EMPLOYMENT TRIBUNALS

Claimant: **Mr M Kutrzeba**

Respondents: **Travis Perkins Plc**
BSS Group Limited

Heard at: **Leicester** **On:** **7 March 2019**

Before: **Employment Judge R Clark (sitting alone)**

Representatives

Claimant: **In Person**
Respondents: **Ms L Randell, HR**

JUDGMENT

1. The claims of discrimination on grounds of religion or belief and race are dismissed. The claims were not presented in time and it is not just and equitable to extend time.

2. The claims of unfair dismissal, breach of contract, unlawful deduction from wages and payment for accrued annual leave are dismissed. The claims were not presented within 3 months of the EDT/relevant date in circumstances where it was reasonably practicable for them to have been. In any event, the further period of time elapsing before they were presented was not reasonable.

3. The claimant's claim for a redundancy payment is dismissed upon withdrawal.

REASONS

Introduction

1. This Preliminary Hearing has been listed to deal with jurisdiction. I indicated at the outset that the issue was whether to extend time for claims that were presented out of time. It seems I was wrong in that as the claimant's principle submission is, in fact, that his claims were presented in time and I will come on to the reasons for that in due course.

2. I need to say something about the parties as well. There is clearly an issue in the case as to whether Travis Perkins Plc is the correct respondent or whether it should be BSS Group Limited which is an entity which operates within,

or at least is associated with, the currently named respondent. In view of the application presently before me, it is sufficient merely to add BSS Group limited as a second respondent.

3. The claimant's ET1 was presented on 30 May 2018. It raises a number of claims. The first four claims are unfair dismissal, breach of contract, annual leave and unauthorised deduction from wages. They are all claims for which the time limit is 3 months beginning with either the EDT or the relevant date and any extension to that time limit is to be considered under the not reasonably practicable test. The claimant also brings claims for discrimination based on religion and belief and race, all of which require a complaint to be brought within 3 months of the discriminatory act or such other period as is just and equitable. There was originally also a claim for a redundancy payment. The claimant has readily conceded that is not the case. It seems what he meant was that if he succeeds in the unfair dismissal claim, he would seek a basic award which he understands to be calculated on the same basis as that of a redundancy payment. Whilst he is right in that, he now accepts that to be a matter of remedy and the facts of his case do not give rise to a claim for a redundancy payment. That claim will consequently be dismissed on withdrawal.

Evidence

4. I have before me various documentation. I have the pleadings in the case, two bundles from the claimant dealing with some case law relevant to extension of time and imprisonment, a substantial bundle going to the circumstances of his arrest and detention and a witness statement which he has adopted as true and correct and has supplemented with extensive oral submissions. I have a similar bundle from the respondent containing correspondence. I did not hear witness evidence from the respondent but Ms Randell has made oral submissions.

Background Findings

5. The claimant was employed for a number of years, from around 2011. The ET1 sets out in box 8.2 and the attached appendices a series of events going back some way into his employment history but culminating in a series of grievances, grievance hearings and grievances appeals in 2014 and 2015. It seems that although the claimant's concerns were not initially upheld, a manager named Patricia Hendry then undertook a further appeal review and found force in what the claimant was saying. At least part of his complaint was upheld. Those complaints related to health and safety matters in the workplace and, in particular, intoxication. One consequence of his complaint being upheld was that a colleague, a team leader, was dismissed for being intoxicated during the working day. The respondent understandably believed it had reached a satisfactory resolution to this matter and has not given it further consideration since.

6. It was said today that some of those earlier events give rise to further claims of whistleblowing, it being said that there are protected disclosures underlying those complaints. I have to say, I cannot see that this is set out in the claim and, so far as the claim does advance any detriments on the ground of any prohibited reasons, they come to a conclusion during 2015. The grievance process itself was concluded in March 2015 and the last reference to incidents with the Manager is towards the back end of 2015. Those claims are therefore of some age.

7. The catalyst for the claim, and the focus of his case, is instead what happened to him in 2017. On 12 May the claimant was arrested. He was arrested for allegations made by his then wife which led to charges being laid for offences relating to controlling/coercive conduct and possession of a bladed article. He was held in police custody and put before the Magistrates' Court on Monday 15 May 2017. He was remanded into custody, it seems against a background of him having no previous convictions. The claimant has provided the Court records and insofar as it is relevant, the reason for not being remanded on bail was fear of reoffending. He was also subject to restraining orders around that time. In the event, he would spend the following 6 months in custody awaiting trial at Leicester Crown Court. That trial was listed for 18 December 2017 and, on that day, he was released. The claimant says he was released because the prosecution offered no evidence and a not guilty plea was recorded by the Judge. I don't think it is going to influence the issues before me today but, as a matter of record, the transcript of that hearing shows the prosecution actually added a third charge to which he pleaded guilty and that plea was accepted by the prosecution and the first two matters on the indictment for which the claimant was originally remanded were left to lay on the file. He received a conditional discharge for 12 months.

8. From the claimant's perspective, and I very much want to stress this, the consequences of this episode and all that flowed from it leaves him with a profound sense of injustice. Indeed, salt is then rubbed into his very open wounds by a number of other factors. One is the underlying circumstances that led to his marriage ending. Another is the fact his wife took their children out of the jurisdiction. Another is the adverse effect it had on his financial situation including his housing. The other is the effect it had on his employment. I repeat how I readily understand his sense of injustice but I also have to say that, as far as my obligations today are concerned, all but the last of those consequences do not lie at the door of the employer.

9. I return to the chronology. The claimant did not turn up for work on Monday 15 May. He didn't attend on 16, 17 and so on. On 18 May the respondent wrote to him asking about his absence which, from its perspective, was a concerning and unauthorised absence. Pausing there, I also accept without question what the claimant has told me about the instructions he gave to his solicitors to make contact with his employer and inform them about his incarceration. I accept that they failed to do that. It may or may not have altered the course of what then happened, but it would at least have meant the respondent would have known of the true state of affairs sooner.

10. Instead, the respondent was oblivious to the true situation until the claimant's Manager physically attended at his home address and was met by the claimant's then wife. It seems she told him of her husband's incarceration with some delight, she being the source of the charges. That was on or around 22 May 2017.

11. The respondent wrote to the claimant on 30 May 2017. The letter was addressed to his home, it invited him to attend a meeting and required him to let them know if he couldn't attend. Whilst I recognise that at later stages, the respondent did attempt some significant adjustments to its process to accommodate the claimant's participation, I have to say that the nature and terms of that correspondence at this stage demonstrated a complete failure to grasp the reality of the situation for Mr Kutrzeba. Nevertheless, that letter was sent. Mr Coe, the manager, held his meeting on 16 June 2017. At that point the

employer's concern was that the incarceration was going to keep the claimant away from his obligations at work for a number of weeks. The outcome was that the employer dismissed the claimant and Mr Coe set out his reasons in a letter of the same date. He relied on the claimant's absence by reason of his detention as establishing the legal reason of "some other substantial reason". That letter was again sent to the claimant's home address. As things stood, that was unlikely to be received by the claimant. Fortunately, the claimant's brother was active in supporting him. By then, he had already been in contact with the respondent and, indeed, was regularly attending at the claimant's home address to collect his post. I can say with certainty that that letter did arrive in the claimant's hands by 29 June as a result of his brother passing it onto him. Indeed, the claimant in due course would lodge an appeal against that decision. It is clear, therefore, that the claimant was aware that his employment had been terminated and the reasons for it by 29 June 2017.

12. At this time, I find that whatever the limitations or restrictions he faced whilst remanded into custody, the claimant had access to a support network including his brother and his solicitors, albeit that their focus would understandably have been the criminal charges he faced.

13. By letter to his employer dated 1 July Mr Kutrzeba challenged his dismissal. It is significant in the context of this hearing that the letter is headed "unfair dismissal" and the opening sections of the letter refer to how it gives him "very solid grounds for my potential case in the Employment Tribunal". There can be no doubt that the claimant was fully aware not only of the existence of the Tribunal but of his right to bring proceedings of the type that he subsequently has. He says the reason he did not do so at the time was because of his incarceration. That letter, whether it explicitly asked for an appeal or not, was treated as an appeal and the employer dealt with arranging the appeal in further correspondence, this time corresponding with him via HMP Leicester. I can see that in that appeal process, the employer did have a greater regard to his incarceration. There is then further correspondence between the parties about the arrangements. From all of that correspondence, I find the claimant was able to freely correspond with the outside world during his incarceration. I say freely recognising the context and that his correspondence was undoubtedly subject to some level of security checks, but it is clear correspondence on the subject of his employment was flowing in and out of the prison. The respondent even began looking into whether an appeal could be heard at the prison although the prison refused.

14. The claimant then set out a basis of his appeal in a proforma which was itself provided by the respondent to assist the process. At that stage, he had a Court date of 10 October albeit even then it was known it was likely to be subject to variation and in the event was, in fact, put back. It was first postponed to November and then again to December. The respondent originally agreed it would wait until 31 October before determining the appeal in order for that hearing to take place. In the event, it did not settle on a final appeal date until late November.

15. On 22 November 2017, the claimant wrote to his employer asking for a further postponement. That was refused and on 24 November, a Mr Buckle went ahead with the appeal on the papers. The decision was to uphold the original decision. His decision was communicated in a letter dated 11 December in which he also dealt with the postponement and his understanding of whether the claimant was likely to be released in December or not. The claimant points out

that Mr Buckle had misunderstood his response and has clearly laboured under the misunderstanding that if he was found guilty he would be detained for a further 3 months. He criticises the reasoning as not considering the possibility that if he was found not guilty, he would of course be released. I note that letter was addressed to the claimant at HMP Leicester.

16. As I have already indicated, on 12 December the claimant attended trial at Leicester Crown Court. I am satisfied that the letter dated the previous day had not yet had chance to reach the claimant by the time he was undoubtedly transported off to Court that morning. It seems the events at Court that then unfolded were because of the prosecution's lack of confidence in the reliability of the complainant, the claimant's ex-wife, and the account she had given. The alternative charge I have already referred to was agreed and dealt with. Thereafter, the claimant was immediately released from custody.

17. I then turn to the next phase of matters relevant to his response to the dismissal. He had not previously presented a claim to the Employment Tribunal about his dismissal because, he says, he had no means of gaining internet access and the prison did not have access to the paper form ET1. I have no explanation as to why his solicitors originally instructed or indeed his brother could not have undertaken that task. I find either of them could have done that, particularly after the claimant had set out his own letter challenging the dismissal decision. On his release he again did nothing himself to lodge a claim. He did not immediately contact the Employment Tribunal nor, indeed, his employer. I find he was advised by his brother "to chill out for a few weeks" after having gone through the ordeal that he had gone through. Nothing further happened until the new year.

18. On 2 January 2018 he wrote to his employer. The respondents say his letter was not received and that explains why there was no response. Nonetheless, he has presented to me a letter he says he drafted. The letter seeks a meeting in order to discuss what he described as "a mutually acceptable outcome to the past situation". I am satisfied the respondent is correct in saying it was not received. Significantly, he then left it for a considerable period of time before contacting his ex-employer again.

19. He did not write again, at least in direct reference to his dismissal, until 23 April 2018. That letter requested reinstatement. His employer replied on 10 May 2018 saying it had exhausted the internal procedures and would not be reinstating him. Before that exchange of correspondence, however, it is right to say that the claimant had been in contact with his ex-employer on 12 February when he had written to make a subject access request under the Data Protection Act. That request was accepted and processed and he received a reply to that on 20 April 2018. The content was essentially his personnel file and associated correspondence between the parties including the correspondence relating to his dismissal and appeal. It is the claimant's case that, on that date, he spoke with someone at the Employment Tribunal to enquire about making a claim. One of the reasons he did that is that, for the first time, he saw within in the disclosure from the subject access request the letter from Mr Buckle dated 11 December 2017 confirming that his appeal had been dismissed.

20. The claimant says that he was told whoever he spoke to at the ET that his claim "appeared to be substantially out of time" and it was suggested that he made contact with ACAS to start early conciliation immediately. He tells me he did as he was instructed and did so immediately. I find that recollection cannot

be right as the early conciliation notification was not made until 29 May 2018, some 5 weeks or so after the receipt of the subject access information. There is therefore further delay which is not explained. The ET1 itself was presented on 30 May 2018.

Submissions

21. The claimant's principle contention to engage the jurisdiction of the tribunal is that until he received the reply to the subject access request on 20 April, he did not know that his appeal had been rejected and, therefore, his employment cannot be regarded as being at an end until then. That date, he submits, must be used to start the clock ticking for the 3 months' time limit to present a claim to the tribunal.

22. He further made a number of submissions going to the merits of the dismissal decision itself and set out his view of the law going to what an employer ought, or ought not, to do in the situation he found himself in. In particular, he argued that it was unlawful for an employer to dismiss an employee who was absent from work due to being remanded into custody. He submitted the law allowed this only where the employee was convicted and imprisoned, but not merely where bail was refused. He also criticised many aspects of the wider unfairness of the situation he found himself in.

23. I have been referred to various authorities by both parties. The not reasonably practicability test is set out in various parts of the Employment Rights Act 1996, the Working Time Regulations 1998 and the Employment Tribunals Extension of Jurisdiction (E&W) Order 1994. Section 111(2) of the 1996 Act is one such citation for the purpose of unfair dismissal but the statutory formula remains constant. It has two limbs. First, the claimant must show that it was not reasonably practical to present a claim in time. If I am persuaded that it was not reasonably practicable, the second limb is that I must be satisfied the further period of time within which the claim was in fact presented was itself a reasonable period in the circumstances. The just and equitable extension of time, set out in section 123((1)(b) of the Equality Act 2010 is regarded as being a less strict test but nonetheless is a test which the claimant has the burden of establishing. There is no presumption in favour of an extension and I have to weigh up all the relevant factors within a wide discretion. If necessary, the check list in Section 33 of the Limitation Act 1980 provides some guidance to factors that may be relevant. Many of the further authorities cited to me refer to the merits of an unfair dismissal case in the context of imprisonment.

Discussion and Conclusions

24. The claim that was presented contains discrimination allegations, which crystallise in 2015, and dismissal allegations relating to an effective date of termination of 16 June, received and read on 29 June 2017. The holiday and wages claims crystallise no later than the EDT. The claimant has raised some additional allegations today that his dismissal was part and parcel of a campaign of retribution for what are now said to be earlier protected disclosures in his 2015 grievances. That is not the claim in the ET1 but, in any event, nothing turns on that as such a claim would remain a claim of unfair dismissal for which the time limit and extension test is already under consideration.

25. In terms of Mr Kutrzeba's general submissions about the situation he found himself in, I have to say, without making any determination on the matters,

there are elements of this case where one might very easily question the respondent's response to his incarceration at various stages one way or another, in substance of process. I can see why Mr Kutrzeba wanted to voice a number of those concerns, but it simply isn't a matter that I have to deal with, at least in respect of the "not reasonable practicability" test. I can see why the claimant feels that the actions of the employer added to his overall sense of injustice, but my concern is not at this stage with the merits, but the application of the relevant time limits and extensions. For completeness, I do not accept the claimant's submission that, as a matter of law, an employer cannot dismiss an employee who is remanded into custody although again, the question of fairness has next to no relevance at this stage. I suppose if there was a principal of law that preserved the employment relationship, that could have been relevant but that is not the case. I would also observe that whilst I entirely understand the claimant's sense of injustice in the matters that led to his remand and the consequences that flowed from it, they are only relevant if they go to one or other of the tests I have to apply.

26. I consider first the discrimination claims. Little has been said about these by the claimant. They are presented around 2½ - 3 years out of time. It is clear the focus of the claimant's current grievance with the employer does not arise from those earlier matters which took place in 2014 and 2015 but, instead arises from his dismissal in 2017. It is that which explains why his submissions really haven't explained at all why no claim was brought nearer the time of those events. There does not appear to have been any obstacle to doing so. I conclude he merely chose not to. That seems to me to be because the outcome of the grievance was in some parts at least positive, or at least broadly to his satisfaction. There followed a long period of time when the parties involved were getting on with their working lives and the respondent was proceeding on the reasonable basis that that matter was long since resolved. I have come to the conclusion that the claimant has not satisfied me why it would be just and equitable to extend time for those stale claims to be brought out of time. Whilst the just and equitable extension admits of a wide discretion, it must bite on something, however slight, to explain and justify why parliament's intended time limit should not apply and to balance what is often a real risk that the quality of available evidence deteriorates and individuals' recollections fade. I am not satisfied this case engages anything which would entitlement me to extend jurisdiction.

27. I then come to the claims arising from the EDT (or deduction the relevant date for which is no later than the EDT). The first issue is whether they are in fact out of time or not. Whilst relying on 16 June as the date of dismissal, the respondent fairly and properly concedes that the claimant would not know of that until he read the letter on 29 June. That date must stand as the EDT (Gisda Cyf v Barratt 2009 EWCA Civ 648). The primary time limit therefore expired on 28 September ignoring any potential extension for early conciliation. The significance of that is that the 3 month time limit started on 29 June 2017 and not, as the claimant argues, on 20 April 2018 when he received the results of his subject access request containing the outcome of the appeal process. There is nothing in the contract which preserves employment pending the outcome of an appeal. Consequently, the claim was presented out of time.

28. In order to engage jurisdiction, the claimant has to firstly show it was not reasonably practicable to present a claim during the primary time limit. Whilst he was in custody during that time, he had solicitors acting for him in the criminal matter and his brother was active in assisting and supporting him with practical

matters concerning his affairs. I have no doubt that the criminal charges and other consequences they led to were a high priority for the claimant and, to some degree, challenging his employment may have been relegated in his own priorities. However, I cannot conclude that the effect was such as to render it not reasonably practicable to present a claim. There was opportunity for extensive correspondence and the claimant was able to lodge an internal appeal against the decision. I have concluded that he was aware not only of the fact of and grounds of the dismissal, but he held a view as to its unfairness in the context of a statutory right, he had knowledge of the tribunal system and I am satisfied it was reasonably practicable to present an ET claim even if I were to accept his account that being in prison meant he has no direct means of doing so. I am not sure that contention is entirely correct. To deny him his civil rights whilst incarcerated is a significant matter and risks infringing his human rights and it would be a serious matter for the secretary of State for the Home Department to impose steps that would deny prevent him from making a claim. In any event, even if that was the case, the claimant had scope to present a claim indirectly through either his brother or solicitors or other agents acting for him. I have concluded therefore that it was reasonably practicable to present his claim within the 3 months primary time limit.

29. That conclusion is enough to bring an end to the claim but for completeness, I also deal with the second limb of the test to assess whether, if I am wrong about the first limb, the date that the claim was in fact presented, nearly 6 months later on 30 May 2018, was itself a further reasonable period of time.

30. To begin with, it must follow from the claimant's contention that it was not reasonably practicable to present a claim when in custody, that from the moment he was released it became reasonably practicable to do so. That was 18 December 2017. There was delay between 18 December and 2 January before any contact was made with the respondent but no contact was made with the Employment Tribunal at that stage. I can see no need to contact the employer at that time before lodging a tribunal claim. This initial 2 week delay was the period his brother advised him to "chill out". When the claimant did contact the employer, it seems there was then a further delay to February, before the Subject Access Request was made. During that time the claimant did nothing in the face of absolutely no response from his ex-employer for another 6 weeks. There was still no claim presented and further delay followed to 23 April 2018 before he requested reinstatement by his ex-employer. There was no attempt to phone or chase up the appeal outside this correspondence and no attempt to attend work on the basis that he believed he had not yet been dismissed until the appeal outcome letter was seen. That chronology does not demonstrate prompt action by a claimant who knew he had a claim and who I have to conclude sat on it for some time after the period of incarceration had ended. The reason for delay is, in part, that the claimant had convinced himself his appeal had not yet been concluded although I have to say his lack of action is not consistent with that belief. I accept his contention that he had not, before April, in fact received the appeal outcome letter which was sent to him on 11 December but addressed to the prison but it is in any event well settled that awaiting the conclusion of an internal appeal *that is known to be ongoing* does not assist him in extending time. The first reason is that just as it is a matter of law that he could not rely on the fact he has waited for the conclusion of an internal appeal process as a reason rendering it "not reasonably practicable" to present a claim within time so it is that there must be some persuasive basis for it to be reasonable to further delay lodging a claim after the time limit has expired for such an appeal to conclude.

There is no persuasive basis in this case.

31. I do accept that there were other aspects of his life that had suffered from the fall out of his ex-wife's allegations. To a degree, they do explain why there was likely to be some further delay to him presenting his claim. Some of those matters were very serious issues, including international child abduction. There is some force in it being reasonable to focus on matters such as that. Had there been evidence before me which showed him juggling his employment claim amongst those other life issues, I expect I would have been persuaded that some further period, perhaps a month or two after release, *may* have been a further reasonable period. But the claimant has not demonstrated to my satisfaction that the failure to present a claim was down to having to deal with any other life issues, albeit I am aware there were other matters going on. I am not satisfied that the total period between his release and him receiving his subject access request demonstrated reasonable and prompt action. Not that any was needed for him to present the claim he had been aware of since 29 June 2017. There was something like 2 months between his release and the subject access request when, if that was what was holding him back, a simple phone call or other contact could easily have established the true situation. Nor am I satisfied that the period of delay after release can be explained by the other life events.

32. Had I been satisfied it was not reasonably practicable for the claim to be presented in time, I would in any event conclude that the time it then took for it to be presented was not itself a reasonable further period of time because of the claimant's own contribution to the further delay. As I have said, I can imagine a state of affairs that would have justified a reasonable further period continuing a few months into the new year. That is not engaged here. I cannot see evidence that would justify that, let alone the further extensive delay to 30 May 2018.

33. In summary, I am satisfied the time limit started to run on 29 June 2017 and not 20 April 2018. I am satisfied that it was reasonably practicable to have presented his claim within the 3 month time limit. If I am wrong about that, the time taken to present the claim was not itself a reasonable further period of time.

34. All the claims have therefore been presented out of time and in the absence of either test for extending time being made out, the Tribunal has no jurisdiction to deal with it. The claims are dismissed for want of jurisdiction.

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Employment Judge Clark

Date 15 April 2019

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE