



## EMPLOYMENT TRIBUNALS

**Claimant** Mr Z Pau  
**Represented by** In person

**Respondents** Ocado Central Services Ltd  
**Represented by** Mr J Arnold (counsel)

**Before:** Employment Judge Cheetham QC

**Open Preliminary Hearing held on 6 August 2020 at  
London South Employment Tribunal by Cloud Video Platform**

## JUDGMENT

1. The complaint of unfair dismissal is dismissed, as the tribunal lacks jurisdiction.
2. The claim for discrimination on the grounds of race and religion and belief is dismissed, as it was not brought in time and it would not be just and equitable to extend time.

## ORDER

1. This claim of unfair dismissal and discrimination on the grounds of race and religion and belief was previously before EJ Ferguson on 18 May 2020, when she listed this hearing to determine whether the Tribunal lacked jurisdiction to hear the Claimant's complaint of unfair dismissal because the Respondent contends (a) he was at all material times an agency worker and/or (b) he did not have two years' continuity of service. Secondly, was the Claimant's claim presented outside the applicable time limit and, if so, would it be just and equitable to extend time?

2. The hearing was conducted by video, but unfortunately the Claimant, who was using an I-Pad, had problems connecting, so he joined the hearing by phone. He was content to do that and he was able to hear both myself and Mr Arnold and we were able to hear him. He also had the hearing bundle before him, which he had previously been sent, but which Mr Arnold also emailed to him again during the hearing.
3. It was also not necessary for the Claimant to give evidence. EJ Ferguson had accepted the Additional Information in the ET1 as the Claimant's evidence on the limitation issue and given him permission to provide a further witness statement. She had also made clear that if he did not provide a further statement, then his evidence was limited to what was in the Additional Information. Since he did not provide a further statement and since Mr Arnold was not taking issue with what was stated in the Additional Information, there was no need for the Claimant to give evidence orally and be cross-examined. I was therefore satisfied that the Claimant was able to participate fully in the hearing, even though it was by telephone.

### **The facts**

4. The first issue was the "ordinary" unfair dismissal claim, which I can take very quickly, because the Claimant accepted that he was an agency worker and not employed by the Respondent. He also accepted that – in any event – he had not been carrying out work for the Respondent for more than about a month.
5. Turning to the limitation issue, the Claimant's last day of work for the Respondent was 19 August 2018. He therefore had until 18 November 2018 to commence ACAS Early Conciliation, but instead did not do so until 19 March 2019. Although he lodged his claim with the tribunal on 12 February 2020, EJ Sage ordered that it was deemed to be accepted on 19 March 2019. The claim was therefore around 4 months out of time.
6. In his Additional Information, the Claimant said that he was able to e-mail the Equality Advisory Support Service and received advice from the Waterloo Legal Advice Centre on 1 November 2018, which was well before the 18 November deadline. He attended the Waterloo Advice Centre again on 8 November 2018. By that date, the Claimant had not received any further correspondence from the Respondent, so on 22 November 2018 (outside the time-limit, but only just), he was advised to contact ACAS. As noted above, he did not do so until 19 March 2019, and without any proper explanation as to the delay.

### **The law**

7. Mr Arnold provided a helpful summary of the applicable principles. In ***Robertson v Bexley Community Centre*** [2003] IRLR 434 CA, at para. 25, Auld LJ stated:

*It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.*

8. This has been echoed in ***Department of Constitutional Affairs v Jones*** [2008] IRLR 128, and also in ***Chief Constable of Lincolnshire Police v Caston*** [2010] IRLR 327.
9. As to the matters to be taken into account in determining whether it is just and equitable to extend time, he referred to ***British Coal Corporation v Keeble*** [1997] IRLR 336. This requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case, and in particular to:
  - (i) the length and reasons for the delay;
  - (ii) the effect of the delay upon the cogency of the evidence;
  - (iii) the extent to which the party sued has cooperated with any requests for information;
  - (iv) the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action; and
  - (v) the steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking action.
10. Finally, in the context of the 'just and equitable' formula, the Court of Appeal in ***Southwark London Borough v Alfolabi*** [2003] IRLR 220, held that while these factors will frequently serve as a useful checklist, there is no legal requirement on a tribunal to go through such a list in every case, "*provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion*".

## Discussion

11. With regards to the unfair dismissal claim, the Claimant accepted he was not an employee. Even if he were, he did not have sufficient continuity of service, so his unfair dismissal claim could not proceed, as the tribunal lacks jurisdiction.
12. Turning to the limitation issue, it is clear from the Claimant's own evidence in the Additional Information that he had access to legal advice and that he was also advised to contact ACAS. That was slightly outside the primary 3 month limitation period, but - as Mr Arnold rightly suggested - it is very likely that a tribunal would have taken a generous view to a very short delay. However, unfortunately, he did nothing further for the next 3 months and he has not given any cogent reason why that was the case. I appreciate that circumstances were difficult for him, as he had lost his job and that led to

great hardship, but the fact remains that he had been told what he needed to do and he delayed doing it.

13. What makes this much harder for him is that, as Mr Arnold submitted, this is a case where the Respondent can point to real prejudice. It is only now, in response to EJ Ferguson's directions, that he has provided any information as to the alleged perpetrators of the discrimination and that is only by nationality. The Respondent has a fairly transient workforce and therefore identifying and locating individuals is very difficult in these circumstances.
14. Therefore, this is a case where it would not be just and equitable to extend time. There has been a delay of some 3 months, which has affected the ability of the Respondent to identify the individuals allegedly responsible. Having had appropriate legal advice, the Claimant did not act promptly and I also have to note that he was late complying with EJ Ferguson's orders regarding further information.
15. In those circumstances, the claims are dismissed as the tribunal lacks jurisdiction.

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Employment Judge S Cheetham QC  
Dated 7 August 2020