that the unfair dismissal claim made in the Original Claim can proceed;
    33.2. So far as the discrimination claims are concerned, as set out below, it is my view that it is not just and equitable to extend time in respect of those claims even now having regard to the fact they were presented in the Original Claim in the Autumn of 2013. The case for an extension of time in relation to those self-same complaints as raised in the 2015 Claim is even weaker because the claim was presented about 18 months later than the Original Claim.

Original Claim: limitation and unfair dismissal

34. The Employment Rights Act 1996 provides as follows at s.111:

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

35. The leading case on the meaning of reasonable practicability is ***Palmer and Saunders -v- Southend on Sea Borough Council [1984] IRLR 119***:

    35.1. The words reasonably practicable can be read as ‘reasonably feasible’ [34]
    35.2. This is a broad question of fact and some important considerations are identified (non-exhaustively) at [35].

36. Where the claimant is ignorant of the time limit, and by logical extension other features of the statutory regime in relation to the presentation of a claim, that is not in and of itself 'just cause' or 'excuse' for the late presentation of a claim (to use Lord Denning's words). However, if the claimant could not reasonably be expected to be aware of the time limit, or by logical extension some other feature of the statutory regime in relation to the presentation of a claim, then the position is different. Reasonable ignorance can make it not reasonably practicable to present the claim inside the primary limitation period (see e.g. ***Wall's Meat Co Ltd v Khan*** [1978] IRLR 499 at per Lord Denning at 501).

37. In ***Cullinane -v- Balfour Beatty Engineering*** unreported UKEAT/0537/10, Underhill J (as he then was) considered s.111(2)(b) ERA. At paragraph 16 he stated that the question of whether a further period is reasonable or not, is not the same as asking whether the Claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. Instead, it requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted having regard to the strong public interest in claims being brought promptly and against the background where there is a primary time limit of 3 months

38. In this case, the primary limitation for complaining of unfair dismissal ended on 30 October 2013. The Claim was not presented on or before that date, but shortly thereafter on 4 November 2013.

39. I find that it was not reasonably practicable for the Claimant to present the claim within the primary limitation period.

40. The Claimant was under the mistaken belief that he could present his claim by posting it to his local employment tribunal office so as to arrive by 29 October 2013. That is what he did. He was wrong to think that he could present the claim in that way, but in the tribunal's view, in the particular circumstances of this case, his mistake entirely reasonable:

    40.1. The Claimant was unaware of the Practice Direction, its existence or its content. This was reasonable ignorance because:

        40.1.1. The Claimant did take steps to get advice in the limitation period, but he exhausted his funds before he got to the stage of drafting and submitting an ET1. There is nothing to suggest that the advisors were at fault. They simply wrote some very limited correspondence on his behalf. In short, the Claimant did what he could to get legal advice but quickly exhausted his funds, so he could not get further assistance with the drafting and lodging of the claim. He cannot be blamed for that;
        40.1.2. The Claimant tried to get free legal assistance from the CAB but the CAB was unable to help;
        40.1.3. There is a significant language barrier and practically speaking that prevented the Claimant from fully accessing open sources of advice about employment tribunal procedure such as the guidance notes accompanying the form ET1.

40.2. The rules in relation to presentation applicable at the time were quite technical and, although there might have been good reasons for them, the rules themselves were not simple common sense, i.e., they were not the sort of rules people could be expected simply to know as a matter of common sense.

40.3. The Claimant's belief that he could lodge an employment tribunal complaint at his local employment tribunal office by post was perfectly logical in and of itself. It was an obvious place to send the complaint.

41. The claim was presented within a further period that was reasonable. Mr Rae's position was that the claim was presented on 4 November 2013. That is just five days after the primary limitation period ended. The claim reached the Central Office before the Claimant was even aware that there was any issue about either fee/remissions or the Practice Direction's requirements. The Claimant's ignorance as to the finer rules for presenting a claim was continuing as at 4 November 2013 and continued to be reasonable ignorance for the same reasons given above.

42. For the avoidance of doubt, if the Nottingham Employment Tribunal had not posted the claim form to the Central Office, and the Claimant had been left to rely only on the online submission of a claim on 13 November 2013, I would nonetheless have considered that a reasonable further period. There is only a short period of time between the end of the primary limitation period on 30 October 2017 and the presentation of the claim online. On the evidence before the tribunal, as at 13 November 2013 the Claimant remained ignorant of the finer rules as to presentation and that continued to be reasonable ignorance.

Original Claim: identifying what the discrimination claims are and limitation in relation to them

43. It is not obvious what the allegations of discrimination are. Rightly or wrongly, at the PH in July 2015 the detail of the discrimination complaints was not explored because it was plain that the latest date on which they could possibly have occurred was 31 July 2013 (the date of dismissal – there being no post-termination complaints of discrimination) and the 2015 Claim was therefore on any view very substantially out of time. The Original Claim, however, was presented much more contemporaneously so, now dealing with that claim, it is necessary to identify the discrimination complaints and the dates they are said to have occurred more precisely. Accordingly, there was a careful discussion today to identify the discrimination claims.

44. The Claimant clarified that he is not pursuing any complaint of disability discrimination. He ticked the disability discrimination box in error when he submitted the Original Claim online. He had merely intended to indicate that he was suffering from a disability following an accident. Accordingly, any complaint of disability discrimination is withdrawn.

45. The only protected characteristic relied upon, then, is race. The Claimant identifies his race as Polish. I spent a significant amount of time trying to understand what the acts of race discrimination were. When initially asked what the claims of race discrimination were, the Claimant answered generally that he was treated worse because of his race. I asked him to clarify what the treatment specifically was and he answered:

45.1. being given the worst jobs to do; his qualifications were not being made use of save once per month;

45.2. he was told that he was spending too much time in the bathroom; English people could go to the bathroom as they pleased;

45.3. he was told his performance was poor and that he was placing products badly, but English people had worse performance and were not picked up on that.

46. None of these matters are raised in the claim form and I explained that to the Claimant. If he wants to pursue them he would need to make an application to amend and that application would have to be made in writing with "properly formulated and particularised" proposed amendments (***Remploy v Abbott****,* unreported EAT, 0405/14/DM). For the avoidance of doubt, I am not inviting or encouraging such an application.

47. I asked the Claimant, then, to focus on the matters raised in the Original Claim and to explain which of them he said were race discrimination.

48. There is an allegation in the claim form that the Claimant was paid significantly less than others. I asked the Claimant today whether this was said to be a race discrimination issue. The Claimant believes that this was financial discrimination but not race discrimination. The Claimant explained that there were other employees who were employed on an "old" contract and they got paid more than he and others on a different "rubbish" contract got paid. The only other employee on an "old contract" whose name he could remember was Mr Piotr Kalisz, whom he said was also Polish. I double checked with the Claimant whether or not he was alleging that the pay disparity was an act of race discrimination of any sort and he again said it was not. The Claimant had assumed that the law protected him against being paid differently for the same work as colleagues whatever the reason for that disparity: it simply required people to be paid the same for the same work. Absent an allegation that the difference of pay was an act of race discrimination (and the Claimant confirmed there was no such allegation) I could not discern any cause of action in relation to this pay issue in the claim form. The Claimant could not identify any cause of action either.

49. It is not clear from the Original Claim whether or not the Claimant was alleging that his dismissal was because of race. I therefore explored that with the Claimant. He clarified that he was not alleging that his dismissal was an act of discrimination. I checked this with him several times and he was clear each time that dismissal was not alleged to be an act of race discrimination. The Claimant said that the reason for his dismissal was "touching an envelope". In essence, the Claimant was accused of dangerous driving of a forklift truck. He considers the driving was not dangerous because he did not touch a colleague with truck, merely an envelope the colleague was holding.

50. This left two matters:

    50.1. Firstly, there was an incident in November 2012 in which the Respondent alleged that the Claimant attended work under the influence of alcohol a matter that he vehemently denies (there is a typo in the claim form which dates this incident as 21 November 2013 but it is uncontroversial that it was in fact in November 2012). This culminated in a final written warning being given on 23 January 2013. The Claimant contends that this matter was not properly investigated and that the warning was in part because of his race, contrary to s.13 Equality Act 2010.

50.2. Secondly, the Claimant alleged that in January 2013 (whilst he was suspended because of the above incident), Mr Stewart commented to another employee that he (Mr Stewart) did not like Poles. This information was passed back to the Claimant by a colleague. The Claimant characterised this as an act of race discrimination which I take to mean direct discrimination within the meaning of s.13 Equality Act 2010.

Limitation

51. In relation to the discrimination complaint, the primary statutory provision is Section 123 of the Equality Act 2010.

> *(1) proceedings on a complaint within section 120 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*
>
> *(b) such other period as the employment tribunal thinks just and equitable.*
>
> *[…]*
>
> *(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;*
>
> *b. failure to do something is to be treated as occurring when the person in question decided on it.*
>
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
>
> *a. when P does an act inconsistent with doing it, or*
>
> *b. if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

52. The acts of race discrimination that are complained of in the Original Claim are said to have occurred between November 2012 and January 2013. The last pleaded act of race discrimination is the final warning on 23 January 2013 and that is the latest moment on which time began to run. The primary limitation period expired not later than 22 April 2013. The Original Claim was therefore presented outside the time specified by s.123(1)(a).

53. I have a discretion to extend time if I consider it just and equitable to do so. In ***British Coal Corporation -v- Keeble [1997] IRLR 336*** in which the EAT indicated that the factors taken into account under section 33 Limitation Act 1980 may be of assistance in determining whether it is just and equitable to extend time. That said, it is a broad test and there is no specific requirement to follow a checklist of factors (***Abertawe Bro Morgannwg University Local Health Board v Morgan*** [2018] EWCA Civ 640).

54. On balance I do not think that it would be just and equitable to extend time and consider the following matters the most material.

55. *Length of the delay:* the Original Claim was first presented on 4 November 2013. So far as the discrimination complaints are concerned it was presented a little over six

months out of time. To put that in context, the delay in presenting the claims was roughly double the length of the primary limitation period. (For the avoidance of doubt, the weight of this factor would not have been materially different if I had concluded that the claim was presented on 29 October 2013).

56. *Reason for the delay*: the reason for the delay has not been clearly explained but the Claimant thought (and thinks) that he had three months from the date of his dismissal to present his claim and I infer that he therefore did not perceive any reason to act more swiftly than he did. The law of limitation is more complex than that and he was thus only half right. Time did run from the date of dismissal for certain purposes (e.g. his complaint of unfair dismissal) but not all purposes. The detail of the law on limitation was beyond the Claimant's knowledge and understanding. For that he cannot be seriously criticised given his lack of means, limited access to legal advice and the language barrier.

57. *Ttaking advice.* The Claimant did seek professional assistance but not until after the primary limitation period had ended. As above he was constrained by finances and the language barrier in the assistance he was able to obtain.

58. *Prejudice to the Claimant.* If I do not extend time, then the prejudice to the Claimant would be significant. He would be shut out from complaining about race discrimination and that is always a weighty factor. That said, he would not be shut of the tribunal system completely because his unfair dismissal claim can proceed.

59. *Prejudice to the Respondent.* If I do extend time I think there will be significant prejudice to the Respondent. The complaints of discrimination are very stale. I have no doubt that the passage of time has prejudiced the Respondent by making it substantially harder to defend those claims. Memories fade over time and:

    59.1. The final warning was given in January 2013. The Claimant did not appeal that final warning and the propriety of the warning was therefore not investigated at that time. The Claimant did allege race discrimination in correspondence of 4 August 2013 and thereafter. But by that stage the matter was already some way into the past.
    59.2. The difficultly in respect of the allegation that Mr Stewart said that he did not like Poles is particularly acute. It would be entirely a matter of oral evidence. The alleged comment was not even heard directly by the Claimant but reported to him by a colleague. It would be particularly difficult to litigate that so many years after the event.

60. On balance, I do not think that it would be just and equitable to extend time.

Is a fair trial possible?

61. This issue now only arises in relation to the unfair dismissal claim. Mr Rae addressed me briefly on this matter. His submissions essentially were that a lot of time had passed, that memories fade and that the claims were stale.

62. I have no difficulty in accepting that it will be significantly harder now for the Respondent (and indeed the Claimant) to deal with the litigation than it would have

been if the matter had been tried in the past; but it is a question of degree. I do not think that the difficulties in litigating the unfair dismissal claim are so severe that a fair trial of the unfair dismissal claim has become impossible:

62.1. Firstly, this particular unfair dismissal claim appears to be a simple claim. Unfair dismissal claims can be very complicated but this one does not appear to be.
62.2. Secondly, there seems to be little if any dispute as to the reason for the dismissal. The Claimant accepted today that he was dismissed because of the incident involving his forklift truck driving. He considers that he used the forklift truck to touch an envelope a colleague was holding and considers that this was not dangerous so his dismissal was unfair. The Respondent on the other hand appears to have thought his driving was very dangerous.
62.3. Thirdly, I am told by Mr Rae that the key witnesses (the dismissing officer and the appeal officer) are still employed by the Respondent and can be called as witnesses.
62.4. Fourthly, and most importantly, the dismissal process is particularly well documented by precisely contemporaneous documents. These include detailed notes of interviews with witnesses to the driving incident, minutes of meetings with the Claimant, correspondence between the Claimant and the Respondent and letters explaining the decisions made. These will not only be a significant aid in refreshing the witnesses' memories but will be extremely important and helpful primary sources of evidence to assist the tribunal to resolve the limited issues that it has to resolve in an unfair dismissal claim of this sort.

63. On balance then I do not accept that a fair trial of the unfair dismissal claim is no longer possible. The unfair dismissal claim can proceed to trial.

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Employment Judge Dyal

Date 01.08.2018

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JUDGMENT SENT TO THE PARTIES ON
2 August 2018

FOR THE TRIBUNAL OFFICE