



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondent

Mr David Mapfumo

First Group Holdings Limited

JUDGEMENT ON OPEN PRELIMINARY HEARING

HELD AT: London Central (CVP hearing)

ON: 26 October 2020

BEFORE: Employment Judge Russell (sitting alone)

REPRESENTATION:

Claimant: In Person

Respondent: Mr Dilaimi, Counsel

Judgment

1. The correct Respondent is First Group Holdings Ltd which company was the Claimant employer .
2. The Claimant's claims for redundancy and arrears of pay are dismissed by withdrawal by the Claimant.
3. The Claimant's remaining claims of unfair and wrongful dismissal and race discrimination are dismissed on jurisdiction grounds as they are out of time under 111(2) of the Employment Rights Act 1996 ERA and section 123 of the Equality Act 2010.

Reasons

Background

1. First Group is a public transport provider in both the UK and North America. The Claimant began employment with Great Western Railway, one of First Group's rail franchise businesses on 16 January 2012. He transferred to First Group Holdings Limited on 4 July 2016, initially as an IT analyst before being appointed to the role of Senior Group Internal Auditor on 1 March 2019. Both GWR and First Group Holdings Limited are wholly owned subsidiaries of the originally named Respondent, First

Group plc , but the Claimant was never employed by First Group plc and mistakenly sued that company and not First Group Holdings Ltd (which was his employer at all material times for the purpose of his claims including at the date of his dismissal).

2. The Claimant was dismissed summarily for gross misconduct on 2 October 2019. The Claimant said his EDT was 6 February 2020. He was dismissed for alleged offences that included travel and expenses breaches which the Claimant denies . He claimed unfair dismissal as well as race discrimination , redundancy , notice pay , holiday pay and arrears of pay.
3. This Open Preliminary Hearing (“OPH”) was listed by EJ Khan in order to determine the following issue: “whether the complaints were presented in time and if not, whether the Tribunal has jurisdiction to consider them”.
4. I heard evidence from the Claimant himself and Ms Woolcott on behalf of the Respondent as well as submissions from their counsel and the Claimant.

Agreement between the parties

On discussion between the parties the following points were agreed/clarified leading to a narrowing of the issues. As noted below .

1. The Respondent accepted that the correct Respondent should be First Group Holdings Limited and that the Claimant had continuity of employment from January 2012.
2. The EDT was confirmed as being 2 October 2019 by the Claimant and not the later date he originally stated which was when he received the appeal outcome letter.
3. He originally claimed 25 days holiday owed to him for 2019 pro rata due up to his EDT set against the Respondent claim of 16 days owed and (they say) paid but in the hearing today he accepted that he had received £3,491.60 less tax and other deductions for accrued holiday as noted on his last payslip.
4. His only other claim for a contractual debt related to notice pay to the extent he was wrongfully dismissed. And he accepted he had no claim for redundancy and wished to withdraw this as well as his arrears of pay claim accepting an earlier EDT .
5. The Claimant agreed that the hearing today to deal with whether his claims were in time (and if not if time could be extended) should deal with his unfair dismissal claim and race claim and alleged holiday claim and debt to the extent this was possible. And in respect of the race claim, and given he had put no substantive details of this in the ET1, whether (to the extent time was extended to otherwise allow that claim to proceed) whether it should be struck out in any event on the grounds it had no prospect of success or a deposit order should be made on the grounds it had little prospect of success.

As a final preliminary manner, the Respondent asked the ET to take note of the fact the Respondent’s solicitors on record are Simmons & Simmons LLP , Aurora, Finzels Reach , Counterslip, Bristol, BS1 6BX ref Audrey Williams Audrey.Williams@Simmons-

[Simmons.com](https://www.simmons.com) Requests to contact them rather than the Respondent directly had been overlooked.

Finding of Facts on Time Limits

1. The Claimant contacted ACAS on 11 May, received a certificate on 21 May and subsequently presented his ET claim on 9 June. Given his EDT of 2 October 2019 his claim was some 5 months late (recognising that such time limit can be extended through the ACAS conciliation) set against the primary time limit of 3 months post the dismissal to present his unfair dismissal claim. And a further 3 months out of time in respect of his discrimination claim as the last act of discrimination complained about was no later than 26 July 2019.
2. Mr Mapfumo identifies 3 reasons why he says it was difficult for him to issue his Claim within the 3 months from his termination date. These are identified as because: (a) he was unable to obtain free legal advice; (b) he had depression; and (c) he was divorcing his wife. However, I find these arguments unpersuasive for these reasons.

A Illness concerns and domestic issues

3. Even though it is clear he was off work for an extended period with sickness he produces very limited medical evidence as to his illness or any mental or other medical concern to support his claim that such illness could or did prevent him from filing his complaint on time.
4. I find that the only prescription he received for depression/mental health concerns was Nortriptyline prescribed by his GP Dr Watkins on or about 14 August 2019. The relatively minor dosage of this did not increase nor were any other relevant drugs added until recently. So, to the extent he sought medical assistance during this time, his condition did not materially worsen in the opinion of his doctor.
5. The Claimant did not visit his doctor at all from 2 October 2019 when dismissed until 9 June 2020 other than one telephone appointment on 22 February 2020.
6. However upsetting his personal life (and one must have empathy for this) any moments of severe difficulty were matched by periods when he could have acted on his ET claim as he did with his family court proceedings.
7. During the disciplinary process any request he made for rescheduling because of illness was accommodated including the appeal which took place in the afternoon as he requested it was not scheduled for a morning.
8. At no time did the Claimant say his divorce or health problems or any other concern should or might mean he needed to delay the appeal. And at no point did the Claimant mention his health concerns at the appeal hearing.
9. The Claimant lodged written grounds of appeal by an email dated 10 October 2019. Which dealt in detail with each allegation and outlined the grounds on which he

disputed the evidence. Without obvious health concerns . Why could he not have lodged an ET1 ?

B Other points in respect of his delay in lodging the claim

10. Even though the appeal process was delayed (with , I find , no bad faith on either side) the Claimant knew on 6 February 2020 that his appeal had failed. Yet he still did not present his ET1 until 6 June 2020. His claim was not just slightly out of time but over 5 months out of time.
11. At the time of his dismissal he was aware of the right to claim Unfair Dismissal in an ET and the fact (despite his denial of this) that they were time limits to do so . I accept he had not then contemplated doing so and also that he did not know what the time limit was.
12. I also accept that he did not ask his union representative as to these time limits, but he did have such a representative and could have asked him and chose not to do so. He had advice from his trade union at all material times.
13. He admitted calling the CAB and firms of solicitors and whilst not being able to instruct lawyers until March 2020 due to understandable financial constraints he had a chance to at least find out the applicable time limits then.
14. Or he could have googled this and done so despite understandably concentrating on his internal appeal. He was more than capable to making a simple internet search as he did to present his case internally and, in this tribunal, claim as he submitted. I note he had done a commercial law paper as a student and was a senior employee with the Respondent with limited excuse for taking no action.

Applying the Law

The relevant provisions covering time limits for the Claimant's claims of unfair (and wrongful) dismissal and his claim for outstanding holiday are covered principally by Section 111(2) of the Employment Rights Act 1996 ERA) Section 207B(2)-(5) ERA. Section 140B(2)-(5) Equality Act 2010 ("EqA") provides similarly for claims brought under the EqA.

Section 111(2) of the Employment Rights Act 1996 provides as follows:

"[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".

When considering whether to extend time in accordance with s.111(2) ERA 1996, the tribunal must apply a two-limb test: (a) The claimant must show that it was not reasonably

practicable to present his claim in time and if he does then (b) the tribunal must then satisfy itself that the time within which the claim was in fact presented was reasonable.

In determining the first limb ('not reasonably practicable') I am referred to the case of *Palmer and Saunders v Southend-on-Sea BC* [1984] ICR 372, CA where May LJ said that the question which should be asked in order to establish whether it was reasonably practicable for the Claimant to present his claim in time was the following: "was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?" And that the question of what is or is not reasonably practicable (or reasonably feasible) is essentially a question of fact for the tribunal to decide.

And as made clear above I have found it was reasonably feasible for the Claimant to have lodged his claim in time. Despite the difficulties I fully accept he was having in his personal life and with his health, I have taken the *Palmer and Saunders v Southend-on-Sea* factors into account and the fact that the internal appeal which was outstanding until the Claimant was advised of the outcome on 6 February 2020 is not sufficient by itself to justify a finding of fact that it was not reasonably practicable to present a complaint to the tribunal: *Bodha (Vishnudut) v Hampshire Area Health Authority* [1982] ICR 200 .

And the Claimant fails on the second limb of the test as he did not file the complaint 'within such further period as the tribunal considers reasonable' .On an objective consideration of the factors causing the delay and bearing in mind that the primary time limit is three months the fact that the Claimant was some 5 months later than that in filing his claim after contacting ACAS is an unacceptable delay . His illness and personal circumstances do not account , and cannot be said to have accounted, for this delay and I pay particular regard to the fact that the Claimant says he knew in March 2020 as to the deadline for making his ET complaint and had (and accepted he had) substantive legal advice at that time . Yet a further period of over 2 months elapsed before he contacted ACAS on 11 May and subsequently presented his ET claim on 9 June.

The time limits in discrimination cases are more flexible. Under section 123 of the Equality Act 2010 proceedings may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable (s123(2)(b)).

However in this case I have found the last act of discrimination complained about was , taking the Claimant's case at its highest , 26 July 2019. So that claim is not only clearly out of time but even later in time than the unfair dismissal claim . And must fail on jurisdiction grounds unless I find that it has been brought within "such other period as the employment tribunal thinks just and equitable." . And I do not. The burden is on the claimant to convince the Employment Tribunal that it would be just and equitable to extend time: *Robertson v Bexley Community Centre* [2003] EWCA Civ 576. And even though this is a less severe test than for an unfair dismissal claim he has not done so.

I have referred to the Equality Act 2010 Employment Statutory Code of Practice in determining whether to exercise a 'just and equitable' discretion and weighed up the relative prejudice to the parties. And I have found there has now been some 16 months after the last alleged incident .And given my findings above as to the opportunity the Claimant did have to file his complaints in time or at least shortly thereafter , the fact it took him over 10 months to do so (and some 7 months out of time) and even then did so

without any particularised claim all count heavily against the Claimant , and against me exercising the statutory discretion.

Section 207B(2)-(5) ERA dealing primarily with how ACAS facilitation does or might affect the time limits is not a material consideration here as I have determined the claims are well out of time in any event.

Substantive Claims on Discrimination and Holidays

1. As far as the Discrimination claims are concerned whilst noting that there is no detail in the ET1 and such claims as are mentioned now are still unparticularised and seem to have limited merit I am not in a position today to determine if these had no or little prospect of success . I also remind myself that in cases like *Anyanwu v South Bank Student Union [2001] ICR 391* and *Ezsias v North Glamorgan NHS Trust [2007] ICR 1126* a strike out , in particular, would be an exceptional step to take where evidence was disputed . And at this stage I would need the Claimant or provide further and better particulars before even a deposit application could be considered. However, this is not a necessary step giving my findings on limitation /time limits.
2. As far as the holiday pay claims are concerned there remains a dispute as to the Claimant entitlement. Notwithstanding the respondent's record as to holiday taken suggesting all outstanding holiday has been paid for the Claimant might be entitled to up to some 5 days holiday owing (he got paid for 16 days accrued holiday in 2019) depending on how many days leave were carried over from 2018 and how many days he had taken as holiday in 2019. I am unable to establish this today but once again it is not a necessary step giving my findings on limitation /time limits.

As a result, all the Claimant's claims are dismissed as the ET has no jurisdiction to deal with any of the Claimant's outstanding claims which are dismissed .And in consequence there is no need to make any (further) management orders .

EMPLOYMENT JUDGE - Russell

26 October 2020
Order sent to the parties on

27/10/2020

for Office of the Tribunals