EMPLOYMENT TRIBUNALS

Claimant: **Mr O Marong**

Respondent: **Corps Security UK**

Heard at: Birmingham **On: 28 June 2019 & reserved decision 18 October 2019**

Before: **Employment Judge Flood**

Appearance:

For the Claimant: **In person**

For the Respondent: **Mr N Bidnell-Edwards, Counsel**

PRELIMINARY HEARING

JUDGMENT

1. The claimant's complaint of unlawful deduction of wages in respect of unpaid holiday pay is dismissed as having been presented out of time. It was presented after the expiry of the statutory time limit. That time limit cannot be extended because it was reasonably practicable for the claimant to present his claim within the time limit.
2. The claimant's complaint of race discrimination is **dismissed** as having been presented out of time. This complaints was presented after the expiry of the statutory time limit. It is not just and equitable to extend time to the date of presentation.
3. The claimant's application to amend his claim to add a further complaint of direct race discrimination relating to his dismissal is refused.
4. The proceedings against the respondent are accordingly dismissed.

REASONS

1. By a claim form submitted on 21 June 2018, the claimant brought complaints of unfair dismissal (under **section 98 of the Employment Rights Act 1996 ("ERA");** unpaid holiday pay; and race discrimination contrary to **section 13 of the EQA Equality Act 2010 ("EQA")**.
2. The claimant's claim of unfair dismissal was dismissed on 13 May 2019 following a withdrawal of that claim by the claimant by a judgment of Employment Judge Findlay sent to the parties on 30 May 2019.

3. The case was listed for a preliminary hearing and came before me to determine the following issues:

   3.1. Whether having regard to the time limit contained in section 23 (2) of the ERA and/or regulation 30 of the Working Time Regulations 1998 ("WTR") (three months, a Tribunal had jurisdiction to consider the claimant's complaint of an unauthorised deduction from wages (holiday pay)

   3.2. Whether having regard to the time limit contained in section 123 EQA (three months) a Tribunal has jurisdiction to consider the claimant's discrimination complaint (s)."

4. The claimant was not represented at the hearing and had not prepared a witness statement, although a bundle of documents had been prepared by the respondent.

5. I decided to allow the claimant to give oral evidence and asked the claimant relevant questions myself about the chronology of events that led to him bringing the claim. The claimant was then cross-examined by Mr Bidnell Edwards. I also had before me the bundle of documents and the pleadings.

6. During his evidence the claimant said that he had received an e-mail from the Employment Tribunal administration on 1 May 2018 which suggests that he had already presented his claim by this date. After a short adjournment he was able to find the email, which appeared to be an automatic acknowledgment from the Employment Tribunal but provided no further details. The claimant could not find the e mail he says he sent which this was an acknowledgement of during the hearing. He asked for further time to be able to search for and find this e mail before a final decision was made on whether his claim was presented out of time. The claimant contended that this would show that he was in correspondence with the Employment Tribunal regarding his claim from at least 1 May 2018. (No further information was provided after this about such an e mail)

7. The claimant also indicated that he wished to amend his claim to allege that his dismissal was also an act of race discrimination (this does not previously seem to have been alleged in correspondence or the proceedings to date). Mr Bidnell Edwards objected to both these applications. The application to amend was linked to the out of time issue so it appeared to me that it was in the interests of justice to consider both at the same time.

8. I adjourned the OPH and confirmed that a decision on the out of time issue and the application to amend would therefore be made once the claimant had clarified (within 14 days) how his application to amend is made and also provided the additional evidence he says supports his contention that his claim was brought in time and/or supports his submission that time should be extended on just and equitable grounds. Once this had been done, the respondent would be given the opportunity to respond and make any further submissions. I made Orders to this effect, which were sent to the parties on 12 July 2019. Although I did not consider it is appropriate to make these orders subject to an Unless Order, I made it clear to the claimant that this was the final opportunity to set out his position on the time issue and clarify his claim. The claimant understood what was required and indicated that this would be done.

9. The respondent wrote to the Tribunal on 2 August to confirm that the claimant had not provided the information required. The claimant sent an email to the Tribunal on 7 August 2019 providing some further information. The respondent made

further submissions to the Tribunal on the points raised, again which are summarised below.

The Issues

10. In determining whether the claimant's complaints for

    10.1. Unlawful deduction were presented within the time limits set out in **23 (2) of the ERA and/or regulation 30 of the WTR** involved considering *whether it was not reasonably practicable for a complaint to be presented within the primary time limit and if not, whether it was presented within a reasonable time thereafter*; and

    10.2. for discrimination were presented within the time limits set out in **sections 123(1)(a) & (b) of the EQA** involved considering *whether time should be extended on a "just and equitable" basis.*

The relevant law

11. On the complaint of unlawful deduction from wages, the relevant legal provisions I have considered are set out at regulation section **23 (2) of the ERA and/or regulation 30 of the WTR** and state that time can only be extended where the tribunal:

    "is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months"

    [and was presented to the tribunal*]*

    "within such further period as the tribunal considers reasonable"

12. The authorities on this provision are clear that the power to disapply the statutory time limit is very restricted. The statutory test is one of practicability. It is not satisfied just because it was reasonable not to do what could be done as per **Bodha (Vishnudut) v Hampshire Area Health Authority [1982] ICR 200.**

13. There has to be some impediment, which reasonably prevents or interferes with the ability of the claimant to present in time as stated by the Court of Appeal in the case of **Walls Meat v Khan 1979 ICR 52**.

14. **Section 123 of the EQA**, which specifies time limits for bringing employment discrimination claims, provides so far as relevant that:

    "(*1) … proceedings on a complaint … may not be brought after the end of—*

    (a) the period of 3 months starting with the date of the act to which the complaint relates, or

    (b) such other period as the employment tribunal thinks just and equitable."

15. The language used ("*such other period as the employment tribunal thinks just and equitable*") gives the employment tribunal the widest possible discretion.

16. **Section 33(3) of the Limitation Act 1980** (power to extend time in personal injury actions) specified a number of factors that a court is required to consider when balancing the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving

rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

17. In **British Coal Corporation v Keeble [1997] IRLR 336**, it was held that the Tribunal's power to extend time was similarly as broad under the 'just and equitable' formula. However, it is unnecessary for a tribunal to go through the above list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion' (**Southwark London Borough v Afolabi [2003] IRLR 220**).

18. The Court of Appeal in **Robertson and Bexley Community Centre (trading as Leisure Link) 2003 IRLR 434CA** made it clear that there is no presumption that time should be extended to validate an out of time claim unless the Claimant can justify the failure to issue the claim in time. The Tribunal cannot hear a claim unless the Claimant convinces the Tribunal that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.

19. In the recent case of **Abertawe Bro Morgannwg University v Morgan [2018] EWCA Civ 640** the Court of Appeal however stated that the "*such other period as the employment tribunal thinks just and equitable*" extension indicates that Parliament chose to give the tribunal the widest possible discretion. Although there is no prescribed list of factors for the tribunal to consider, "*factors which are almost always relevant to consider are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent"*. There is no requirement that the tribunal had to be satisfied that there was a good reason for the delay before it could conclude that it was just and equitable to extend time in the claimant's favour.

20. The general case management power in rule 29 of **First Schedule to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** (amended and reissued on 22 January 2018) **("the Rules")** together with due consideration of the overriding objective in rule 2 to deal with the case fairly and justly, gives the Tribunal power to amend claims and also to refuse such amendments.

21. In the case of Selkent Bus Co Limited v Moore [1996] ICR 836, the Employment Appeal Tribunal gave useful guidance, namely:

> *(4) Whenever a discretion to grant an amendment is invoked the Tribunal*
>
> *should take into account all the circumstances and should balance the*
>
> *injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.*
>
> *(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:*
>
> *(a) The Nature of the Amendment*
>
> *Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.*

(b)The Applicability of Time Limits

If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, e.g. in the case of unfair dismissal section 67 of the Employment Protection (Consolidation) Act 1978.

(c) The Timing and The Manner of the Application

An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Regulations of 1993 for the making of amendments. The amendments may be made at any time – before, at, even after the hearing of the case. Delay making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking factors into account the Parliament considerations are relative injustice and hardship involved in refusing or granting an amendment. The question of delay, as a result of adjournment, and additional costs, particularly if they are unlikely to be recovered by the successful party are relevant in reaching a decision."

22. This position is also summarised in the Presidential Guidance issued under the provisions of **Rule 7** of the Rules which I have also considered.

The relevant facts

23. The claimant's claim for holiday pay relates to the period 8 November 2017 until 12 January 2018 – he says he took no holiday and received no pay. His last pay was due on or about 7 February 2018 which was the next pay run after the date that the claimant was dismissed. The claimant suggested it was some time in April that he received his last payslip, but no evidence was presented to suggest this. He commenced early conciliation in time on 11 April 2018 but would need to have presented his claim by 11 June 2018 and it was not presented until 21 June 2018, so on its face it is out of time.

24. His claim for discrimination related to an incident of racial abuse described in his claim form, which the claimant says occurred on 8 January 2018. He would need to have contacted ACAS by 8 April 2018 but contacted ACAS on 11 April so again on its face his claim has been brought out of time. The claimant today made an application to amend his claim to add an allegation of discrimination namely that his dismissal with effect on 12 January 2018 was on the grounds of race. The respondent objected to this application to amend. If this were permitted, then it would be the case that the ACAS conciliation had been presented in time. However as in relation to his unpaid holiday pay claim, he would have been required to present his claim by 11 June 2018 in any event.

25. The claimant gave evidence on the course of events leading up to his decision to issue proceedings. He said after he was dismissed on 12 January 2018, he got into contact with ACAS straight away. ACAS informed him that he would have to go through the internal procedures to appeal against his dismissal. He acted quickly and issued his appeal on 15 January 2018. An appeal hearing was organised and held on 8 February 2018. This was adjourned to allow further investigations to take place on the allegation of racial abuse made. The claimant said that on Friday 9

February 2018 he was contacted by one of his colleagues who told him that one of the people, he had alleged had racially abused him, Mr McCormack had been sacked from the respondent misconduct, so he was confident that he would get his job back. The claimant was given his appeal outcome on 26 February 2018.

26. The claimant submitted a grievance on 20 March 2018 alleging that he had been racially abused. The grievance was heard by Mr Lacey of the respondent on 3 April 2018 and was rejected by a letter of 9 April 2018. The claimant did not appeal against the outcome of this grievance. The claimant said that it was after he received this email on 9 April 2018 with the grievance outcome that he decided to submit his claim. Up until this point he was convinced that he would get his job back but once he had received the e mail on the 9 Apri,l he knew he would not have a job. He said that he contacted the Employment Tribunal in Nottingham on 9 April 2018 about bringing a claim and he said that he was advised that he needed an ACAS conciliation number in order to submit his claim.

27. The claimant contacted ACAS and commenced his ACAS conciliation on 11 April 2018 and this ended on 11 May 2018. The claimant said that during this period he was "under depression", was very distressed and that mentally and emotionally he was in a very bad place. He presented his claim on 21 June 2018. He could not explain why his claim was not presented within the month after 11 May 2018 i.e before 11 June 2018 but said that it was a difficult time and that his judgment was affected. He said he was behind with his rent and council having suffered a loss of income and was struggling to support his children and grandchildren.

28. The claimant also suggested that he in fact had been in touch with the Tribunal about his claim before 21 June 2018. He referred to an e mail he had received from the Tribunal from around 1 May 2018. He took some time during the hearing to try and find this e mail but was unable to find anything conclusive. He was also unable to produce anything further in the period given after the hearing and before the decision was to be made.

Conclusion

The claim for unlawful deduction of wages.

29. The claimant effectively has the burden of proof in showing that it was not reasonably practicable for his claim to have been presented in time. His submission on this is effectively that the delay in issuing the claim was caused by his mental state during the time after he had been dismissed and because for much of that time, he was under the mistaken impression that he would get his job back. He apologised for the delay but asks that he be permitted to bring his claim in any event.

30. The respondent submits that there is no basis to show that it was not reasonably practicable for the claimant to have presented his claim on time, or that it was then presented within a reasonable time period. It submits that no medical evidence has been provided to support what the claimant says about his health. It points out that the time limits are particularly strict for these types of claims for very good reasons.

31. I completely accept that the claimant was having a difficult time having lost his job and was focusing entirely on his hope that he might get it back by pursuing internal processes. However, I cannot go so far as to say it was not reasonably practicable for the claimant to commenced early conciliation and issued his claim in time. Around the time his claim should have been submitted things were not easy.

However, this is not sufficient to meet the test of being some impediment, which reasonably prevents or interferes with the ability of the claimant to present in time. The jurisdiction of the Employment Tribunal is strictly defined by legislation and can only hear claims that satisfy all the legal tests for such claims to be brought including time limits. Claims such as unlawful deduction for wages breach of contract, unfair dismissal have a particularly strict time limit with limited room for manoeuvre

32. I do not therefore need to consider the second arm of the test as to whether the claim was presented within such further time period as was reasonable.

33. I decline to extend time and the claimant's claim for unlawful deduction of wages is dismissed.

Discrimination complaints

34. The claimant made the same points as above on the reason why his claim was submitted late (and he commenced his early conciliation late). He asks the Tribunal to exercise its discretion to extend time on the grounds that it is just and equitable to do so.

35. The respondent submitted that in the case of the claim for discrimination, that the claimant had in effect failed twice to do the things he was required to do to present his claim. In the first place, there was a delay of 4 days in commencing the early conciliation process (for the claim as it stands although the respondent accepts that this would not apply to any amended claim to include dismissal if the amendment application was granted). There was then a further delay of a month and 10 days after the date he should have submitted his claim form (which is relevant to both the current claim and any amendment). The respondent asks me not to accept the claimant's suggestion that he in fact submitted it earlier and asks me to look at the date shown on the form itself which is automatically generated. It is pointed out that the claimant has not been able to produce any evidence to back up the contention that he had submitted his claim earlier. Although the claimant may have had difficulties, none of these were exceptional or out of the ordinary in respect of someone who had recently left employment. There is no suggestion that the respondent had misled the claimant about the need to bring a claim and the claimant gave very clear evidence that by 9 April the claimant knew he would not be getting his job back and yet he still delayed in bringing the complaint.

36. I have considered factors set out above in the relevant case law. I take particular note of the recent directions given by the Court of Appeal in the **Abertawe Bro Morgannwg University v Morgan** case above. On balance I prefer the submissions of the respondent.

37. The length of the delay was not insubstantial being over a month.

38. It is now some time since these events took place, but there is no particular issue as regards the cogency of evidence should the claim be permitted to proceed.

39. The main issue that I consider relevant for me to consider here would appear to be the reason for the delay in issuing proceedings. I accept that the claimant was going through a difficult time following his dismissal and the Tribunal is sympathetic to these difficulties. However I find that the main reason that the claimant delayed in commencing his claim in the relevant time limits was that he was hopeful at least early on that he would get his job back. The later delay was clearly impacted by other factors, but I have not seen any specific evidence as to what was happening

other than what the claimant tells me about the difficulties he was having e.g. any medical evidence. I also do note that the claimant then said he had in fact submitted a claim earlier, but was unable to produce the documentary evidence he had to support this.

40. I have also considered the fact that the claimant was during this period receiving guidance and assistance from ACAS. It is not clear what was said to the claimant about time limits, but I conclude that the claimant was aware that time limits applied to his right to bring a claim as it is unlikely that he would have been speaking to ACAS since February and this had not been mentions

41. Considering all these matters and weighing up the prejudice to both sides, that the respondent would be more severely prejudiced, if the claim was allowed to go ahead.

42. It is clear from the case law that it is not a question of the Tribunal being able to exercise jurisdiction just because it would be kind to do so. There must be something raised by the claimant which convinces me that it is just and equitable to do so. I have not been so convinced so this Tribunal's judgment it is not just and equitable to extend time for indirect discrimination complaint to be brought.

Amendment application

43. In deciding this application, I considered the factors identified by Selkent before addressing the balance of prejudice and hardship. I set out the analysis on each of these points below:

Nature of the amendment

44. The amendment requested here appeared to me to be a substantial one. The claimant's allegation of race discrimination to date relates to a single incident involving a fellow employee which he said he experienced on 8 April 2018. He now says that his dismissal was because of his race. This is an entirely different allegation and not just re-labelling exercise. This was more in the nature of "entirely new factual allegations which change the basis of the existing claim" as identified in the Selkent case above.

Applicability of time limits

45. The complaint that dismissal was direct race discrimination is out of time in the same way as the existing complaint (albeit that it is the presentation of the claim rather than this and the commencement of early conciliation that is a concern with the amendment). Therefore whether the amendment requested was out of time was a factor that was broadly neutral. It did not tip the balance one way or the other.

Timing and manner of the application

46. The application to amend was made at the second preliminary hearing held on 28 June 2019 which is over a year after the claim was initially presented. A preliminary hearing for case management held by Employment Judge Findlay on 13 May 2019 identified the incident on 8 April 2018 as the sole complaint and it was not contended at this time that the claimant's dismissal was tainted by discrimination. The complaints in relation to dismissal to date were that the claimant's dismissal was unfair not that it was an act of discrimination. It is also notable that the claimant did not mention this issue until at the last moment, at which point of course his claim for dismissal had been dismissed.

Balance of prejudice

47. Putting these factors together I concluded that the balance of prejudice and hardship favoured refusing the amendment. My main concern was that allowing the amendment would simply be giving the claimant an opportunity to reframe what he was complaining about now that it was clear to him that he was not able to pursue an unfair dismissal claim. The claimant has referred to racist language used by employees in the canteen (but does not given any particulars of dates). Otherwise makes no reference to why he feels that his dismissal was on the grounds of race or why this was not raised before

48. This complaint was raised substantially after the primary limitation period and so the respondents would be prejudiced in addressing this new factual complaint as to do so would require additional work that would be burdensome. The claimant has had ample opportunity to set out what his claim was about. The relative prejudice to the claimant if the application is not granted would be relatively small whereas the disadvantage to the respondents if it were and the effect on the proceedings could be significant. For the above reasons, Amendment Application 2 is refused.

Signed by: Employment Judge Flood

Signed on: 18 October 2019