Case No: 2300479/2017

EMPLOYMENT TRIBUNALS

Claimant: Mr Hugh Geohagen

Respondent: Abellio London Limited

Heard at: **London South (Croydon)** **On: 28 November 2017**

Before: **Employment Judge John Crosfill**

Representation

Claimant: Mr John Neckles, a trade union representative

Respondent: Mr P Mills, a consultant with Back Jones Solicitors Ltd

JUDGMENT having been sent to the parties on 15 January 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The preliminary hearing had been fixed in order that I could determine whether or not the various claims had been presented within the time limits imposed by the applicable legislation. The Claimant was dismissed by the Respondent on 6 May 2014 he presented his claim to the employment tribunal on 14 December 2016.

2. The claims brought by the Claimant are as follows:

   2.1. A claim of unfair dismissal contrary to S94 of the Employment Rights Act 1996 ("ERA 1996"); brought as

      2.1.1. an "ordinary claim" under section 98

      2.1.2. an automatically unfair dismissal under sections 103A, 104 and Section 12 of the Employment Relations Act 1999 ("ERA 1999"); and

2.2. a claim under section 11 of the ERA 1999 and Section 48 of the ERA 1996 that he had not been given his statutory right to be accompanied at a disciplinary hearing and appeal; and

2.3. A claim for damages for wrongful dismissal (notice pay) brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994; and

2.4. a claim that his dismissal and the acts leading up to it were acts of direct discrimination contrary to sections 13 and 39 of the Equality Act 2010 ("EA 2010")

2.5. a claim that the sale acts were acts of victimization contrary to sections 27 and 39 of the EA 2010.

The time limits - law

Unfair dismissal

3. In respect of the various unfair dismissal claims the time limit applicable is that imposed by Section 111 ERA 1996. The material parts of which say:

(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.

(2A) Section 207A(3) (extension because of mediation in certain European cross-border disputes) and section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2)(a).

4. The same test applies in respect of the claim for notice pay and the claim that the Claimant was not given the right to be accompanied.

5. The expression "reasonably practicable" does not mean that the employee can simply say that his/her actions were reasonable and escape the time limit. On

the other hand, an employee does not have to do everything possible to bring the claim. In ***Palmer and Saunders v Southend-On-Sea Borough Council*** **[1984] IRLR 119** it was said that reasonably practicable should be treated as meaning "reasonably feasible".

6. ***Schultz v Esso Petroleum Ltd*** **[1999] IRLR 488** is authority for the proposition that whenever a question arises as to whether a particular step or action was reasonably practicable or feasible, the injection of the qualification of reasonableness requires the answer to be given against the background of the surrounding circumstances and the aim to be achieved.

7. The question of whether it is open to an employee ignorant of her rights to rely upon that ignorance as a reason why it was not reasonably practicable to present a claim in time has been the subject of a number of decisions of the higher courts. In ***Dedman v British Building and Engineering Appliances Ltd*** **[1973] IRLR 379** Scarman LJ said the following:

"Does the fact that a complainant knows he has rights under the Act inevitably mean that it is practicable for him in the circumstances to present his complaint within the time limit? Clearly no: he may be prevented by illness or absence, or by some physical obstacle, or by some untoward and unexpected turn of events.

Contrariwise, does total ignorance of his rights inevitably mean that it is impracticable for him to present his complaint in time? In my opinion, no. It would be necessary to pay regard to his circumstances and the course of events. What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would not be appropriate to disregard it, relying on the maxim "ignorance of the law is no excuse." The word "practicable" is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance. But what, if, as here, a complainant knows he has rights, but does not know that there is a time limit? Ordinarily, I would not expect him to be able to rely on such ignorance as making it impracticable to present his complaint in time. Unless he can show a specific and acceptable explanation for not acting within four weeks, he will be out of court."

8. In ***Wall's Meat Co Ltd v Khan*** **[1978] IRLR 499** Brandon LJ dealt with the issue of ignorance of rights as follows:

"The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable."

9. In those and in subsequent cases it has been held that the question of whether bringing proceedings in time was not reasonably practicable turns, not on what was known to the employee, but upon what the employee ought to have known ***Porter v Bandridge Ltd*** **[1978] ICR 943,** ***Avon County Council v Haywood-Hicks*** **[1978] IRLR 118**.

10. Where the "ignorance" relates to a matter of fact rather than ignorance of a right or time limit then in ***Cambridge and Peterborough NHS Foundation Trust v Crouchman*** **2009 ICR 1306** Underhill P (as he was) set out the principles that emerged from the previous authorities including those relied upon by Mr Neckles before me. He said:

"Although I believe that the principles emerging from those authorities are reasonably clear, each is concerned with the specific problem presented on its particular facts, and there are some inconsistencies of terminology. It may therefore be desirable for me to summarise the position—so far as relevant to the issues on this appeal—as I understand it. I do so as follows:

(1) Ignorance of a fact which is "crucial" or "fundamental" to a claim will in principle be a circumstance rendering it impracticable for a claimant to present that claim: see Churchill v A Yeates & Sons Ltd [1983] ICR 380, 382–384, approved in both Machine Tool Industry Research Association v Simpson [1988] ICR 558 and Marley (UK) Ltd v Anderson [1996] ICR 728.

(2) A fact will be "crucial" or "fundamental" in the relevant sense if it is such that, when the claimant learns of it, his state of mind genuinely and reasonably changes from one where he does not believe that he has grounds for the claim to one where he believes that he does have such grounds: see Mr Ouseley's second proposition accepted in Machine Tool [1988] ICR 558, 565. The reference to a belief that there are "grounds" for the claim is to a belief that the claim is sufficiently arguable to be worth pursuing—"viable", in shorthand. This formulation is not, I think, different in substance from the reference at p 383 in Browne-Wilkinson J's judgment in Churchill to "discovery of a new fact [which] for the first time shows a cause of action to exist which, on the previously supposed state of facts, did not exist"; but if there is any difference the formulation in Machine Tool is authoritative.

(3) But ignorance of the fact in question will not render it "not reasonably practicable" to present the claim unless (a) the ignorance is reasonable—see Mr Ouseley's first proposition—and (b) the change of belief in the light of the new knowledge is also reasonable. (This requirement of reasonableness perhaps duplicates that which is anyway inherent in the requirement that the fact be "fundamental" (see (2) above).)

(4) Whether the belatedly-learnt crucial fact is true is not as such relevant: what matters is whether the late-acquired information about it has genuinely and reasonably produced the change of belief—Machine Tool Industry Research Association v Simpson [1988] ICR 558, 564 (quoted at para 8 above).

(5) The test set out in those paragraphs must be applied to each "head of unfair dismissal upon which a complaint or complaints is or are founded": Marley [1996] ICR 728, 738 e–f, 739 g. The concept of a "head" of claim needs some unpacking. It is clear from the ratio of the judgment read as a whole that what Waite LJ has in mind is that an unfair dismissal case under section 98 may sometimes contain more than one analytically distinct basis of complaint. Obvious examples appear in Marley and Churchill themselves, where the employees wished to allege both that the employer had not proved the reason for dismissal on which he relied (redundancy) and that in any event dismissal for that reason was unfair. But I do not think that the only possible distinction is between challenges to the reason advanced by the employer under section 98(2) and challenges to the reasonableness of the decision under section 98(4). It would be possible to have different "heads" of claim addressing different aspects of the reasonableness issue—e g, in a complaint about a dismissal for misconduct, a case that there was inadequate investigation and a distinct case that dismissal was a disproportionate sanction; or differently-based challenges to the reason for the dismissal (as indeed appears to have been the case in Marley , where the "second crucial fact" was held to justify a challenge to the reason for dismissal, even though such a challenge had been pleaded following discovery of "the first crucial fact"). When Browne-Wilkinson J makes this point in Churchill [1983] ICR 380, 383, he speaks of different "grounds" of complaint; so also did counsel for the employer in Marley [1996] ICR 728, 737–738 (particularly the reference to "ground A" and "ground B"). But I respectfully agree with Waite LJ's tacit preference for the terminology of "heads" of complaint, because the "grounds of complaint" can also mean, more generally, all the facts and matters relied on in support of the claim; and the phrase was indeed used in that sense in the form of originating application (the "IT1") in use at the time of these three cases. The underlying concept is of a way of putting the complaint which is sufficiently self-contained and different from other ways of putting it that it would not be an abuse of process to mount a distinct complaint based on it: that is the essential ratio of Marley . It follows that tribunals should not be over-minute in analysing different "heads" of claim: the analysis should be of a fairly broad kind. Even so, the distinctions involved may not always be clearcut.

(6) In a case where it was reasonably practicable to bring a complaint under one head of unfair dismissal but not another, the latter can proceed (provided it is brought within a reasonable time once the relevant fact is known), but the former cannot. This point was not actually expressly decided in Churchill or Marley : indeed in Marley it did not arise, because the first complaint had already been dismissed on other grounds. But the conclusion seems necessarily to follow from Waite LJ's acceptance of the submission (see p 738 b) that "it is essentially to the grounds of complaint (as opposed to the right of complaint generally) that [section 111(2)] applies".

Having attempted that summary, I should however acknowledge that judicial exposition should never cause tribunals to lose sight of the basic words of the statute. That point is made in Marley —and see also Post Office v Sanhotra [2000] ICR 866, 871–872, para 16, per Charles J.

Equality Act Claims

11. The time limits in respect of the remaining claims under the Equality Act 2010 are more generous and are found in section 123 of the Equality Act 2010 the material parts of which read as follows:

1) Subject to sections 140A and 140B 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.

12. The proper approach to the question of whether an extension of time should be given pursuant to sub-section 123(1)(b) is also the subject of guidance from the upper courts. The following are relevant to my decision:

12.1. In ***Chief Constable of Lincolnshire Police v Caston*** **[2010] IRLR 327** it was said that the employment tribunal was required to approach the exercise of the discretion with proper regard to all of the "circumstances of the case". The suggestion that the discretion should be "liberal" or strict was a distraction.

12.2. ***Robertson v Bexley Community Centre*** **[2003] IRLR 434, (**as explained **in *Chief Constable of Lincolnshire Police v Caston***) is authority for the proposition that it is for the Claimant to show that there is a basis for invoking the subsection and that it follows that an extension of time will be by way of an exception to the ordinary rule that a claim should be presented within 3 months from the act complained of.

12.3. Whether a failure to provide an explanation or a good explanation for is necessarily be fatal to any application for an extension of time was at the time of the hearing the subject of conflicting decisions of the EAT see ***Habinteg Housing Association Ltd v Holleron,*** ***Rathakrishnan v Pizza Express (Restaurants) Ltd*** **[2016] IRLR 278** and ***Edomobi v La Retraite RC Girls School*** **UKEAT/0180/16**. That conflict has been resolved by the Court of Appeal. ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** **[2018] EWCA Civ 640** which was decided after I gave my oral judgment but does not conflict with my conclusion that a failure to provide a good explanation for any delay is not fatal to an application to the question of whether it is just and equitable to extend time but is a factor.

12.4. The scope of the sub-section is similar to the applicable test in S33 of the Limitation Act 1980 and a tribunal considering the exercise of the discretion should have regard to the checklist set out in that section - **British Coal Corpn v Keeble** **[1997] IRLR 336** but need not recite all of the factors slavishly **Southwark London Borough v Afolabi [2003] EWCA Civ 15, [2003] IRLR 220** provided no important factor is left out. It

will usually be an error of law to fail to consider the respective prejudice to both parties including any evidential prejudice see ***Pathan v SLIC*** **[2014] All ER (D) 06** as an example.

The Claimant's Application

13. The Claimant accepted that his claims were presented substantially outside the time limits imposed by the legislation. He had prepared a witness statement. The Respondent was prepared to deal with the matter on the assumption that the facts in that statement were true. From that witness statement, together with the ET1 and ET3, the following material facts emerged (on the assumed basis described):

13.1. The Claimant had worked for the Respondent as a mechanic from 1 July 2011 until his summary dismissal which took effect on 6 May 2014; and

13.2. On 25 October 2013 the Claimant had been suspended after he had placed a sign on the wall near his toolbox which suggested in very robust terms that people should a person or persons who had stolen his tools could expect swift consequences.

13.3. On 29 October 2013 the Claimant attended an investigatory meeting. He admitted writing the sign described above. He suggested that he was the victim of race discrimination and victimization.

13.4. The investigation concluded that the Claimant should face disciplinary proceedings. There were a series of meetings and adjournments. In respect of the last of these meetings the Claimant asked to be represented by Mr John Neckles. That request was refused by the Respondent. The Claimant attended that final meeting on 2 May 2014 without a companion. He declined to take an active part in the proceedings. After the hearing he was summarily dismissed.

13.5. The Claimant appealed the decision to dismiss him. He provided substantial grounds of appeal and later submitted an amended notice of appeal. That document referred expressly to the following matters (1) a suggestion that the reason for the dismissal was because the Claimant had made a protected disclosure and/or done a protected act (2) an allegation that there had been a failure to permit the Claimant a contractual and/or statutory right to be accompanies at all hearings (3) severity of the sanction of dismissal in comparison to others who had not been dismissed and, (4) that the decision to dismiss was not in accordance with the Equality and Diversity Policy. The Claimant requested that he be accompanied to the disciplinary hearing by Francis Neckles of the PTSC Union. That request was refused. The Claimant did not attend the appeal hearing and his appeal was dealt with on the papers and was dismissed.

14. The Claimant said in his witness statement that, on 14 December 2016 he had learned of other employees who had been disciplined but not been dismissed. He said he had been told:

    14.1. That on 4 May 2014 an employee MG of mixed race had used the expression *"you black bastard, fuck off before I do you one"*; and

    14.2. RC a white British employee who has been disciplined for saying *"Too many fucking black working here, if I had my way I would shoot the lot of them".* He was dismissed but reinstated although downgraded and required to do an equal opportunities course.

    14.3. That he learned that both employees had been permitted to be represented by a representative from Unite the Union.

15. The Claimant said that on receipt of this information he contacted John Neckles and was advised that he had the claims he subsequently presented on 14 December 2016.

16. Documents supplied by the Respondent confirm the information relied upon by the Claimant in respect of MC. The Respondent says that it had no information about MG.

Discussion and conclusions

17. I shall deal with what I consider to be the more straightforward matters first.

    17.1. It seems to me that whilst the discovery of markedly more lenient sanction imposed upon RC may have been an important matter in respect of other claims, it had no bearing whatsoever on the claims relating to sections 11 and 12 of the ERA 1999 (the latter brought as a claim of automatic Unfair dismissal under S104 ERA 1996). The Claimant was well aware at the time of the meetings at which he sought representation by John or Frances Neckles that the Respondent had refused that request. The Claimant had complained about the denial of his right to be accompanied in his letter of appeal against his dismissal. The "new facts" said to be discovered could not reasonably be thought to have informed the Claimant that he had a claim when he had previously been unaware of that. He was already aware of these claims and the new facts could not have achieved the change of mind recognised in ***Cambridge and Peterborough NHS Foundation Trust v Crouchman*** above. The new facts were neither fundamental nor crucial to the claim. The Claimant already knew he had sought and been refused his chosen representative and he knew he had been dismissed.

    17.2. The same reasoning applies to the claim for notice pay. The Claimant knew that he had been dismissed without notice. The only material matter

is whether the Claimant was or was not guilty of a serious breach of contract ("gross-misconduct") entitling the Respondent to dismiss him without notice of whether the Respondent had followed the contractual disciplinary policy. Clearly the Claimant knew what he had or had not done. The information he later learned had no bearing whatsoever on those questions.

17.3. The claim under S103A ERA 1996 turned on whether the Claimant was dismissed for making a protected disclosure. He said that his protest about the right to be accompanied amounted to such a disclosure. The newly discovered facts had no bearing whatsoever on this claim. The Claimant knew of his disclosure and knew of his dismissal at the time. The new information neither evidences or informs the question of whether the reason for the dismissal was because a disclosure was made.

18. I have therefore concluded in respect of these three matters that the new facts said to have been learned by the Claimant were in no sense crucial or fundamental to these heads of claim. The Claimant was already aware of all material facts. He does not suggest that there was anything other than the point relied upon above that meant that it was not feasible for him to have presented his claims earlier. I note in particular that, with the exception of the claim for notice pay, these claims are expressly referred to in the grounds of appeal submitted on behalf of the Claimant. I conclude that it was reasonably practicable for these claims to have been presented within 3 months. Accordingly, the Tribunal has no jurisdiction to entertain these claims.

19. In respect of the claims brought under Section 27 of the Equality Act 2010 the facts necessary to establish the claim include a requirement that the Claimant did a protected act. Here at various stages the Claimant had informed the Respondent that he believed that he was the victim of discrimination. That element was satisfied and all material facts known to the Claimant. The Claimant must have been aware of any detriment that he says he suffered. This is again a matter expressly alluded to in the Claimant's grounds of appeal where he makes express reference to a claim under S27. I consider that there is nothing in the new information learned by the Claimant that has any direct bearing on that question. At best it showed that there was on these occasions a leniency towards discriminatory behavior. The time limit for these claims turns on whether it is just and equitable to extend the ordinary 3-month time limit. I shall return to that matter below when I consider the direct discrimination claims.

20. I accept that the new facts learned by the Claimant would indicate a significant disparity in treatment between the Claimant, who was dismissed, and particularly MC who was reinstated. The position in respect of MG is far less clear. Whilst the Claimant had used rude and aggressive language, he had done so after a number of his tools were stolen. Whilst in my oral reasons I expressed my sympathy with his position, his language was, as I am sure he recognises, inappropriate in the workplace. Against that, the language that the Respondent accepted MC used was however highly offensive.

21. Whilst there are a number of decisions which caution a tribunal against too readily accepting arguments as to disparity of treatment, the test for unfair dismissal in section 98(4) ERA 1996 includes consideration of "equity" and, in an appropriate case, disparity in treatment may make an otherwise fair dismissal unfair.

22. In addition, I consider that a tribunal having regard for the reason why the Claimant was dismissed might properly have regard to the leniency shown to MC in contrast to the Claimant when asking whether it was appropriate to draw any inferences in respect of discrimination. It might properly be said that the leniency shown demonstrated a surprising tolerance of discriminatory conduct. It may be explicable on other grounds but did call for an explanation.

23. I therefore consider that the new facts were such that they might provide evidence for the claims of unfair discrimination and direct discrimination. I am satisfied that they are "crucial and fundamental" in the sense used in ***Cambridge and Peterborough NHS Foundation Trust v Crouchman***.

24. It is however clear from ***Cambridge and Peterborough NHS Foundation Trust v Crouchman*** and ***Porter v Bandridge Ltd*** that mere ignorance of facts will not suffice unless it can be said that the "ignorance" is reasonable.

25. I have had considerable regard to the content of the Claimant's notice of appeal and amended notice of appeal drafted for him by Mr Neckles. It is quite clear from the first notice of appeal that the Claimant was alleging that there was disparity of treatment and that there had been a failure to follow the equality and diversity policy. I find from the contents of that letter that the Claimant held the view that there had been discrimination and disparate treatment.

26. I have concluded that the Claimant's ignorance of the treatment of MC was not reasonable. He, together with his union representative had a belief that there had been unfairness and discrimination. It would have been a straightforward matter to have made enquiries of the Respondent as to whether others had been dismissed in the same or similar circumstances to the Claimant. The Claimant had some knowledge that there had been as he says so in his notice of appeal. Such an approach was (using questionnaires) and remains commonplace and is straightforward. There is no suggestion that the evidence was concealed. I have reached the conclusion that the new facts relied upon by the Claimant, being crucial or fundamental in the sense only that they provide evidence of claims already believed to have existed, were facts of which the Claimant was not "reasonably ignorant". I would have taken a different view had some enquiries been made and false or evasive responses provided.

27. Applying that conclusion to the claim for ordinary unfair dismissal, whilst I am satisfied that the evidence of disparity was crucial and/or fundamental and changed the Claimant's mind about whether he has a viable claim I consider that his ignorance of those facts was not reasonable. He had already alleged disparity in his appeal letter. He then took no steps to see what evidence there

might be to evidence that belief. I believe that it was feasible and/or practical for him to have done so particularly as he had the assistance of a trade union. As such I find that it was reasonably practicable to have brought the claim of unfair dismissal within 3 months. The claim is therefore out of time and the Tribunal has no jurisdiction to entertain it.

28. I turn then to the Equality Act claims. The test here is what is just and equitable. That said it seems to me that where a Claimant could establish "reasonable ignorance" then it would be a persuasive factor in deciding whether or not to grant an extension of time.

29. The "new facts" could support a contention that discrimination was tolerated. That would not provide direct evidence of whether the Claimant himself had been victimised or directly discriminated against. The Claimant had already formed a belief that that was the case but lacked this particular evidence to support that belief. I have concluded above that no reasonable enquiries were made to see whether that belief was correct. It seems to me that that is a significant factor in this case when a party has an experienced representative. The Claimant had some obligation to investigate a claim which he believed he had at the time if he wished to present it to the employment tribunal. It is insufficient to sit back and wait to see if sufficient evidence comes in.

30. A further factor in this case is the length of the delay. The initial period of 3 months expired 2 years and 6 months before the claims were presented. That is a significant delay and, in circumstances where recollection may be important, is a delay likely to diminish the quality of the evidence at least to a degree (I do not place any great weight on "mere delay").

31. I have concluded that in circumstances where the Claimant had a belief that he had these claims and alluded to then in his letter of appeal but took no steps to investigate or prosecute those claims for a period of 2 years and 6 months it is not just and equitable to permit those claims to proceed. I therefore decline to extend time on the basis that it is just and equitable to do so.

Employment Judge John Crosfill
Date 15 May 2018