EMPLOYMENT TRIBUNALS

Claimant		Respondent
Yaw Fosu-Mensah	**v**	**Jaguar Land Rover Limited**

PRELIMINARY HEARING (OPEN)

Heard at**:** **Birmingham Employment Tribunal** On: **30 July 2020**

Before **Employment Judge McCluggage**

Appearances

For the Claimant **Dr Ibakakombo (lay representative)**

For the Respondent **Mr J Heard (counsel)**

JUDGMENT

The claim for unfair dismissal was brought out of time and is dismissed.

REASONS

1. By his claim form dated 24 October 2019 the Claimant raised allegations of Unfair Dismissal, race discrimination and associative disability discrimination.

2. Employment Judge Flood listed the case for determination of the preliminary issues:

   (i) Was any complaint presented outside the time limits in sections 123(1)(a) & (b) of the Equality Act 2010 ("EqA") and if so, should it be dismissed on the basis that the Tribunal has no jurisdiction to hear it?
   (ii) Was the unfair dismissal complaint presented outside the time limits in sections 111(2)(a) & (b) of the Employment Rights Act 1996 ("ERA") and if so, should it be dismissed on the basis that the Tribunal has no jurisdiction to hear it?
   (iii) Whether to strike out all or part of the claim because it has no reasonable prospect of success.

(iv) Whether to order the claimant to pay a deposit (not exceeding £1000) as a condition of continuing to advance any specific allegation or argument in the claim if the Tribunal considers that allegation or argument has little reasonable prospect of success.

3. The case was subject to further case management by Employment Judge Dean on 15 April 2020. Judge Dean was unhappy with compliance with case management directions and so gave further direction for preparation today.

4. While the face of Judge Flood's order was clear that she expected time limit and strike out/deposit orders to be considered today and without any restriction on issues, I was informed by Dr Ibakakombo the claimant's representative that he was under the apprehension that the strike out/deposit orders were not general in nature but were restricted to issues relating to whether the claims were in time.

5. My initial reaction was to find that a surprising proposition. Mr Heard, counsel for the respondent, told me that he had come prepared to make submissions as to the prospects of all issues in the case for purpose of strike out/deposit. He observed that Judge Dean had made no such restriction in her order, but he properly acknowledged that he was not present at the hearing in April. On the tribunal file, was a document titled "Record of Proceedings" which appeared to be a part transcript of the BT telephone hearing before Judge Dean. The Record of Proceeding stated towards its end:

> "The claimant wants to know from the claimant why the respondent's belief the case has no reasonable prospect of success or pay a deposit
> VCD referred to the clarity of the respondent's response to identify the reasons why no or little reasonable prospect of success -- the timing and the OOT points" [sic]

6. My view was that this record appeared to be broadly consistent with what Dr Ibakakombo told me was his understanding. It might be that if one replaced the dash with a comma, the sentence would have a different meaning, but I was uncomfortable going behind this record. My view is that it was generally preferable for a respondent seeking to strike out a claimant's case to particularise which allegations and why they had no prospects of success. Here the strike out was listed by way of judicial order rather than application so no such particularization had been given. In combination of these two factors I concluded it would be unfair to the Claimant to proceed with the strike out/deposit aspect of the application. The Respondent could renew any such application within 21 days which I ordered as part of the case management directions agreed at the end of the hearing.

7. Where time limits were concerned, I decided to postpone the issue of time where discrimination allegations were concerned to the final hearing. There was no dispute that any acts of alleged discrimination occurring prior to 20 June 2019 were *prima facie* out of time. The issue was only whether there was a 'continuing act'. Judge Flood had listed the allegedly detrimental treatment as allegations (a) to (k) at paragraph 13(viii)

of her order. It was acknowledged that allegations (a) to (f) would be out of time if they did not form a continuing act. Mr Heard submitted that there was a 6 month gap between allegation (f) and (g) as well as different decision-makers being involved and so this was an issue which could be resolved today. Dr Ibakakombo noted that Mr Allford, Mr Williams and Ms Carter all worked on the same line in the factory. I also noted that at §26 of the ET1 Grounds, Ms Carter was said to be present at the disciplinary hearing itself. In those circumstances it seemed to me that it might be reasonably argued that the disciplinary process and its appeal were linked through discriminatory action. I so concluded that evidence would need to be heard to resolve this and so postponed the issue of limitation where the discrimination claim was concerned to the final hearing.

8. However, I did go on to hear evidence and submissions on the issue of time jurisdiction on the unfair dismissal claim. An electronic bundle of documents was prepared by the respondent, and I had a witness statement and heard oral evidence from the Claimant and I also had a written submission from the Respondent. Both Claimant's and Respondent's advocates made helpful oral submissions.

9. I found the following facts:

    9.1 The Claimant was dismissed on 7 December 2018 purportedly on the ground of conduct. The dismissal was of immediate effect with payment of notice in lieu. This was agreed between the parties.

    9.2 Application to the tribunal was on 24 October 2019 but by reason of early conciliation it was agreed that the claim was to be treated as being presented on 19 September 2019.

    9.3 However, time for bringing the unfair dismissal claim expired on 6 March 2019, pursuant to section 111(2) of the Employment Rights Act 1996.

    9.4 The Claimant had in 2014 been involved in a disciplinary process whereby he was dismissed, but was reinstated through an appeal process on 22 May 2014.

    9.5 The Claimant had been off sick from work from 18 April 2018.

    9.6 On 8 June 2018, Mr Allford a manager issued the Claimant with a final written warning for failure to adhere to the Respondent's sickness absence policy.

    9.7 Prior to that meeting, the Claimant sent a letter dated 6 June 2018 to the decision maker Mr Allford asking for information "in order for me to prepare for a non-racially discriminatory disciplinary meeting." In his oral evidence, the Claimant said that parts of this letter were copied off a letter that Dr Ibakakombo had written for a friend of his, Mr Monthe, who was also in an employment dispute with the Respondent. Mr Monthe attended the disciplinary hearing with

the Claimant. I found this evidence of the authorship of the letter somewhat unconvincing but I did not need to make a finding as to whether Dr Ibakakombo was more directly involved. However, it did show that the Claimant was aware of sources of legal advice by this time. I make no further findings about this issue because I do not wish to trespass upon issues which the tribunal for the final hearing may wish to address.

9.8 In September 2018 the Claimant travelled to Ghana. The circumstances in which he did so will form part of the dispute for the final hearing. The Claimant arrived back into the UK in late November, which was after the expected date of 5 November.

9.9 The Claimant produced documentary evidence of suffering from severe malaria in November.

9.10 The Respondent invited the Claimant to attend a disciplinary hearing on 4 December 2018 alleging that he took unauthorised leave to visit Ghana and was in breach of the Respondent's Attendance Management Procedure.

9.11 A Med 3 was issued in respect of the Claimant from 29 November 2018 to 26 December 2018 in respect of an anxiety disorder.

9.12 The disciplinary hearing proceeded on 4 and 7 December and the Claimant was dismissed with effect from 7 December 2018.

9.13 On 3 January 2019, the Claimant emailed Mr Allford and Ms Carter to say that as a result of the holidays he was unable to meet his legal advisor to write his appeal and asked for a two week extension. The Claimant's witness statement at paragraph 42 makes clear this legal advisor was Dr Ibakakombo Somewhat surprisingly, when cross-examined he denied this, and said that the email referred to a cousin of his who was a barrister in London. This barrister was never named and there was no mention of the cousin within the Claimant's witness statement. The Claimant said he did not accept legal advice from anyone else at this time.

9.14 Despite this oral evidence, the documents in the bundle showed that on 8 January 2019 the Claimant emailed Dr Ibakakombo with a copy of the disciplinary hearing minutes. This is not an email that would ordinarily be provided to the tribunal, but the Claimant had disclosed it. In oral evidence, the Claimant confirmed that the "19.12.18 YFM Outcome.pdf" attachment to the email was the dismissal letter which following the hearing.

9.15 Therefore, I concluded that there were ongoing communications with the Claimant's specialist representative Dr Ibakakombo who was aware that the Claimant had been dismissed and of the date of dismissal.

9.16 On 10 January 2019 the Claimant emailed the Respondent to say he would appeal and providing grounds of appeal. This letter is written in very particular language:

> "The grounds of my appeal are:
>
> (i) I was Unfairly dismissal;
> (ii) I claim being racially discriminated by Carl Allford i.e the dismissal decision is itself an act of racial discrimination.
> (iii) I was discrimination on grounds of my mother's disability (because of my Association with my disabled mother)" [sic]

9.17 The Claimant insisted in oral evidence that this letter was written following advice from his cousin.

9.18 The Claimant confirmed in oral evidence and I find that he knew at this stage that if resolution could not be found he would have to take his case to court. His evidence was that he thought he had to exhaust the Respondent's disciplinary process before going to court.

9.19 Unfortunately, on 22 January 2019, the Claimant's mother died in Ghana. As a result he could not attend the disciplinary appeal set for the days following. He travelled to Ghana on 24 January 2019.

9.20 The Respondent sought to reschedule the appeal hearing for 9 April 2019.

9.21 It seems that the funeral was delayed for local reasons to a later date in April and so the Claimant could not return for the 9 April hearing. In fact the Claimant remained in Ghana until 23 July 2019.

9.22 On 21 May 2019 the Claimant emailed an "Appeal Statement" from Ghana. This provided a reasoned criticism of the disciplinary hearing and the decision to dismiss him. Notably, much of the language of this Appeal Statement appears in the ET1. One striking example is the phrase, "the panel meeting which heard this matter was rather inquisitorial than a fact finding meeting": see §30.3 of the ET1 Grounds. It is also repeated in the Claimant's witness statement for this hearing.

9.23 I concluded that the Claimant had skilled advice from the UK available to him whilst in Ghana. This is not surprising given the efficiency of modern communication systems.

9.24 On 19 July 2019 the Respondent determined the appeal on paper. The appeal was refused. However, the Respondent's policy allowed for a second appeal though with reasonably tight time limits for providing grounds.

9.25 The Claimant's evidence was that he was suffering from malaria when he returned to the UK on 23 July 2019 and this affected his health to September. However, there was no medical evidence provided for this period and the contemporaneous correspondence between the Claimant and Respondent in the bundle did not raise malaria as a reason for his delay in providing grounds for his second appeal. I did not accept that Claimant was medically incapacitated during this period. He was able to provide the grounds for his second appeal by 26 August 2019.

9.26 On 25 July 2019 the Claimant asked for more time for his second appeal "as my legal team and myself are preparing the statement against my decision." He was given an extension to 26 July 2019. His witness statement said that he was in contact with Dr Ibakakombo though they could not meet because of malaria. There was no explanation as to why they could not speak by telephone. I did not accept that it was impractical for the Claimant and his advisor to communicate over this employment dispute.

9.27 On 27 July 2019, the Claimant emailed Ms Carter asked for more time "as my team helping me to write my statement was not available."

9.28 Thus I concluded that by late July the Claimant had consulted skilled advisors further and any impediment was merely logistical. Neither the Claimant nor Dr Ibakakombo elaborated upon the team's unavailability during this period in evidence or submissions.

9.29 On 14 August 2019 the Claimant asked for an extension of time so he could meet his solicitor to help write the grounds of appeal. He referred to "Acas policy" in this email.

9.30 On 16 August 2019 Ms Carter wrote a letter saying that the time for supplying grounds for a second stage appeal had passed.

9.31 On 26 August 2019 the Claimant submitted an appeal against Ms Carter's refusal to grant an extension of time and for reconsideration of his request for an extension of time.

9.32 The Claimant's explanation for not issuing his tribunal claim in time was primarily that he thought he had to conclude the internal appeal process. He also relied upon the fact he was abroad in Ghana and that he was ill upon his return. He says the first time he learned that he was supposed to issue his tribunal claim within 3 months of his dismissed was on 19 September 2019 when he physically met with Dr Ikakokombo (paragraph 92.13 of witness statement).

Law

10. Section 111(2) of the Employment Rights Act 1996 states so far as is relevant:

> "…[A]n 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."

11. Dedman v. British Building and Engineering Appliances [1973] IRIR 379 is authority for the proposition that the words "not practicable" (there being no 'reasonable' in the legislation at that time) should be given a liberal interpretation. However, in every case the tribunal should inquire into the circumstances and ask whether the claimant or his advisers were at fault for allowing the time limit to pass by without presenting the complaint. Denning MR held that if advisors made a mistake then a claimant must abide by the mistake (§17). Dedman was a case where the claimant went to advisors but they not advise the applicant about the time limit for unfair dismissal proceedings. The EAT held in Ashcroft v. Haberdashers' Aske's Boy's School [2008] IRLR 375 that the principle in Dedman was not dependent upon the advisor being a solicitor.

12. I heed that Marks & Spencer PLC v. Ryan [2005] EWCA Civ 470 confirms that that section 111(2) the 1996 Act should continue to be interpreted liberally in favour of employees.

13. Wall's Meat v. Khan [1978] IRLR 499 is a case where the Court of Appeal emphasised that what is reasonably practicable is a question of fact but that ignorance or mistaken fact can in some circumstances be sufficient to hold it was not reasonably practicable to bring a claim in time if the ignorance or mistaken belief was reasonable. Brandon LJ observed *obiter* that where an employee knows of his rights unfair dismissal legislation but is unaware of the time limit, it may be difficult to show he behaved reasonably in not making enquiries. While *obiter,* the observation by Brandon LJ is one factor which I consider as one of various circumstances properly be weighed up in a case like this when considering reasonable practicability.

14. Palmer v. Southend-on-Sea Borough Council [1984] IRLR 119 is authority for the proposition that the mere fact an employee is pursuing an internal appeal does not mean of itself that it is not reasonably practicable for an unfair dismissal application to be made in time. May LJ's general guidance at 125 within this authority I find of assistance:

> "… an industrial tribunal may wish to consider the manner in which and reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery has been used. It will no doubt investigate what was the substantial cause of the employee's failure to comply

with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the industrial tribunal to investigate whether at the time when he was dismissed, and if not then when thereafter, he knew that he had the right to complain that he had been unfairly dismissed; in some cases the tribunal may have to consider whether there has been any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for it to know whether the employee was being advised at any material time and, if so, by whom; of the extent of the adviser's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given to him. In any event it will probably be relevant in most cases for the industrial tribunal to ask itself whether there has been any substantial fault on the part of the employee or his adviser which has led to the failure to comply with the statutory time limit. Any list of possible relevant considerations, however, cannot be exhaustive and, as we have stressed, at the end of the day the matter is one of fact for the industrial tribunal taking all the circumstances of the given case into account'

Analysis and Conclusions

15. The end of the primary 3 month period for bringing the Claimant's unfair dismissal claim was 6 March 2019.

16. The question for me under section 111 is then whether it was reasonably practicable for the Claimant to bring his claim for unfair dismissal by that date.

17. When considering this question, I am concerned that I was not being given a full picture of the advice that the Claimant was receiving prior to his leaving for Ghana.

18. The grounds of appeal letter dated 10 January 2019 shows plainly that the Claimant was receiving specialist legal advice. The words "dismissal decision is itself an action of racial discrimination" is the type of language that an employment law specialist commonly uses in this type of case. The mention of associative discrimination at ground of appeal 3 would ordinarily require a reasonably specialist knowledge of employment law.

19. I was concerned about the Claimant's rather vague evidence concerning his cousin. My overall impression was that the Claimant was striving to distance himself from receiving advice from Dr Ibakakombo in January prior to his leaving for Ghana. I am satisfied that I have not been given the full story about the Claimant's interaction with his advisors at that time. I must do the best I can on the evidence provided.

20. I am not prepared to reject the Claimant's evidence that he had received advice from his cousin. What I conclude is that whether from a single one of or in combination from Dr Ibakakombo and his unnamed barrister cousin he had received skilled advice as to the substantive employment dispute from advisors who knew that he had been dismissed on 7 December 2018. Those advisors were or should have been aware of

strict employment tribunal time limits. I do not find that the Claimant's professed ignorance of time limits was reasonable in this case. The ignorance ground would not of itself be sufficient in the circumstances of this case to make bringing the claim other than reasonably practicable by 7 March 2019.

21. However, I can accept that because of the death of the Claimant's mother and an understandable need to travel to Ghana it was not reasonably practicable for him to present his Tribunal claim by that date. That bereavement was unexpected. The last thing on the Claimant's mind will have been tribunal time limits. He had responsibilities as the eldest son.

22. It is apparent that by 21 May 2019 the Claimant had received further advice which I conclude from probably from Dr Ibakakombo (though whether from this source or his cousin I ultimately find immaterial) in order to draft his grounds of appeal. The same text/language from these grounds appears in the Claimant's ET1 and also his witness statement (see, for example, paragraph 52.3). Thus, despite his bereavement, the Claimant still had his employment situation in mind. By this time in May 2019 the Claimant through his advisors should have realised that there was a pressing need to make application to the tribunal on his return to England if not before.

23. Bearing in mind the need for me to apply a liberal approach to practicability, I conclude that it was not reasonably practicable for the Claimant to bring his complaint to the tribunal whilst still in Ghana. However, my conclusion is that it was incumbent upon him to bring the claim rapidly upon his return.

24. I reject in absence of corroborating evidence that the Claimant's malaria was sufficient to prevent him from bringing tribunal proceedings over the summer of 2019. In my judgement, the further reasonable period within which the Claimant must have made his application to the tribunal was a further month maximum after his return from Ghana. He was back in contact with his advisor Dr Ibakakombo who should be taken to be aware of the urgency of the situation.

25. Therefore, my conclusion is that while it was not reasonably practicable for the Claimant to bring his claim within the 3 month period following dismissal, the further period I consider reasonable for him to have brought his unfair dismissal claim ended on 23 August 2019.

26. The claim for unfair dismissal is therefore out of time and must be dismissed.

Employment Judge McCluggage
6 August 2020