EMPLOYMENT TRIBUNALS

Claimant: Mr P Svaetichin

Respondent: Young & Co's Brewery PLC

Heard at: London South Croydon

On: 25 September 2029

Before: Employment Judge Tsamados (sitting alone)

Representation

Claimant: Ms R Morton, Counsel
Respondent: Mr R Hignett, Counsel

PRELIMINARY HEARING RESERVED JUDGMENT

The Judgment of the Employment Tribunal is as follows:

The Claimant's complaints were not brought within the requisite time limits set out in the Employment Rights Act 1996, the Employment Tribunals (Extension of Jurisdiction) (England & Wales) Order 1994, the Trade Union & Labour Relations (Consolidation) Act 1992 and the Equality Act 2010. This claim is therefore dismissed.

REASONS

Background to and issues for determination at this hearing

1. By a Claim Form presented to the Employment Tribunal on 8 October 2018, the Claimant, Mr Svaetichin, brought complaints of sex, sexual orientation and age discrimination, unfair dismissal because of whistleblowing and detrimental treatment due to trade union membership, against the Respondent, Young & Co's Brewery Ltd, his ex-employer. His employment

ended on 8 February 2018, he commenced ACAS Early Conciliation on 18 September 2018 and this was concluded on 5 October 2018. He entered Early Conciliation outside of the primary time limits within which to present claims to the Employment Tribunal. It was accepted that all of his complaints were presented to the Employment Tribunal outside of the requisite time limits.

2. In a Response received by the Employment Tribunal on 18 December 2018, the Respondent denied each of the complaints and raised the time-limit issue.

3. A Preliminary Hearing on case management was conducted by Employment Judge ("EJ") Sage on 3 April 2019. The date of the full hearing was set, for five days commencing 29 June 2020. In addition, EJ Sage listed an open Preliminary Hearing for today to determine the following:

    a. Whether it was reasonably practicable for the Claimant to have brought his complaints of trade union detriment contrary to section 146 TULRCA 1992 within three months of 25 January 2018?
    b. Whether it was reasonably practicable for the Claimant to have brought his unfair dismissal complaints within three months of 8 February 2018?
    c. Whether the Employment Tribunal has jurisdiction to consider any of the acts/omissions of discrimination identified in the Claim Form?
    d. Whether the first protected disclosure in paragraph 8 of the Claim Form is being relied upon?
    e. Whether the complaint of sexual orientation discrimination has little or no reasonable prospect of success?
    f. Whether the complaint of sexual harassment has little or no reasonable prospect of success?
    g. The resultant issues in the case and any necessary case management.

4. EJ Sage also set a series of case management orders in order to prepare the case for this Preliminary Hearing.

Documents

5. The Claimant provided me with a skeleton argument, a list of issues, a document entitled "Better Particulars of Paragraphs 6, 7 and 8" (of his grounds of claim) and a letter from his GP's Surgery dated 9 September 2019. He gave evidence by way of a written statement and in oral testimony.

6. The Respondent provided the trial bundle consisting of 817 pages.

7. Given the matters raised within the Claimant's Better Particulars as to allegations of sexual misconduct and drug dealing, I reminded the parties that this was a public hearing and that my Judgment will go on to the Employment Tribunals' website. I suggested that both parties might like to consider this as a matter to take into account in terms of the conduct of the proceedings. Both Counsel acknowledged what I had said but did not respond further.

Preliminary issue

8. I then adjourned to read the Claimant's witness statement and skeleton argument and the pages referred to within the bundle, which I will refer to as R1 where necessary.

9. The Respondent's Counsel, Mr Hignett, objected to the protected disclosures identified within the Claimant's list of issues. He pointed out that the Claim was limited to the two identified in the ET1. The Claimant's Council, Ms Morton, replied that these protected disclosures were included in the list of issues and agenda provided at the previous Preliminary Hearing. I stated that nevertheless the Claimant would require leave to amend and no such application had been made.

10. After the reading adjournment, Ms Morton sought leave to amend so as to include the protected disclosures relating to an email of 2 March 2017 (at R1 68-74, and an email of 4 September 2017 (at R1 161-167).

11. I indicated to the parties that I would park this issue for now and return to it if there was time today or if not by way of a written application which could be dealt with in the papers if the parties agreed.

Findings

12. I set out below the findings the Tribunal considered relevant and necessary to determine the issues I am required to decide. I do not seek to set out each detail provided to the Tribunal, nor make findings on every matter in dispute between the parties. I have, however, considered all the evidence provided to me and have borne it all in mind.

13. Without treading on the toes of the Employment Tribunal that may be dealing with the full hearing of this Claim, I set out the following circumstances in as far as they are non-contentious and act as background to the matter I have to decide.

14. The Claimant was employed as a Hotel Receptionist at the Respondent's public house and hotel in Wimbledon, The Dog & Fox, from 6 August 2015 until his dismissal with effect on 8 February 2018.

15. The Claimant presented his ET1 to the Tribunal on 8 October 2018. He does not gain the benefit of any extension to the original time limits by virtue of commencing Early Conciliation on 18 September 2018 because this was after expiry of the original time limits which on the latest date of complaint ended on 7 May 2018.

16. The Claimant complains of sexual harassment and sex discrimination. Particulars of these complaints can be found within his Statement of Claim at R1 15 paragraph 6a and at paragraphs 7-13 of his Better Particulars.

17. The Claimant alleges that he was subjected to sexual harassment by Ms Oksana Williams, the General Manager of The Dog & Fox, between August 2016 and February 2017 in that she touched him inappropriately. He also alleges that he raised concerns about her inappropriate sexual behaviour towards other members of staff which he found offensive and demeaning.

18. The Claimant further alleges sex discrimination in relation to being passed over for promotion by Ms Williams. He accepted that the three comparators that he names in his grounds of claim relate to his allegation that he was passed over for promotion. In particular, the Claimant accepted that Ms Terracina left the Respondent's employment in April 2017 and so his complaint must have arisen before that date. He further stated that Ms Hodge was promoted over him on 19 June 2017.

19. The Claimant alleges that both elements of his complaint were raised in his grievance to the Respondent dated 2 March 2017. (at R1 281-287).

20. The Claimant further alleges that he was subjected to age discrimination in relation to being passed over for promotion and in relation to his level of pay. Particulars of this complaint are set out at paragraph 7 of his Statement of Claim (at R1 15) and at paragraphs 14-17 of his Better Particulars.

21. The Claimant accepted that the complaint in relation to promotion applied to the same three comparators that he relies upon for his complaints of sex discrimination although he further accepted that this was not set out within his grounds of claim or his Better Particulars.

22. With regard to the complaints in relation to pay, the Claimant alleges that his pay was increased to £8 per hour in 2017 and it remained the same until his dismissal in 2018. EJ Sage had required the Claimant to provide further information of the higher rates of pay received by those of a different age or age group to him (at R1 41 2.1.2.3). However, the Claimant has not done so within his Better Particulars, although he said this information was in the bundle (without reference to whereabouts) and further it could be provided.

23. The Claimant further alleges that he was subjected to detrimental treatment by the Respondent because he raised protected disclosures, i.e. he blew the whistle. This is set out at paragraph 8 of his Statement of Claim and R1 15-16 and paragraphs 19-23 of his Better Particulars.

24. The Claimant relies upon alleged protected disclosures that he made in an email to the Respondent's staff on 22 January 2017 at R1 107. This is addressed to The Dog & Fox generic email address and to a number of individuals who are either receptionists or night porters. The Claimant alleges that the protected disclosure is within the text which is circled R1 107 relating to "7 days check". He accepted that this was an unwritten task that managers ask reception to undertake by way of checking reservations coming up within the next seven days. He further accepted that his email was in effect berating staff for not undertaking a seven days check in respect of a room reserved on 10 January for 23 January 2017.

25. When asked what legal obligation this alleged disclosure was raising, the Claimant explained that it was to protect his employer's interests and that the failure to undertake these checks could result in disciplinary action and ultimately dismissal.

26. When asked why such a matter was within the public interest, the Claimant explained that if the checks were not undertaken, the Respondent would receive less income by way of room rates and further that as a result the tax yield is incorrect. He did not accept as the Respondent avers that the real reason for the checks was to ensure that guests who have booked rooms are still coming to the hotel on the dates they have booked.

27. The Claimant alleges that as a result he was subjected to detrimental treatment in that Ms Williams asked at least two of his colleagues to make complaints about him in January or February 2017. In addition, the Claimant alleges that he was treated detrimentally by Mr Cormac Rawson, the Area and Operations Manager, when Mr Rawson dealt with his grievance hearing between February and April 2017 (the grievance hearing findings letter is dated 20 April 2017 and is at R1 452-456).

28. The Claimant further alleges that he made a protected disclosure to Mr Jason Wright, the Area Operations Manager, in July 2017 by informing him that Ms Williams had covered for staff members who were selling drugs on the Respondent's premises. The Claimant says that he was treated detrimentally by Mr Wright by ignoring his application for a job as Group Sales Manager in August 2017.

29. The Claimant further complains that he was unfairly dismissed on general principles as well as on the automatic ground of making protected disclosures.

30. The Respondent's position is that the Claimant was dismissed by the Respondent in an email letter dated 8 February 2018 (R1 746-750). He was dismissed for gross misconduct with immediate effect. The letter was from Ms Sian O'Brien, the General Manager of The Crown Hotel, which is another hotel operated by the Respondent. The covering email was from Tony & Sian O'Brien, who are both General Managers of The Crown Hotel and was cc'd to Mr Chris Welch. The subject box is "Outcome of Disciplinary Hearing".

31. The Claimant appealed and the outcome was communicated to him by the Respondent's letter dated 2 July 2018 (R1 787-790).

32. The Claimant's position with regard to when he was dismissed is set out later on in this Judgment.

33. The Claimant further complains that he was subjected to detrimental treatment because of his membership of his Trade Union, Unite. This is set out at paragraph 9 of his Statement of Claim and at paragraph 24 of his Better Particulars.

34. The Claimant alleges that there was a discussion at the disciplinary hearing which took place on 25 January 2018 as to whether the Respondent would provide with a recording or transcript of a telephone conversation between Mr Ben North, the new General Manager and Mr Jaisal Patel. The Claimant believed that in this conversation Mr North tried to persuade Mr Patel to make complaints about him. The Claimant further alleges that he told Ms O'Brien, who was chairing the hearing, that he had discussed this issue with

his Trade Union, and her response was to immediately accuse him of trying to blackmail her and spoke to him very harshly. He believes that this response seemed clearly to rise from antipathy to his reference to his Trade Union.

35. The Claimant had been receiving assistance from Unite from at least February 2017. He was in contact with a Mr Steve Harris and also with Ms Michelle Braveboy, from Unite's legal department. I was referred to Claimant emails to various people within Unite at R1 376-392. In particular, the email dated 19 February 2018 in which Claimant makes reference to the three months since his disciplinary invitation and from his suspension (at R1 376). He asks whether "these milestones (are) of any significance". The difficulty with the emails is that the Claimant has not included any responses from those persons he has written to.

36. The Claimant alleges that it was not reasonably practicable for him to bring his complaints of Trade Union detriment, unfair dismissal or wrongful dismissal within 3 months of 25 January (for the Trade Union detriment) or 8 February 2018 (for the other two complaints) because of delays caused by his Trade Union, his concern of the legitimacy of his dismissal (as I will come to) and his ongoing grievance and appeals. Which he felt would resolve the matters without the need to go to the Employment Tribunal.

37. However, in oral evidence it did seem clear that the substantial cause of the Claimant's failure to present his complaint with the requisite time limits was as follows.

38. The Claimant believed that he could not bring a Claim until he had been dismissed and had been to ACAS. He did not accept that the letter of 8 February 2018 was a genuine letter of dismissal and it was not until he received the appeal outcome letter that he believed he had been dismissed.

39. The dismissal letter had been sent from a generic email address at The Crown Hotel. The Claimant said that this could be accessed by other members of staff and he doubted it was a different at The Crown Hotel. Further, he was concerned because the attached letter was not signed. From these matters he said that he formed the view that this was, as he put it, a "pretend dismissal letter", sent by someone purporting to be Sian O'Brien and was a spurious document. The Claimant participated in the appeal process on this basis and points to the opening paragraph of his email of appeal dated 14 February 2018 at R1 362, in particular:

> *"I wish to appeal against the "outcome" given by somebody pretending to be Sian O'Brien on Thursday 08/02/2018, to the disciplinary raised against me by the Management of the Dog and Fox. I urgently called the attention of the Company to the gross misbehaviour regarding what somebody accessing the email the Crown, Chertsey, might have been doing sending an unsigned document affecting my rights and benefits."*

40. In addition, he points to the second paragraph, in particular:

> *"I am presenting an appeal to this spurious document, notwithstanding the fact that nobody has vouched for its legitimacy or endorsed the responsibility of the acts undertaken as its consequence. I strongly protest for the uncertainty and distress that the situation is causing me, also aggravating my already weak health."*

41. In email correspondence to the Respondent commencing on 10 February 2018, the Claimant had raised his concerns about the genuineness of the letter and sought clarification (R1 374-377). He said in evidence that he could not rely on an unsigned letter as proof of investigation and dismissal in a court, for the Police or for Universal Credit. He asked the Respondent for a signed copy of the letter but never got one. It was only when he got the appeal outcome letter that he believed that his dismissal had been confirmed. He further stated in evidence that his concern was that if he ever had to "denounce the conspiracy" and show who had carried out the investigation and dismissed him, he did not have something that he could rely upon.

42. It is fair to say that these are not matters that the Claimant raised within his Claim Form.

43. The Claimant accepted that from November 2017 onwards, he had not been attending work due to ill-health, he had not received any wages after November 2017, although received a payment of wages on 12 February 2018 and on a date he could not remember had received his P45 from the Respondent.

44. The Claimant had also brought grievances dated 2 March, 30 August 2017 and 4 September 2017. It would appear that the grievance processes were exhausted by 1 August 2017 in respect of the first two grievances and the third grievance was an attempt to in effect raise a right of further appeal against the outcome. The Claimant sent a further appeal on 14 November 2017, but this was rejected by the Respondent.

45. In addition, the Claimant pointed to his medical condition, namely specific ailments flowing from his diagnosis with HIV since February 2016. It is clear that the Claimant has a serious medical condition, but the manifestation of this at the material time was not seen as psychological but as a need for counselling. The Claimant was awaiting counselling between 9 May 2018 when he had an initial assessment and 17 September 2018 when his counselling commenced (at R1 404) and issues to do with blood pressure monitoring and work related stress (reference is made to the letter provided from his GP dated 9 September 2019 and the GP letter dated 28 March 2019 and medical records to May 2018 starting at R1 408).

46. There is a nothing within the medical evidence at R1 404 to 421 to indicate that the Claimant's medical condition was debilitating to the degree that the Claimant was unable to manage his affairs and in particular between February to July 2018. During that time, he had been in communication with the Respondent and preparing for the appeal hearing which took place after delays to accommodate the attendance of his Trade Union representative and due to his own attendance at medical appointments. He had produced a lengthy appeal email on 14 February 2018 (R1 752-762) as well as other correspondence. I do not accept that his ill-health prevented his compliance with the time limits.

47. The Claimant also relies on delays by his Trade Union in providing assistance by way of representation at various internal meetings with the Respondent. He was receiving assistance from his Trade Union since

February 2017. He was represented at grievance and disciplinary hearings. He was in contact with his Trade Union on various occasions during March and April 2018 seeking assistance and belatedly told shortly after 18 April 2018 that his request for legal representation had been denied.

48. The Claimant had also visited the Citizens Advice Bureau ("CAB") seeking advice.

49. The Claimant stated that from 2017 onwards he had a general awareness that there was a 3 month time limit within which to go to ACAS and that this was running from the date of his dismissal and then there was a three-month delay. He further stated that he believed the time limit did not start until he had been dismissed and gone to ACAS. He was not able to say how he knew this or formed this view.

50. The Claimant had been to Sutton CAB in 2017 but stated that he simply saw a clerk and was not told anything about time limits. He further stated that he also went to Sutton CAB in September 2018 but again saw a clerk who told him that he could not see an adviser until he had been to ACAS and got an ACAS number and did not mention anything about time limits. He accepted that he did not ask about time limits, but he stated that this was because he thought that the time limits did not start until he had been dismissed. However, at paragraph 20 of his witness statement he states "as soon as I went to the citizens advice bureau, I issued my concerns with ACAS on 18 September 2018, but I was already out of time by them according to the professionals, even if unbeknown to me." This is at odds with his oral evidence.

51. The Claimant had been receiving assistance from his Trade Union from early 2017 onwards. He had the services of a Trade Union representative both at his grievance hearings and at his dismissal meeting. He had spoken to his Trade Union by telephone on a number of occasions during 2017 and 2018 regarding representation and legal assistance. However, he says there was no discussion of time limits or the need to take action within a certain time frame and he did not ask about time limits because if his belief that they did not start to run until his dismissal. However, it is clear that he did ask on at least one occasion at R1 376. This was not about his dismissal but about a time limit of 3 months running from his disciplinary invitation and suspension. He has not provided copies of any responses received, it any.

52. The Claimant accepted that he looked online about Employment Tribunal time limits but not into how this applied to discrimination claims. His position is that he was only aware of the time limit in relation to dismissal. This is at odds with his enquiry at R1 376.

53. Whilst the Claimant was mistaken as to when the time limit ran from, he did not explain where this belief came from and in any event he had sufficient access to sources of advice to clarify the position but did not do so.

54. I heard submissions from both counsel and also had the benefit of a written skeleton argument from the Claimant's Counsel I have taken the submissions into account in reaching my decision.

Essential law

Unfair Dismissal, Wrongful Dismissal, detrimental treating relating to whistle-blowing and Trade Union membership

55. With regards to the complaint of unfair dismissal section 111(2) of the Employment Rights Act 1996 states that:

> *"… [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).]"*

56. The same provision as to the time limit is contained within section 48 of the Employment Rights Act 1996 in respect of detriments relating to whistle-blowing (with provision for a series of acts or acts extending over a period of time), the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 with regard to the wrongful dismissal complaint and to section 147 of the Trade Union & Labour Relations (Consolidation) Act 1992 in respect of the Trade Union detriment compliant.

57. There are two limbs to this formula. First, the employee must show that it was not reasonably practicable to present his/her claim in time. The burden of proving this rests firmly on the Employee (Porter v Bandridge Ltd [1978] IRLR 271, CA). Second, if s/he succeeds in doing so, the Tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.

58. Whether it was reasonably practicable for the Employee to submit her claim in time is a question of fact for the Tribunal to decide having looked at all the surrounding circumstances and considered and evaluated the Employee's reasons.

59. The Court of Appeal in **Palmer & Anor v Southend on Sea Council** [1984] IRLR 119 considered the meaning of the words 'reasonably practicable' and concluded that this does not mean 'reasonable', which would be too favourable to employers and does not mean 'physically possible', which would be too favourable to employees, but means something like 'reasonably feasible', ie 'was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?'

60. May LJ in Palmer stated that the factors affecting an employee's ability to present a claim within the relevant time limit are many and various and cannot be exhaustively described, for they will depend on the circumstances

of each case. However, he set out a number of considerations from the past authorities which might be investigated ([1984] IRLR at 125). These included the manner of, and reason for, the dismissal; whether the employer's conciliation machinery had been used; the substantial cause of the employee's failure to comply with the time limit; whether there was any physical impediment preventing compliance, such as illness, or a postal strike; whether, and if so when, the employee knew of his rights; whether the employer had misrepresented any relevant matter to the employee; whether the employee had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the wmployee or his adviser which led to the failure to present the complaint in time.

61. When considering whether or not a particular step is reasonably practicable or feasible, it is necessary for the Tribunal to answer this question 'against the background of the surrounding circumstances and the aim to be achieved'. This is what the 'injection of the qualification of reasonableness requires' (**Schultz v Esso Petroleum Ltd** [1999] IRLR 488, CA)

62. It may not be reasonably practicable to present a claim in time if the employee, at a late stage, discovers some important fact which transforms his existing belief that he has no cause of action into a belief that he does or may have a valid claim.

63. The leading case is **Machine Tool Industry Research Association v Simpson** [1988] IRLR 212, in which the Court of Appeal set out the principles that apply in such a situation. Purchas LJ, giving judgment, said that the determination of the issue of reasonable practicability in such a situation involves a study of the employee's subjective state of mind. The employee is not, therefore, required to prove the truth of the facts that led him to bring his claim. The employee must establish three things: firstly, that it was reasonable for him not to be aware of the factual basis upon which he could bring a claim during the three-month limitation period (it being accepted that it cannot be reasonably practicable to bring a case based on facts of which he is ignorant); secondly, that the knowledge gained has, in the circumstances, been reasonably gained by him, and that that knowledge is either crucial, fundamental or important to his change of belief from one in which he does not believe that he has grounds for a claim, to a belief which he reasonably and genuinely holds, that he has a ground for making a claim; and thirdly, that the acquisition of the knowledge is crucial to the decision to bring the claim in any event. These principles were also summarised by Underhill J in **Cambridge and Peterborough Foundation NHS Trust v Crouchman** [2009] ICR 1306, EAT, at para 11.

64. Where the employee satisfies the Tribunal that it was not reasonably practicable to present his claim in time, the Tribunal must then proceed to consider whether it was presented within a reasonable time thereafter. The Tribunal must exercise its discretion reasonably with due regard to the circumstances of the delay.

Discrimination and Harassment complaints

65. Section 123 governs time limits under The Equality Act 2010. It states 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…*
> *…(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.'*

66. A Tribunal may allow a claim outside the time limit if it is just and equitable to do so. This is a wider and therefore more commonly granted discretion than for unfair dismissal claims. This is a process of weighing up the reasons for and against extending time and setting out the rationale. Case law has suggested that a Tribunal ought to consider the checklist under section 33 of The Limitation Act 1980, suitably modified for tribunal cases. The factors to take into account (as modified) are these:

    a. the length of, and reasons for, the worker's delay;
    b. the extent to which the strength of the evidence of either party might be affected by the delay;
    c. the employer's conduct after the cause of action arose, including his/her response to requests by the worker for information or documents to ascertain the relevant facts;
    d. the extent to which the worker acted promptly and reasonably once s/he knew whether or not s/he had a legal case;
    e. the steps taken by the worker to get expert advice and the nature of the advice s/he received. A mistake by the worker's legal adviser should not be held against the worker and appears to be a valid excuse.

67. The Tribunal should consider whether the employer is 'prejudiced' by the lateness, ie whether the employer was already aware of the allegation and so not caught by surprise, and whether any harm is done to the employer or to the chances of a fair hearing by the element of lateness.

68. Where the delay is because the worker first tried to resolve the matter through use of an internal grievance procedure, this is just one factor for the ET to take into account (**Apelogun-Gabriels v Lambeth LBC and another** [2002] IRLR 116, CA).

69. If the delay was because the worker tried to pursue the matter in correspondence before rushing to the Tribunal, this should also be considered (**Osaje v Camden LBC** (1997) EAT/317/96; November 1997 Legal Action 16).

70. Where a claim is outside the time limit because a material fact emerges much later a tribunal should consider whether it was reasonable of the worker not to realise s/he had a prima facie case until this happened (**Clarke v Hampshire Electro-Plating Co Ltd** [1991] IRLR 490, EAT)

Conclusions

The complaints of Unfair Dismissal, Wrongful Dismissal, detriments arising from whistle-blowing and trade union membership

71. The Claimant's essential argument is that he believed that he could not bring claims relating to his dismissal until he was dismissed. He did not accept the veracity of the dismissal letter because it was unsigned and sent from a generic email address which from his knowledge of the one used by The Dog & Fox could be accessed by anyone.

72. Applying the principles from the **Simpson** case which by analogy is applicable to this set of circumstances.

73. Was reasonable for the Claimant to be aware of the factual basis upon which he could bring a claim during the three-month limitation period (it being accepted that it cannot be reasonably practicable to bring a case based on facts of which he is ignorant)? I conclude that the Claimant's belief that this letter was not a real letter of dismissal (and so there was no dismissal on receipt of this letter) is simply not reasonable. Indeed the Claimant had taken steps to appeal just in case the letter was genuine. From this it would have been reasonable to expect him also to have taken steps to secure his claim in the Employment Tribunal, i.e. by going to ACAS as he was aware. In addition, the Claimant was not attending work due to ill-health from November 2017 onwards, he was not receiving any wages from that date onwards not paid any wages until shortly after the letter of dismissal that he disputed was genuine and at some point he had received his P45. Further, whilst he had access to the CAB, Unite and the Internet, he did not receive or ask for any advice as to whether his belief about the letter of dismissal was correctly held or whether he should take any action to preserve his rights.

74. That the knowledge gained has, in the circumstances, been reasonably gained by him, and that that knowledge is either crucial, fundamental or important to his change of belief from one in which he does not believe that s/he has grounds for a claim, to a belief which he reasonably and genuinely holds, that he has a ground for making a claim. For the above reasons, I would also find that the Claimant does not satisfy this limb of **Simpson**. The elements which gave rise to the Claimant's belief that he had been unfairly dismissed arose within the letter of dismissal and were set out at great length within his letter of appeal.

75. That the acquisition of the knowledge is crucial to the decision to bring the claim in any event. Similarly, the above reasoning applies to this limb of **Simpson**.

76. I also considered whether there was any physical impediment preventing the Claimant's compliance with the time limits. As I have set out above in my findings whilst the Claimant has a serious underlying medical condition this did not manifest itself at the material time between February and July 2018 as rendering him incapable of managing his affairs. Further during that time he was in correspondence with the Respondent and produced a lengthy email setting out his grounds of appeal as well as other correspondence. As

I have said, I do not accept that his ill-health prevented compliance with the time limit.

77. I also considered whether the Claimant knew of his rights, whether he had been advised by anyone, and the nature of any advice given. The Claimant was aware of 3 month time limit but believed it did not start until he had been dismissed and gone to ACAS. He had been to and had access to advice from the CAB. He was a member of Unite and had access to their services and was in contact with someone from the legal department. He had the services of his union both in grievances hearings and at the disciplinary hearing. He also indicated that he was able to search on the Internet for information about Employment Tribunal time limits. Whilst the Claimant was mistaken as to when the time limit ran from, he did not explain where this belief came from and in any event he had sufficient access to advice to clarify the position but did not do so.

78. In conclusion, I find that the Claimant should have been aware that he had been dismissed on receipt of the dismissal letter and that he needed to act within 3 months of that date. He did not do so when it was reasonably practicable of him to have done so. In any event, even if it was not reasonably practicable of him to have done so he did not do so within a further reasonable period of time, waiting from receipt of the appeal letter of 2 July 2018 until 18 September 2018 to commence Early Conciliation, which in any event did not conclude until 5 October 2018 and he did not present his Claim Form to the Employment Tribunal until 18 October 2018.

<u>The discrimination complaints</u>

79. With regard to the complaints of sex discrimination and sexual harassment, this complaint is alleged to have taken place from August 2016 to February 2017. Even accepting that this was a continuing course of conduct over a period of time, the time limit within which to have brought the complaint would have expired in May 2017. The Claimant brought his complaints over 17 months later in early October 2018.

80. Similarly, with the sex discrimination relating to the failure to promote or Mr promotion opportunities these all relate to matters between late 2016 and early 2017 and so the complaints were brought at least 17 months after the expiry of the time limit.

81. This is similarly the case with the complaints of age discrimination relating to the promotion issues. With regard to the allegation of discrimination in pay if this were a continuing course of conduct running through to the end of the Claimant's employment, the complaint was not brought until October 2018 and so is at least four or five months out of time.

82. As I have said above I do not find that the Claimant's ill-health prevented him from conducting his affairs and dealing with this matter.

83. The Claimant has stated that he was not aware of time limits relating to complaints of discrimination. He was only aware of time limits running from the date of his dismissal. However, he was not able to explain where this belief arose from. Further, he had access to the CAB, to Unite and to the

internet to find out about time limits. He states that he was not told about time limits and did not ask given his erroneous belief. But he did specifically asked his Trade Union about time limits relating to non-dismissal matters although there is no indication as to a response, if any. I do not accept that the Claimant took reasonable steps to make enquires as to the time limits applying.

84. In part the Claimant also appears to say that he was relying on the outcome of internal procedures before acting on the discrimination complaints. However, those matters concluded in 2017 and I was not given a clear explanation beyond ignorance of time limits as to why the Claimant waited until September 2018 to commence Early Conciliation in respect of the non-discrimination complaints.

85. I have also taken into account the degree of prejudice that would be caused to the Respondent were I to extend time in which to bring these complaints. At the point a which the Claim Form was presented to the Employment Tribunal, the matters of which the Claimant complains go back as far as 17 months. This has an effect on the extent to which the strength of the evidence of either party might be affected by the delay and I was told that Ms Williams left the Respondent's employment in 2017 and that they are no longer in touch with her. Many of the issues that the Claimant has raised are to do with Ms Williams.

86. For these reasons I find that it is not just and equitable to extend time in respect of the complaints of discrimination.

87. The Claimant's claim is therefore dismissed in its entirety.

88. There is thus no need for me to deal with the Claimant's application for leave to amend given that it relies on matters arising during the same period of time or the Respondent's applications for a strike out or deposit order. Further, whilst I pencilled in a further Preliminary Hearing for 29 January 2020 this is not required and that date is vacated.

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Employment Judge Tsamados

Date 12 December 2019