THE EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr M Ahmed **v Pinnacle Group Limited**

Heard at: London Central **On**: 20 February 2020

Before: Employment Judge H Clark

Representation
Claimant: In person
Respondent: Ms A Rokad - Counsel

RESERVED JUDGMENT FOLLOWING OPEN PRELIMINARY HEARING

The judgment of the Tribunal is that it has no jurisdiction to hear the Claimant's claims for unfair dismissal, unlawful deduction from wages, race, disability and religion and belief discrimination as they are out of time. It would not be just and equitable to extend time.

Employment Judge Clark

Dated: 25 February 2020

Judgment and Reasons sent to the parties on:

25/02/2020.....

…….....
For the Tribunal Office

REASONS

1. This is the second listing of an Open Preliminary Hearing (OPH) to determine whether "*all or any of the [Claimant's] claims are out of time, and if so, whether time should be extended."* The potential time limit issues arose from the original rejection of the Claimant's Claim Form due to the absence of an ACAS certificate and its subsequent acceptance following a request for reconsideration.

2. The first OPH took place on 18 July 2019 before Employment Judge Hodgson. In a reserved decision dated 12 September 2019 EJ Hodgson determined some of the legal issues in this claim (as set out below) following receipt of written submissions from the parties. In the event that a further hearing was necessary, EJ Hodgson ordered the Claimant to prepare copies of any documents on which he relied and a witness statement. The Claimant did not comply with this order.

Conduct of the Hearing

3. At the hearing on 18 July 2019, the Claimant was represented by Solicitors, but he parted company from them around 10 days ago for financial reasons. With the Respondent's agreement and having regard to the overriding objective in the Employment Tribunal's procedure Rules 2013, the Tribunal permitted the Claimant to give oral evidence at this hearing, notwithstanding the absence of a written witness statement. The Tribunal afforded Ms Rokad time after the Claimant's evidence in chief to take instructions and prepare her cross examination.

4. At the start of the hearing, the Claimant also produced one document which the Respondent had not previously seen, namely a photocopy of a proof of posting which was copied on top of the Claimant's application for reconsideration dated 23 December 2018. The original was not available, but the copy was dated 15 January 2019 and included the correct building number and postcode for the offices of the London Central Employment Tribunal. It was not suggested that the Respondent was materially prejudiced by the late production of this photocopy, which Ms Rokad dealt with pragmatically. Apart from the correspondence on the Tribunal's file, the Tribunal was not referred to any other documentary evidence by either party.

5. The Claimant's claims are set out in a Claim Form which was first lodged with the Employment Tribunal on 16 November 2018 and included a claim for unfair dismissal, race, disability, religion or belief discrimination and a claim for other payments. In brief, the Claimant had worked for the Respondent and its predecessors as a security guard/concierge since 15 March 1997. He was dismissed allegedly for gross misconduct on 31 August 2018. His original Claim was also brought against a named Contract Manager at the Respondent, but the case has proceeded against the Claimant's employer only. All the Claims were denied in a Response Form dated 4 June 2019.

6. There were two primary reasons that EJ Hodgson could not determine all the outstanding time limit issues: firstly, it had become clear that the Claimant might want to argue that the date of rectification of his initial claim was the date he contacted ACAS on 26 November 2018. Secondly, that the Tribunal had not heard evidence from the parties and, therefore, could not determine the date on which the reconsideration request was filed, or consider whether any extension of time which might follow from that factual finding should be granted.

7. In her oral submissions Ms Rokad invited the Tribunal to revisit the decision of Judge Hodgson, on the basis that the parties' respective written submissions post-dated it. Whilst it is right that Judge Hodgson invited submissions concerning the onward progress of the case after his decision dated 12 September 2019, he ordered written submissions from both parties on the points of law which arose in the case in his order dated 18 July 2019, namely to *"file and serve written submissions and any legal authorities relied on concerning the correct interpretation of rule13(4) of the Employment Tribunal Rules of Procedure 2013*". Both parties were also ordered identify the specific defect in the original Claim and to explain when and how it was rectified for the purposes of rule 13(4). The Claimant and Respondent's Solicitors provided written submissions respectively dated 30 July 2019 and 1 August 2019 and were, therefore, before EJ Hodgson when he reached his reserved decision on the legal principles to be applied.

8. The Claimant first presented his Claim Form on 16 November 2018, but it was rejected by Regional Employment Judge Potter on 13 December 2018 as no early conciliation certificate number had been provided. It was accepted at the 18 July 2019 hearing that such a certificate was needed (notwithstanding a suggestion that an application for interim relief had been made on the Claim Form). Paragraph 4 of EJ Hodgson's decision sets out the scope of what he was determining:

"*Later, following a reconsideration the claim was treated as presented, as the defect had been rectified. However, the parties could not agree the date the defect should be treated as rectified, and hence they could not agree the date it should be deemed presented. The primary dispute was about the principles to be applied, and that is what I will deal with in these reasons.*

The decision continued at paragraph 5:

"There is also a dispute as to whether the application for reconsideration was made on 23 December 2018 or 1 May 2019… That dispute of fact must be resolved, but I cannot finally resolve it at present because the parties have not given evidence on the point."

9. Ms Rokad, suggested there were three issues for my determination: 1) the date of rectification, 2) the effect of section 207B of the ERA 3) whether time should be extended. However, EJ Hodgson has already determined as a matter of principle the event which constituted the rectification of the defect in the Claimant's initial (rejected) claim and expressly rejected any suggestion that contacting ACAS (on 26 November) constituted rectification of the defect. This was a legal question which was expressly addressed in the parties' written submissions following the hearing. EJ Hodgson's relevant conclusions for the purposes of this hearing were:

9.1 The relevant defect in the Claimant's initial claim was "*the failure to include the ACAS certificate number." (*paragraphs 53 and 55).

9.2 For the purposes of rectification under rule 13(4), the notified defect was the failure to provide a certificate number as required by 18A(8) and rule 10(1)(c). This defect was rectified "*by the application to reconsider."* (paragraph 61).

9.3 "*The Claim Form must be deemed presented when the early conciliation number was provided to the Tribunal, with the application for reconsideration.*(paragraph 62).

9.4 The extension provided for by section 207B ERA is not contingent on proceedings being, or not being, instituted. Thus, time was extended for the Claimant's claim until 11 January 2019, "*It follows that if the dismissal claims are not presented before 11 January 2019 they are out of."* (paragraph 25)

The Issues

10. Whilst the Tribunal appreciates that the Respondent's interpretation of section 207B(4) differs from that of EJ Hodgson and invites this Tribunal to reach a different conclusion, it is the Tribunal's view that this could only be achieved by an application for reconsideration (or appeal) of EJ Hodgson's decision of the 12 September 2019. Thus, the issues for consideration by this Tribunal are:

10.1 As a matter of fact when was the Claimant's application for reconsideration of the rejection of his Claim Form made.

10.2 In light of that factual determination, was that prior to 11 January 2019 (the date determined by EJ Hodgson as the expiry of the time limit for the dismissal claims).

10.3 If after 11 January 2019, in relation to the unfair dismissal/unlawful deduction from wages claims, was it reasonably practicable for the Claimant to have presented a timely claim?

10.4 If it was not, did the Claimant present his claim within a reasonable period thereafter?

10.5 In relation to the discrimination claims (which related purely to the Claimant's dismissal), would it be just and equitable to extend time.

The Law

11. The relevant time limit for a claim for an unfair dismissal claim is set out in section 111 ERA.

> *"(1)A complaint may be presented to an Employment Tribunal against an employer by any person that he was unfairly dismissed by the employer.*
>
> *(2)Subject to the following provisions of this section, an employment Tribunal shall not consider a complaint under this section unless it is presented to the Tribunal—*
>
> *(a)before the end of the period of three months beginning with the effective date of termination, or*
>
> *(b)within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for*

the complaint to be presented before the end of that period of three months."

12. The meaning of the words "*reasonably practicable*" has been considered by the higher courts on a number of occasions. The burden lies on the Claimant to prove that it was not reasonably practicable for him to present a timely claim (*Porter v Bandridge Ltd [1978] 1 WLR 1145).* In *Palmer v Southend-on-Sea Borough Council [1984] 1 WLR 1129* the Court of Appeal held that the test equated to one of "reasonable feasibility" which fell somewhere between something which was physically possible at one end of the scale and pure reasonableness at the other. In some circumstances, an ignorance of the law can render it not reasonably feasible to present a timely claim.

13. The substantive law concerning discrimination time limits is contained in section 123 of the Equality Act 2010. The relevant parts of the section provide that:

"

(1) *"Subject to sections 140(A) and 140B, proceedings on a complaint within section 120 may not be brought after the end of –*
   (a) the period of three 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.
(2) *….*
(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;"

14. The "just and equitable" extension in section 123(1)(b) gives the Tribunal a broad discretion to extend time, albeit there is no presumption in favour of granting an extension. It falls to the Claimant to prove that there are grounds to extend. The factors set out in section 33 of the Limitation Act 1980 are likely to be relevant to the exercise of the Tribunal's discretion, but there may be other factors. The length and reason for the delay will clearly be pertinent, as may be whether the Claimant has had access to legal advice, how the cogency of the evidence might be affected by the delay and what prejudice might be caused to either party by the grant or refusal of an extension.

<u>The nature of the Claimant's claims</u>

15. Although the Claimant's Claim Form at paragraph 8.2 sets out some detail of his claims for unlawful deduction from wages and unfair dismissal, the particulars of his discrimination claims were not, beyond a general statement that he had been discriminated against by management and that

he had been unfairly treated "due to race, religion and disability." The Tribunal, therefore, sought to establish the nature of the Claimant's claims with him. In discussion concerning the nature of the disability discrimination claim, the Claimant confirmed that the disability on which he relies related to a back problem. When asked what treatment by the Respondent he was complaining about in relation to his back problem, the Claimant stated, "*I wouldn't bring that in. They didn't treat me badly because of my back."* He then confirmed that he did not wish to proceed with his disability discrimination claim.

16. The Claimant suggests that his dismissal was an act of race or religious discrimination. The Tribunal explained the possible racial grounds to the Claimant with a view to his clarifying on what racial grounds he relies. The Claimant confirmed he was not alleging that he was discriminated against because of his colour, but he was unable to explain whether he relied on his nationality or his ethnic or national origins. The Claimant's religion is Islam.

17. The Tribunal discussed the basis for the Claimant's direct discrimination claims with him. He explained that a particular manager did not like him and that he was responsible for engineering the Claimant's dismissal. The Tribunal took some time to explore why the Claimant considered that his manager didn't like him. The reason the Claimant put forward was that the Claimant had threatened to report the manager for falsifying the log book. When asked whether there was anything which made the Claimant think the dislike was because of his ethnic or national origins or his religion, the Claimant said it was because the Claimant always challenged the manager when he came in. He also said that the manager always stands behind him but he did not stand behind other members of staff. The latter appeared to be an example of different treatment, but not as to the reason for the treatment.

18. Apart from his dismissal, the Claimant confirmed that there are no other allegations of discrimination. As set out in the reserved decision of EJ Hodgson, the Claimant (and others) have a long-standing dispute with the Respondent concerning an underpayment of wages. It is common ground that the last potential deduction in relation to this underpayment was in April 2017. The underpayment was alleged to have started in 2011.

19. In the course of his evidence, the Claimant also mentioned that he wanted to claim reimbursement from the Respondent for his SIA licence, which came up for renewal during his suspension. It was explained to the Claimant that this was not referred to at all in the Claim Form and is a different type of claim (breach of contract) to the unlawful deduction from wages claim. If such a

claim is to be pursued, a formal application to amend would need to be made to the Tribunal.

20. When the Claimant was suspended in the summer of 2018, he was assisted by his trade union, Unison, who also suggested that he speak to ACAS. The Claimant confirmed that he was aware of the availability of free legal advice from Citizens' Advice and consulted both Citizens' Advice and a Law Centre after he filed his Claim Form. The Claimant's evidence was confused as to when he first contacted ACAS. He suggested he had done so prior to presenting his Claim Form to the Employment Tribunal, although it is common ground he was not issued with an early conciliation certificate. Given the Claimant was represented by Solicitors until very recently, if it were contended that ACAS wrongly failed to issue an early conciliation certificate prior to the presentation of his Claim Form, it is reasonable to expect that enquiries of ACAS would have been made and some evidence adduced to assist the Tribunal with any contact between the Claimant and ACAS prior to 16 November 2019. The Tribunal, therefore, finds that the Claimant's first contact with ACAS post-dated the presentation of his initial Claim as set out on the early conciliation certificate, namely, 26 November 2018.

21. Although the Claimant did not take any formal legal advice prior to presenting his Claim, he had a friend who had access to a lawyer who helped him complete his Claim Form and typed out the contents of section 8.2. Although the Claimant has an email address, he suggested he is not proficient on a computer and had help not just from his friend but also his nephew with emails to the Tribunal. The Claimant was well aware of the Employment Tribunal time limit and referred to it in his evidence as three months less a day. He had been told about this by Unison.

22. When questioned, the Claimant suggested that he delayed presenting his first Claim Form because he was waiting for his appeal hearing, but it was still in time. The time limit expired on 30 November 2018 and he did not present his claim until 16 November 2018. As to the subsequent delay in requesting a reconsideration, his explanation for this was that this was still in time. At no point during his evidence, in spite of being given opportunities to do so, did the Claimant suggest that there was any barrier to his presenting his Claim or applying for a reconsideration of it. The Tribunal specifically asked whether the Claimant's disability impacted on his ability to present a Claim and he confirmed it did not. As far as the Claimant was concerned he had issued a timely claim and then applied within the suggested 14 days for a reconsideration of the rejection of his claim which took place on 23 December 2018.

23. The Claimant maintains that his application for reconsideration was made on or about 23 December 2018. The letter of reconsideration bears that date. The certificate of posting which the Claimant says he obtained was not produced to the Tribunal. However, a certificate of posting was provided dated 15 January 2019. The Claimant suggested that he sent a second copy of the letter of 23 December on 15 January 2019 to make sure it arrived. It is his evidence that he contacted the Employment Tribunal regularly after 15 January 2019 to find out the outcome of his Claim, mostly by telephone and on one occasion by coming to the Tribunal and trying to use the internal telephone. When he was told that a particular named member of staff was absent so could not deal with his Claim, he was asked by an unnamed member of the Tribunal administration to scan a copy of his application for reconsideration and to send it by email to the Tribunal. With the help of his nephew, the Claimant did this on 1 May 2019. This is the first record that the Tribunal has of his Claim.

24. By letter dated 28 June 2019 the Claimant was asked by EJ Hodgson to provide the Tribunal with a copy of the application of 1 May 2019 to be sent electronically if possible. By an email dated 8 July 2019 this copy was sent in the following terms: "*the attachment enclosed is a recorded delivery receipt that shows that I sent the original documents on 15 January. When I sent it on 15 January I did not receive any acknowledgement of my application so I then called the court I was told that it had been received but [Mr H] was on holiday and the woman I spoke to asked me if I had a copy which I did and she told me to email her the documents and this is why I sent another copy on 1 May and my original application was on 15 January. Mohammed Ahmed.*"

25. In light of the contents of the Claimant's email to the Tribunal dated 8 July 2019 suggesting that his "*original application was on 15 January*" and the absence of any certificate of posting from on or around 23 December 2018, the Tribunal is satisfied that the Claimant's application for reconsideration was made on 15 January 2019 rather than either 23 December 2018 or 1 May 2019. There was no suggestion that the Claimant was sending a second copy of his application on 15 January 2019 and his email of the 8 July 2019 is wholly inconsistent with his having done so. In accordance with the conclusions of EJ Hodgson, therefore, the Claimant's applications for unfair dismissal and discriminatory dismissal are out of time by four days, the time limit having expired on 11 January 2019. The claims for unlawful deductions from wages are substantially out of time as it is accepted that the Claimant was paid correctly from 1 April 2017.

Conclusions

26. In the course of their written submissions to EJ Hodgson, the parties referred the Tribunal to the case of *Adam v British Telecommunications Ltd* UKEAT/0003/19/JOJ, which makes it clear that the fact that a Claimant has presented an earlier timely claim, which is then rejected, does not determine the reasonable practicability of presenting a second Claim, which is out of time. The Tribunal's focus should be on whether it was reasonably practicable to present the second Claim in time, having regard to all the circumstances (including the original Claim).

27. As Ms Ronak pointed out to the Claimant, the Claim Form sets out at section 2.6 in relation to an Early Certificate Number that "*Nearly everyone should have this number before they fill in a claim form. You can find it on your ACAS certificate. For help and advice call ACAS on 0300 123 1110."* However, the Claimant's explanation for not having an ACAS certificate number was that his Claim contained an application for interim relief. It did not, as was accepted at the 18 July 2019 hearing. The Claimant appears to have been aware of the need to contact ACAS as he did so shortly after he had presented his original Claim Form, but before it was rejected. He suggests that he did contact ACAS before his claim, but there is no evidence of this, in circumstances where it is reasonable to expect such evidence (given the Claimant had been represented by Solicitors for over 6 months).

28. The Claimant's Claim Form was rejected on 13 December 2018 and the letter of rejection explained that the Claimant had 14 days in which to apply for a reconsideration of the rejection of his Claim Form under Rule 13. The ACAS certificate was issued on 11 December 2018, so would have been in the Claimant's possession at or about the time his Claim Form was rejected. The Claimant then delayed a further month before correcting the defect on his Claim Form, by sending an application for reconsideration with his Early Conciliation Certificate Number to the Tribunal on 15 January 2019. This was both outside the time limit for a reconsideration request and the primary jurisdictional time limits for all his substantive claims. The Claimant's primary case was that he sent the reconsideration application to the Tribunal on or about 23 December 2018, which the Tribunal has determined as a matter of fact did not happen. However, the Claimant was still asked whether there were any reasons for his delay in both presenting his original Claim and submitting his application for reconsideration. In relation to the former, he suggested that he was waiting for the appeal to be dealt with, but there was no other barrier to his presenting his first Claim.

29. The Response Form sets out the chronology in relation to the Claimant's appeal. The Claimant was dismissed on 31 August 2018, on 6 September 2018 the Claimant wrote informing the Respondent that he intended to appeal.

The Respondent wrote to the Claimant on 28 September 2018 asking whether he still intended to appeal as his appeal had not been received. The Claimant's grounds of appeal were received on 2 October 2018 and a hearing arranged on 26 November 2018. Whilst the Tribunal has not have sight of the correspondence between the parties to determine whether the Claimant might reasonably have thought that his letter dated 6 September 2018 was sufficient to constitute an appeal, in light of the parties' on-going correspondence concerning the appeal, the Tribunal is satisfied that the Claimant had a genuine reason for delaying issuing his original Claim Form.

30. Once the Claimant's original Claim Form had been rejected, however, and in light of the Claimant's admitted knowledge of the substantive 3 month time limit and the 14 day time limit for an application for reconsideration, no good reason has been put forward by the Claimant for the delay in rectifying the defect in his original Claim. In evidence he said he thought he had 45 days to apply for a reconsideration and applied within that time scale. In fact the information sheet appended to the rejection letter dated 13 December 2018 sets out in bold on the first sheet, "*The time limit for asking the Tribunal to reconsider its decision is 14 days from the date of the rejection letter, but there is also an overall time limit for starting a claim. The Tribunal will allow late claims only in very limited circumstances. So if you want the Tribunal to reconsider its decision to reject your claim, don't delay in writing in."* On the back of the information, there is a reference to the time limit to appeal being 42 days, which might have been the time period to which the Claimant was referring. It is unlikely that the Claimant would have read the (much shorter) reverse of the information sheet (number 1.11A) but not the first page, as the reverse made little sense in isolation and was clearly a continuation of the text on the first page. In the circumstances, the Tribunal is satisfied that the Claimant was aware of the 14-day time limit and that any delay would have a potential impact on the primary time limit for his Claim.

31. The Claimant had access to "second hand" legal advice when he submitted his Claim via his friend and was aware of the existence of ACAS, whose telephone number was set out on the Claim Form. He had advice from his Trade Union during the currency of his employment, who referred him to ACAS and consulted both Citizen's Advice and a Law Centre after he submitted his Claim. In these circumstances, the Claimant had reasonable knowledge of and access to sources of legal advice. He has always been aware of the primary time limit. Even if the Claimant is not proficient on a computer, he had a friend and nephew who were and were helping him. If the deficit in his first Claim was a result of a misunderstanding on his part or of his friend who was helping him, having started the Early Conciliation Process on 26 November 2018 and received the express guidance from the Tribunal as to the 14-day

time limit to request a reconsideration of the rejection of his first Claim on 13 December 2018, there was then no barrier to the Claimant's correcting the initial error. This could and should have been done immediately, as the Early Conciliation certificate was issued on the 11th December 2018. In all the circumstances, the Tribunal is satisfied it was reasonably practicable for the Claimant to have prevented a timely unfair dismissal claim. The Claimant's claim for unlawful deduction from wages carries the same time limit so the same considerations apply, but the delay was for substantially longer than 4 days, since the Claim arose in April 2017. The Tribunal accepts that the Claimant made inquiries of the Employment Tribunal as to the progress of his Claim, but that does not inform the practicability of a timely claim, as these inquiries post-dated the submission of his reconsideration request on 15 January 2019.

32. The Tribunal has a broader power to extend time in relation to a discrimination claim, as it can do so where it is "just and equitable" to do so. Given the relatively short delay in meeting the 11 January 2019 deadline in this case, there is no real risk of evidential prejudice to the Respondent (as Ms Rokad conceded). As set out above, however, there was no good reason put forward for the delay in the Claimant's making his application for reconsideration and, therefore presenting his Claim. Extensions to time are not automatic, even where the delay is short. The Tribunal acknowledges that the consequence of failing to extend the deadline will cause prejudice to the Claimant. He will be deprived of the opportunity to have his discrimination claim determined.

33. Whilst the Respondent will not be prejudiced in evidential terms by permitting the Claimant to proceed with his discrimination claims, the Claimant was unable to explain the basis of these claims to the Tribunal. In light of the fact that the Claimant has been professionally represented for over 6 months, that is surprising. The Claimant conceded without hesitation that he was not suggesting that he had been treated badly by his employer due to his claimed disability (a back problem) or because of his colour. His own explanation for what he regards as an unfair dismissal was that a manager did not like him. He provided a cogent non-discriminatory explanation for this. When expressly asked by the Tribunal as to whether he thought the dislike might be related to his race or religion and if so, what led him to that belief, the Claimant struggled to answer either question.

34. The Tribunal appreciates that the resolution of a discrimination claim can turn on what inferences can be drawn from all the evidence and the Tribunal is not considering whether the Claimant's claim should be struck out for having no reasonable prospects of success (with all the caution which should be

exercised in those circumstances). However, where a Claimant's own primary explanation for his less favourable treatment is apparently unrelated to his race or religion and he is unable to put forward any explanation which might discharge the initial burden of proving that his race or religion influenced his dismissal, extending time to allow such a claim to proceed will cause the Respondent the prejudice of having to defend an apparently weak claim. If this is taken together with the absence of a cogent reason for the delay, the Tribunal does not consider it would be just and equitable to extend time to enable the Claimant's claims for race and religious discrimination to be heard.

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