EMPLOYMENT TRIBUNALS

Claimant: **Mr Saiful Islam**

Respondent: **Mr Mohammed Abdul Qayum**

Heard at: **Cardiff** **On: 20 January 2020**

Before: **Employment Judge RL Brace**

Representation:
Claimant: In person
Respondent: Mrs FN Qayum (daughter of respondent)

JUDGMENT

1. The claimant's claims of sex discrimination are dismissed on withdrawal by the claimant.

2. The claimant's claims of unfair dismissal, breach of contract and/or unlawful deduction from wages are dismissed for lack of jurisdiction as the claims were brought out of time and time is not extended.

WRITTEN REASONS

1. Both the claimant and the respondent are litigants in person. The respondent was assisted at the hearing by his daughter Mrs F N Qayum. On 19 January 2020 the claimant had emailed the tribunal, objecting to Mrs Qayum representing the respondent. At the hearing the claimant was reminded that Mrs Qayum had already been told, at the case management preliminary hearing which had taken place on 18 October 2019, that she could attend hearing and support her father but that she would not be able to provide interpretation for any evidence that the respondent wished to give. She had not been told, contrary to the claimant's suggestion, that she could not represent him. The claimant was informed that Mrs Qayum would be able to represent her father at the hearing as there was no restriction of the right to audience at the Employment Tribunals (s.6 Employment Tribunals Act 1996).

2. Both parties were also reminded that they had been asked at the preliminary hearing if an interpreter would be required and both had confirmed that they did not require such services. This was repeated by both again at the outset of the hearing and both confirmed that they did not require such services.

3. We sought to identify the documents that were before the tribunal and agreed that these consisted of:

    a. a set of documents, which had been provided by the claimant to the respondent in compliance with the case management order made on 18 October 2019 (the "Bundle",) numbered 1-150 and which also included:

        i. written submissions from the claimant regarding the issue of time and limitation before the tribunal [1-3]; and

        ii. references to some 19 cases none of which I was referred to by the claimant;

    b. a statement from the claimant, which had been disclosed to the claimant and to the Tribunal on 29 October 2019 in accordance with the case management order [A1-A9]; and

    c. additional correspondence, which the claimant indicated related to his ongoing complaint regarding his case against the respondent's solicitors, Chetna & Co, relating to their conduct in the leave to remain application made in respect of the claimant in 2008.

4. The claimant also brought to the hearing a further bundle of documents, a copy of which had been given to the respondent and labelled 'Bundle No 2', which contained copies of some media coverage of the claimant's case before the Upper Tribunal Immigration and Asylum Chamber, together with a copy of the Upper Tribunal Immigration and Asylum Chamber Judicial Review Decision Notice dated 20 December 2019. No objections were made to the inclusion of this documentation by the respondent and the documents were accepted.

5. Both the claimant and respondent had submitted written submissions in anticipation of the hearing:

    a. The respondent had submitted a written submission (but no witness statement,) which was dated 14 October 2019;

    b. the claimant had submitted further written submissions by way of email to the tribunal (and copied to the respondent) on 5 November 2019, 15 November 2019 and 19 January 2019.

6. These were read in anticipation of the hearing but were not specifically referred to by the parties during the hearing.

7. It was accepted by the claimant that the claims of unfair dismissal and claims in respect of the national minimum wages (whether being brought as an

unlawful deduction from wages and/or a breach of contract claim,) were significantly out of time. The parties were informed that the issue before the tribunal was whether the claims should be dismissed for lack of jurisdiction or whether an extension of time for presenting his complaints, should be granted.

8. At the outset of the hearing both parties were referred to paragraph 3 of the case management order, which set out the issues before the tribunal regarding time and extension of time, and the parties were referred to s.112(b) Employment Rights Act 1996. I reminded the parties that a tribunal may only extend time for presenting a complaint where it is satisfied that:

    a. it was not reasonably practicable for the complaints to be presented in time; and

    b. the claims were nevertheless presented within such further period as the tribunal considers reasonable.

9. I confirmed to the parties that on the papers before me, the parties were in agreement with regard to the dates of employment, certainly with regard to termination of employment being 4 January 2008. Whilst the claimant had failed to supply employment dates within the ET1 submitted, the claimant's dates of employment, including a termination date of 4 January 2008, had been provided by the claimant to the tribunal following a request for confirmation of employment dates by the tribunal. The date of termination of employment was also stated by the respondent in the ET3 to be 4 January 2018 [47]. This termination date was again confirmed by the claimant in paragraph 16 of his witness statement [A3].

10. At this point however, the claimant disputed that his employment ended on that date and stated that his employment had in fact ended a few months later, on 11 June 2008.

11. No formal application to amend the ET1 was made by the claimant. Rather than deal with the matter by way of a formal amendment application at this stage, I determined that it would be in accordance with the overriding objective set out in Rule 2 of the Rules set out in Schedule 1 to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, that we would deal with the time points on the basis of the claim before me i.e. that the employment terminated on 4 January 2008 (in which case the primary limitation period would have expired on 3 April 2008), but that I would also hear arguments on time points on the basis that the employment terminated on 11 June 2008 (in which case the primary limitation period would have expired on 10 September 2008). This was on the basis that the parties agreed, that taking into account the delay of over 11 years in issuing the claim, after either limitation period, the question of whether the claimant had submitted his claim within a reasonable period after limitation would be the same in each case.

12. The respondent also raised issues regarding the identity of the proper respondent and stated that the proper respondent was not Mr Qayum personally, but a limited company known as Cassia Oriental Ltd, despite the fact that:

    a. the respondent had not denied within the ET3 filed that he had employed the claimant in his personal capacity [51];

    b. no application had been made by the respondent to strike out the claim against him personally, before or at the hearing;

    c. it had not been raised as an issue at the preliminary hearing on 18 October 2019;

    d. the contemporaneous documentation, in relation to the immigration applications for the claimant refer to the claimant's employer as the respondent t/a Cassia Oriental restaurant [92].

13. No application was made by the respondent and the hearing proceeded on the basis that Mr Qayum was the proper respondent.

14. Both the claimant and the respondent gave evidence on oath or affirmation, and both had the opportunity to cross examine each other. I also asked questions of both witnesses.

15. Whilst the witness statement from the claimant did set out a detailed chronology of the claimant's immigration applications dating back to 2002, it was not clear from the claimant's witness statement why the claimant's case was that it was not reasonably practicable to bring a complaint within the three month primary limitation period as distinguished from arguments that he had that the claim had been brought within such further time period that was reasonable.

16. As the claimant was a litigant in person I allowed him to provide additional oral evidence after been sworn in, in addition to the matters set out in his witness statement in order to understand, for each time period i.e. up to 4 June 2008 and up to 10 September 2008, why the claimant was saying that it was not reasonably practicable to submit his claim within the primary limitation period and further to understand the reasons why the claimant was claiming that it was reasonable for him not to have submitted his claim until 16 December2018, a period of nearly 11 years after the time period for submitting his complaints. I asked the claimant questions to clearly establish his arguments firstly on why he had not submitted his claims within the time limits and secondly, why he had delayed in submitting the claim.

17. The respondent had not submitted a written statement. I considered it again in accordance with the overriding objective to also allow the respondent to provide live evidence on oath on the issues raised in the claimant's written statement by:

    a. in relation to the date of termination; and

b. on issues that the claimant had raised in his witness statement, that the respondent had threatened the claimant that he had power to deport him.

Claimant's submissions

Limitation to 3 April 2008

18. The claimant's submissions on why it was not reasonably practicable to bring his complaint by 3 April 2006, being the primary limitation period, were that:

    a. he was uneducated;

    b. he was inexperienced about the employment tribunal process;

    c. he did not have the financial means to engage legal representation;

    d. he was unaware of sources of information and assistance, such as Citizen's Advice Bureau;

    e. he did not have the requisite information required to bring his claim;

    f. he was concerned that a complaint against the respondent would lead to his deportation as, he alleged, the respondent had verbally threatened the claimant, in 2007 and 2008, that he had power to deport him if he did so complain [para 30 claimant witness statement].

Limitation to 11 September 2006

19. The claimant's submissions on why it was not reasonably practicable to bring his complaint by 11 September 2006 were, in addition to the above:

    a. he was struggling with his immigration status and seeking to resolve that aspect of his life;

    b. he was focussed on trying to get new employment.

Was the claim submitted within such further period as the tribunal considers reasonable?

20. The claimant's submissions on this issue are that:

    a. he did not get the information required to bring a claim against the respondent until the outcome of his subject access request to the Home Office;

    b. there was also an indication that the alleged threat from the respondent that he had power to deport him if the claimant complained, continued beyond 2008;

    c. he also relied on health issues.

Findings

21. I had no evidence before me as to the level of the claimant's education and make no findings as to his being 'uneducated'. I accept that the claimant may

very well have been inexperienced about the tribunal process at the time and may not have had the financial means to engage legal representation.

22. Notwithstanding that, I also found that neither his level of education nor his financial means had prevented him from pursing his immigration applications which had resulted in a substantial number of immigration hearings;

23. I make no specific findings in relation to the applications in relation to the claimant's leave to remain and/or leave to remain status, but I do find on balance of probabilities that from the period from 4 January 2008 through to 2011, the claimant was engaged in a number of applications and appeal applications to gain leave to remain and indefinite leave to remain,

    a. supported by the respondent in March 2006 (application made 27 March 2006) [84]);

    b. supported by the respondent in January 2008 (application made on 4 January 2008 [84]);

    c. supported by Golam Nurunnabee Mujibs, the claimant's new or new prospective employer, in August / September 2008 (application made on 16 August 2008 [para 27 claimant witness statement].

24. Those applications had, including the appeal processes in respect of each of them, concluded by 11 January 2011 [84].

25. The claimant told me that he had been threatened, in 2007 and again in 2008, by both the respondent and Chetna and Co solicitors, that if he went 'against them' they could deport him [para 30 claimant witness statement]. When I sought to clarify what the claimant meant, he confirmed that they had influence over his immigration applications at that time and if he had brought these proceedings then, that could impact on their support on his immigration status.

26. There is a dispute as to whether that threat was made by the respondent in 2007 and 2008 or at all. The respondent on cross examination denied that such a threat was made. The respondent also argued that it contradicted the support that he had given the claimant later in 2008, on a separate and further immigration application made for the claimant, after his employment had ended with the respondent. He also argued that no complaint had been made about him to the police, yet the claimant had complained about the claimant's previous employer.

27. I decline to make a finding that the respondent threatened the claimant in the manner alleged. Such a threat, if it were made, had been made over 12 years ago. I was not convinced that the claimant was able to prove on balance of probabilities that such a threat had been made.

28. In addition, whilst the documentation in the Bundle, in relation to the claimant's application for leave to remain and ancillary appeals, was not a full

documentary record, any involvement that the respondent had, or could have had in those applications ended:

a. either on 28 July 2008, when the application made on 16 June 2008 for leave to remain was made [84]; or

b. at the later date of January 2011, when the claimant's appeal rights in relation to the 8 September 2008 leave to remain work permit application, were exhausted [85].

29. There was no evidence from the claimant for me to find that the respondent had, or could have had, any involvement or influence on the claimant's immigration applications e.g. by providing information regarding the claimant's work situation,) after these dates.

30. Whilst additional applications have made after this date in respect of the claimant's right to remain, there was a period of around three and a half years, from July 2011 and December 2014, when no applications were made.

31. In March 2016 the claimant attended his GP surgery [82] reporting low mood and some depressive symptoms, Additional health issues included non-cardiac chest pain, high blood pressure and type II diabetes. Whilst I did find that he had at that stage reported to his GP that he had a history of depressive symptoms, I had no evidence of this before me. The claimant's poor health continued until 31 August 2018 when the claimant's GP confirmed that the claimant's conditions of high blood pressure, high cholesterol, diabetes and anxiety with depression.

32. On 16 December 2017 the claimant contacted ACAS and Early Conciliation commenced regarding his claims before the employment tribunal. The Early Conciliation Period ended on 21 December 2017**.**

33. In around March 2018, the claimant contacted the Personal Support Unit who provided the claimant support to submit a further immigration application and a subject access request to the Home Office regarding his previous applications. In live evidence the claimant also confirmed that they advised him that he had the right to complain to an employment tribunal regarding unfair dismissal and National Minimum Wages claim and that he could get an extension of time to bring a complaint.

34. When asked if he had been advised by them of time limits to bring a claim, as well as the right to bring a claim outside of the time limits, he confirmed they had not. I did not accept this evidence. Having accepted that he had been advised of the fact that he could seek to bring a claim out of time, on balance of probabilities, I found that it was more likely than not that he would have been advised at the same time of the time limits and the need not to delay in any application.

35. The claimant relied on the fact that he did not have the requisite information in order to bring a claim until he received the response to his subject access request to the Home Office.

36. The claimant received this information on 18 September 2018 [referred to at 69] which led him to believe that the claimant/his solicitors, Chetna & Co, failed to provide him with:

    a. a copy of the HO refusal of further leave to remain on 17 January 2008;

    b. failed to lodge an appeal.

37. He considered that the respondent's action in failing to provide him with this information to be negligent and he believes that this led to the loss of his immigration status in January 2008.

38. I made it clear to the claimant that I would be making no findings in relation to the immigration application but asked, if that was right, how did this impact on his ability to lodge an employment tribunal claim arising out of his employment with the claimant.

39. In response the claimant confirmed that the subject access response, received by him on 18 September 2018, also provided him, for the first time with copies of his pay slips [93-101] which evidenced to him that the respondent had paid him less than minimum wage.

40. When questioned why he needed that documentary evidence to bring a claim, he simply repeated that if he had received his pay slips sooner, he would have had knowledge of his pay and could have had access to a remedy earlier and issued his employment tribunal claim earlier. On cross examination, the claimant accepted that he knew in 2008 that he had a claim; that he never said that he did not know he had a claim, and that it was his case that he had not had the evidence to support his claim which the subject access request provided.

41. The claimant was of the belief from the date of termination in 2008 that he had the basis of a claim and did not require any documentation from the Home Office, by way of pay slips or otherwise, to form that belief.

42. The claimant lodged his claim on 16 December 2019.

The law

43. A tribunal may only extend time for presenting a claim where it is satisfied that:

    a. it was not reasonably practicable for complaint to be presented in time

    b. The claim was nevertheless presented 'within such further period as the tribunal considers reasonable'.

44. When a claimant tries to excuse late presentation of his or her ET1 claim form on the ground that it was not reasonably practicable to present the claim within the time limit, three general rules apply:

    a. S.111(2)(b) ERA (and its equivalents in other applicable legislation) should be given a 'liberal construction in favour of the employee' —

Dedman v British Building and Engineering Appliances Ltd1974 ICR 53, CA

b. what is reasonably practicable is a question of fact and thus a matter for the tribunal to decide. *Practical common sense is the keynote and legalistic footnotes may have no better result than to introduce a lawyer's complications into what should be a layman's pristine province.*

c. The onus of proving that presentation in time was not reasonably practicable rests on the claimant. '*That imposes a duty upon him to show precisely why it was that he did not present his complaint' —* ***Porter v Bandridge Ltd*** *1978ICR 943, CA. Accordingly, if the claimant fails to argue that it was not reasonably practicable to present the claim in time, the tribunal will find that it was reasonably practicable —* ***Sterling v United Learning Trust****EAT 0439/14.*

45. Even if a claimant satisfies a tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his or her favour. The tribunal must then go on to decide whether the claim was presented 'within such further period as the tribunal considers reasonable'. Thus, while it may not have been reasonably practicable to present a claim within the three-month time limit, if the claimant delays a further three months a tribunal is likely to find the additional delay unreasonable and decide that it has no jurisdiction to hear the claim

46. Case are so different and depend so much on their particular circumstances but the CA in **Palmer and anor v Southend-on-Sea Borough Council**1984 ICR 372, CA, the Court of Appeal conducted a general review of the authorities and concluded that 'reasonably practicable' does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means something like 'reasonably feasible' Lady Smith in **Asda Stores Ltd v Kauser** EAT0165/07 explained it in the following words: 'the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done'.

47. CA in **Marks & Spencer plc v Williams-Ryan** [2005] EWCA Civ 470 also set out a number of legal principles distilled from a review of case law:

a. s.111(2) ERA should be given a liberal interpretation in favour of the employee

b. Regard should be had to what, if anything, the employee knew about the right to complain to a tribunal and the time limit for doing so;

c. Regard should be had to what knowledge the employee should have had, had they acted reasonably in the circumstances,

Conclusion

Was it reasonably practicable for the complaints to be presented in time?

48. I did not consider that the claimant's submissions regarding his education, financial means nor knowledge of either process or organisations such as Citizen's Advice Bureau were sufficient to satisfy me that the claimant had met the reasonable practicability test i.e. that it was not reasonably practicable for the claim to have been presented either by 3 April 2018 or 10 September 2008.

49. I was not persuaded that it was reasonable for this claimant to be ignorant of the relevant time limits and concluded that he ought reasonably to have made enquiries about how to bring a tribunal claim before the relevant time limit. The claimant had demonstrated, through his immigration applications, to know that he ought to have taken steps to ascertain how to progress any claim. He did not do so in relation to his potential employment claims.

50. I did not make a finding that the claimant had been subjected to a threat from the respondent, although I did conclude that *if* the claimant had proven on balance that this threat had been made, or he believed he was under threat, this would have been sufficient to have persuaded me that it was not reasonably practicable for the claimant to have brought his complaint within either relevant time limit. I had no evidence from the claimant that the respondent had or could have had any influence on his applications after the June 2008 application. I was not persuaded by the claimant's evidence, which was that whilst he did not need the respondent any more in order to progress his immigration applications, the respondent 'could have been a problem'.

51. Even if I had persuasive evidence that the alleged threat could have led to some delay in submitting a complaint, I concluded that it would have had no bearing on a delay and failure to file an ET1 from, at the latest, 11 January 2011, a matter which I deal with later in this judgment.

52. I did not consider that any information provided to the claimant by the Home Office in September 2018, in response to the Subject Access Request, was needed by the claimant in order to bring a claim whether:

    a. information regarding the respondent's/Chetna and Co's conduct in 2008 in relation to the claimant's leave to remain application; or

    b. the pay slips themselves

53. This was not 'new' information which was presented to the claimant sufficient to justify that it was not reasonably practicable for the claim to have been presented either by 3 April 2018 or 10 September 2008.

54. The claimant was aware of how many hours he had worked and what he had been paid during his period of work at the respondent. He acknowledged that he had the information to know that he had a claim within the relevant time

limits, and I did not accept that this had any impact on the claimant's ability to bring proceedings against the respondent within either relevant time limit.

55. I was not persuaded by the claimant's submissions that his general worry and concern regarding his immigration status, and searches at that time for alternative employment rendered it not reasonably practicable for the claimant to have submitted a claim to the employment tribunal. No evidence in support of these submissions was provided by the claimant.

56. I therefore concluded that on the facts of the case, it was 'reasonably feasible', that it had been reasonably practicable for the claimant to have submitted his complaint by 3 June 2008 or, at the latest, by 10 September 2008 and the tribunal had no jurisdiction to consider the complaints.

57. I conclude that:

    a. time should not be extended; and

    b. there is no jurisdiction to hear the claims.

Was the complaint submitted within a reasonable time?

58. Despite that conclusion, if I am wrong on that point, I also set out my judgment on the position of the timing of the submission of the complaint i.e. that *if* I had (or should have) concluded that it had not been reasonably practicable for the claimant to have submitted his claim in time, had the presented his claim within a reasonable period thereafter.

59. In this regard, there had been significant delay by the claimant which led me to the conclusion that the claimant had not submitted his claim within a reasonable time period thereafter.

60. I was not persuaded that any alleged potential threat from the respondent in 2007 and 2008, had any impact on the claimant's delay after he left the claimant's employment and/or when he pursued his leave to remain as a result of other applications. At the very latest, and being generous to the claimant, had he persuaded me about the threat, he might have had some explanation for a delay to January 2011, being the date when the claimant's appeal rights in relation to the 8 September 2008 leave to remain work permit application were exhausted.

61. At the very latest, the claim should have been presented in January 2011 and any delay in submitting a complaint to the tribunal after that date was unreasonable.

62. Whilst I did find that the claimant did have some health issues including depression and anxiety in the period from 2016, and that the claimant had indicated that he also had such issues historically, I concluded that none of the claimant's health issues impacted on his ability to:

a. continue with his applications to remain in the UK from the period 2008;

b. make subject access complaints to the Home Office in March 2018:

c. lodge a complaint to the police regarding his first employer (not the respondent) for slavery and trafficking prior to 22 November 2018 [referred to at 63]

d. lodge a complaint to the police regarding their management of his complaint against his first employer on 22 November 2018 [64].

63. I was therefore not persuaded that the claimant's health impacted on his ability to bring a claim prior to 2016 or indeed was a reasonable explanation of why he delayed in bringing a claim until 16 December 2018 such that it could be an argument supporting an explanation of why the claimant had brought his claim within a period that was reasonable.

64. Having taken steps regarding his claim and contacting ACAS in December 2017, the claimant then did nothing to progress his claim for a whole year to 16 December 2018, without any, or any persuasive, explanation. This seriously undermines any argument that it was reasonable to delay further.

65. I have already set out my findings and conclusions regarding the subject access request and would again repeat that within the context of delay; that it offers the claimant no excuse. In any event the results of the subject access request were received in September 2018. The claimant did not submit his claim for a further three months which is not, in itself, reasonable.

66. In conclusion, even if I had been persuaded, which I was not, that it had not been reasonably practicable for the claimant to have brought his complaint by 3 April 2008 (or indeed 10 September 2008,) I would not have been persuaded that the claimant had presented his claim within a reasonable period thereafter.

67. I considered the delay of 11 years to be wholly unreasonable and without merit for the reasons given and, on that alternative basis, would conclude that:

a. time should not be extended; and

b. there is no jurisdiction to hear the claim.

Employment Judge R Brace

Date 25 January 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 3 February 2020

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FOR EMPLOYMENT TRIBUNALS