THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE P BRITTON (sitting alone)**

BETWEEN:

Claimant **Mr Chris Rodway & Others**

AND

Respondent **GTR Limited**

ON: **1 October 2020**

APPEARANCES:

For the Claimant: **Mr Nicholas Toms, Counsel**

For the Respondent: **Mr. Paul Gott QC**

JUDGMENT

1. The Application to amend the claim is dismissed on the basis that the claim upon which it is sought to amend was in itself out of time, it having been reasonably practicable to have presented it within time or within a reasonable period thereafter.

REASONS

Introduction

1. The claim of Mr. Rodway and his colleagues (the Rodway Claimants), of which I gather there are still about 55, relates to their being penalised by reason of their participation in trade union activities, them being members of the Nation Union of Rail Maritime and Transport Workers (RMT). This has to do to with their participating in industrial action over a considerable period in time in relation to the much-publicised dispute between

the RMT, in particular, and several Railway Operators including the Respondent as to whether there should be trains operated without conductors.

2. The case comes before me in that it had been adjudicated upon in terms of what I would describe as the amendment issue by Employment Judge Sage sitting at the London South Tribunal in Croydon on the 5th of June 2019.

3. She granted the application of the Rodway Claimants to amend the claim. Her adjudication was appealed and in due course it came before the Honourable Mr Justice Kerr (Kerr J) sitting alone in the Employment Appeal Tribunal (EAT). He adjudicated on the matter on the 4th of June 2020 and handed down his Judgement on the 17 June 2020. That decision having been published it was received by the London South Employment Tribunal circa 29 July 2020.

4. Today had intended to be the first day of the main Hearing apropos the mainstream issues for determination post the granting of the amendment, but because the matter of the amendment had been remitted back for re-determination by a different Employment Judge by Kerr J, him having upheld GTR LTD's appeal against the granting of the amendment, the application to amend has now been listed for today: hence my involvement..

5. For the purposes of my adjudication I had before me a considerable bundle of documents but both myself and counsel have worked essentially from a core bundle to which to some extent I will refer. I have had the benefit of their written skeleton submissions and oral argument. I have considered closely the judgement of Kerr J which is also been before me.

6. For reasons which I shall I come to, I have heard evidence under affirmation from Mr. Rodway.

Core factual and procedural background and history: first observations

7. Before I deal with the application it is essential that I set out the brief history of this now somewhat protracted matter. For further detail the reader is invited to consider the judgement of Kerr J and in particular as to his setting out the facts.

8. Suffice it to say that against the background of the jurisprudence, since labelled as **Bear Scotland**[1], the Respondent agreed that it would make back-dated payments in relation to holiday pay for a period of two years and in particular for my purposes to employees who were members of the RMT.

9. This agreement had been reached under the collective agreement of which I need say no more. But what was made plain by Mr Evans for the Respondent on the 31 October 2016 (see bundle page (Bp) 92) was that it was only going to pay those members of the RMT participating in the industrial action to which I have referred if they signed up to that they would no longer participate in said dispute. Thus, this was encapsulated in Mr Evans' letter to the RMT dated the 31 October inter alia stating as follows:

[1] *Bear Scotland v Fulton and anor 2015 ICR 221 EAT*

"…*will (without prejudice to our rights) withhold payment of any back-dated holiday pay from conductors. Any conductors who have either worked normally worked during this dispute or confirm that they will now work normally during the remainder of this dispute, and will not participate in further industrial action, will receive payment."*

10. Not surprisingly the RMT was not happy about that and therefore its General Secretary, Mick Cash, wrote to the Head of Employee Relations of the Respondent on the 9 November 2016.

11. Having recited his reliance upon the illegality of what was proposed by reference to part 3 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULCRA) and also citing Article 11 of the European Convention of Human rights he stated thus:-

"On this basis please reply by return to confirm that these payments will be made to the individuals who have thus far been denied back-dated holiday pay with immediate effect. ***If this does not happen then claims will be placed into early conciliation and Employment Tribunal proceedings logged with immediate effect[2].***
I look forward to hearing from you by 1600 on Friday the 11th of November 2016."

12. The Respondent would not budge. So, what happened is that it made the payments as it had stated that it would do. Thus, all those who had committed themselves in terms of not participating henceforth in the industrial action had received the payment in the pay-roll run latest December 2016. Conversely those who had not signed up including Mr Rodway and his fellow Claimants were not paid.

13. This was not a case where the back-dated holiday pay was going to be paid over a series of payments i.e. stretching into 2017. That is absolutely clear from the letter of Mr Evans (Bp92)[3]. Therefore, this engages the jurisdiction of the Tribunal and to which I shall come.

14. Stopping there, Mr Rodway is a long serving worker in the railway industry and an active Trade Unionist. Indeed, he is a Branch Secretary of the RMT and was at the time of the material events. I have no doubt whatsoever that he is very conversant in matters to do with the collective agreement and the rights of himself and his colleagues; and indeed I learnt during this Hearing that he had successfully brought a previous action in the Tribunal. What it means is that he is not ignorant of his employment rights.

15. As it is, Mr Cash's bluff, if that is what he was, having being called by the fact that the Respondent did not back down, there is nothing before me to indicate that thereafter anything happened at the collective agreement level.

16. What I do know is that on the 11 December 2017 Mr. Rodway issued a claim in the Tribunal (ET1) on behalf of himself and 60 RMT colleagues. It was lodged at the Bristol Employment Tribunal although Mr Rodway and his colleagues seemed to have been based in West Sussex. Doubtless that is why in due course the claim was transferred to the London South Tribunal. As to the claim, first the box was ticked for discrimination based upon religion or philosophical belief. That, of course, would engage the Equality Act 2010 (the EQA). Second, the box was ticked for a claim based upon non payment

[2] *My emphasis*
[3] *Bp=bundle page.*

of wages. This would engage Part II of the Employment Rights Act 1996 (the ERA); and the non payment could include a claim for unpaid holiday pay[4]. The right to complain to the Employment Tribunal as to non payment is set out at s23.

17. The particulars of the claims were set out in section 8.2 of that ET1. Details were given about the holiday pay issue, and that them having not been paid because of their commitment to the industrial action, and which would "*be lawful under current legislation*". Therefore this was inter alia

> *" harassment and bullying"* and "… *not only does this violate the respondent's obligations under the agreed bargaining machinery but by continuing with this discrimination they are in breach of the following:*
> *Freedom of Association under Article 11 of the European Convention on Human Rights*
> *1996 Employment Rights Act "*

18. No particulars were given as to why religion or philosophical belief was engaged (Bp 7).

19. In due course a response (ET3) was filed by the Respondent (Bp30) Inter alia pointed out was the lack of any particularisation viz the EQA based claim. Second, that if this was a claim relating to the non payment of holiday pay, then it was out of time: see paragraph 6

20. The matter came before Employment Judge Harper on 6 March 2018 sitting in Bristol at a telephone case management hearing (TCMPH). As to his published record of that TCMPH (Bp56-59) EJ Harper first of all focused on the lack of any particularisation as to the EQA claim as to which see paragraphs 1.2.

> *"Completely silent as to any details relating to the discrimination claim. I explained to Mr Rodway that it does not appear at all clear as to how the religion and belief claim came with in the (*EQA)
> *… I made the point that it* was not for *me to advise either party but there are other areas of law which provide protection for trade union members/ representatives."*

21. He was able to establish that otherwise before him was the claim for the unpaid wages: namely the holiday pay.

22. Stopping there, insofar as this claim might have been one for detrimental treatment by reason of Respondent not paying because of the trade union activities, thus engaging the relevant provisions of TULCRA , it is agreed, and it seems to be implicit in the record of that TCMPH, that participation in industrial action thus resulting in a non payment of such as holiday pay is not a prohibited act viz TULCRA by the Respondent But of course engaged is Part II of the ERA. Put at is simplest **Bear Scotland** required the payment of such as statutory holiday pay based upon "normal remuneration" rather than, say, contractual hours. Thus if the Claimants had been paid holiday based upon the latter, and which was less than the "normal remuneration", then payment of the difference for up to two years was now required.to be paid. It is obvious the Respondent had agreed to that, but of course subject to its seeking to rely on the caveat viz payment

[4] *S27 of the ERA includes holiday pay in the definition of wages for the puproses of this part of the ERA.*

being subject to the signing up to no participating in the industrial dispute. As to whether that is a sustainable defence is not for me today. And because of the out of time issue as to which I shall come and the restrictions as to adjudication based upon the " not reasonably practicable test " as opposed to the more generous " just and equitable test".

23. Post that TCMPH Mr Rodway wrote promptly (Bp97-99) to the Bristol Tribunal on 7 March 2018. First, as three of the claimants had now been paid by the Respondent, he withdrew their claims. Second, as to the TULCRA issue he conceded that: *"not protected status".* And he withdrew the discrimination based claim in its entirety viz the EQA. He then reiterated at some length that he and his colleagues were wrongfully not being paid the holiday pay which was still withheld and because of their refusal to sign up to forgo the industrial action. And thus, the Respondent's failure to pay "…*was violating the 1996 Employment Rights Act."*

24. On the 16 March 2018 Employment Judge Ford QC accordingly dismissed the EQA claim upon withdrawal. The point therefore is that once the EQA claim was withdrawn and reliance on TULCRA abandoned, thus left was only the wages claim as per s23 of the ERA .But, I observe, this would engage as a first fundamental as to whether the Tribunal had jurisdiction to hear the claim and because of the time limit.

25. Thus, engaged is s23 as follows:

> *(2) Subject to sub section (4) an Employment Tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with –*
>
> *(a) in the case of a deduction by the employer, the date of the payment of the wages from which the deduction was made…"*

26. Stopping there, for the purposes of Part II of the ERA non payment constitutes an unlawful deduction. Thus non payment of this holiday pay in the pay roll run which obviously was at latest December 2018 was the trigger point from which time ran. Thus as per s23 (3) thereafter there was not a series of deductions by way of under payment of wages which might extend time.

27. So, becomes engaged 23(4):

> *"Where the employment tribunal is satisfied that it was* ***not reasonably practicable***[5] *for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.".*

28. Thus as a fundamental first issue as it goes to the jurisdiction, the Tribunal would have to first make a decision on the " not reasonably practicable" issue. The burden of proof as to satisfying that test is upon the Claimant.

29. Doubtless that is one of the reasons why EJ Harper ordered a preliminary hearing. As to which see paragraph 1 (b) of his Orders.

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[5] *My emphasis.*

30. However at that stage on the 16 March Thompsons came on record as acting for the Rodway claimants.

31. This time the matter was referred to Employment Judge Ford at Bristol and on the same day at his direction an e-mail was sent to Thompsons and the solicitors for the Respondent. Inter alia stated was:

> *2) Now that the Claimants are represented by Thompsons, Employment Judge Ford considers it would be helpful if the basis of the claims were clarified. Accordingly* ***by Friday 6 April 2018*** *the claimants' representatives shall clarify the bases of the claims and the statutory provisions under which they are brought.*
>
> And at:
>
> *7) I am directed that the file in these cases has been transferred to London (South) Employment Tribunal office and that all future correspondence should be addressed to (* that office*) …"*

32. On the 6 April 2018 Thompsons duly wrote to London South. Confirmed was that " *the claims needed to be amended so that their claims are clearer*". Counsel had been instructed to that effect and it was expected that the amended claims would be filed by 20th April. Thus an extension of time from the 6th April deadline was requested. (Bp 102).This was granted. Then on 16 April Thompsons duly sent in to London South the amended grounds of claim copying the Respondent's solicitors (Bp 102a). The amended grounds are at Bp 64-65). They had been drafted by Naomi Ling of counsel. The factual scenario as per that I have rehearsed as to the non payment was pleaded, and now averred was that the Respondent's actions were in breach of the Employment Relations Act 1999 (blacklists) Regulations 2010 (the Blacklisting Regs). As to why was then set out at paragraphs 8-9 of the pleading. Reliance was again also pleaded viz Article 11 of the European Convention on Human Rights and Art 3 of the HRA, essentially on the basis that thus the Regulations should thus be applied on what I encapsulate as being the well know **Marleasing** principle.

33. The sending in of that pleading was acknowledged by the Tribunal on the direction of Employment Judge Freer. In that direction sent out on the 16th May 2018 it was not said that the amendment could not be accepted until inter alia the Respondent had said whether or not it opposed the amendment. That letter could be read as being that the Tribunal had accepted the amendment without awaiting upon any representations from the Respondent, which of course would be contrary to the Tribunal's 2013 rules of procedure.

34. But it is a factor that could come into play in terms of it being just and equitable to grant the amendment apropos the jurisprudence in that respect: in particular see **Selkent Bus Co Ltd v Moore 1996 ICR 836 EAT (" Selkent"))** per Mummery J as he then was.

35. So regrettably the out of time issue had not been addressed re the s23 ERA claim; there had been no preliminary hearing;. and the matter remained in limbo for the rest of 2018.

36. On the 30 January 2019 the Respondent paid all the Rodway Claimants the outstanding holiday pay.

37. On the 12 April 2019 another set of 65 claimants, who had also been withheld the holiday pay by the Respondent for the same reason as the Rodway Claimants, issued proceedings in the London South Employment Tribunal under the lead name Ajayi: case number 2301571/2019.That claim had also been issued by Thompsons. It was not brought on either of the original heads of claim in the Rodway ET1. It relied on the breach of the Backlisting Regs and had obviously also been drafted by Naomi Ling. Engaging as it does the same scenario as per the Rodway Claimants, it relies only upon the alleged breach by the Respondent of the Blacklisting Regs.

38. That claim is not before me. It does not engage the amendment issue and thus time issues, which is what I am required to determine today.

39. Reverting to the Rodway claims, On the 1 March 2019 Employment Judge Sage picked up this case and issued directions, in particular as to what was the Respondent's stance in relation to the application to amend. By their reply dated 6 March 2019 (Bp 109-110) the Respondent's solicitors made plain that the application was opposed. Recited were the directions back on 6 March 2018 of EJ Harper, and in particular that the remaining claim was out of time. Implicit in their objection therefore has to be a fundamental which is this. If the claim upon which the amendment is seated is out of time. then unless time is extended on the not reasonably practicable test, then there is nothing to amend. I identified that as a core issue at the commencement of the hearing before me. Thus consideration of the merits of the amendment apropos **Selkent**[6] would not engage if time was not extended as the original claim would thus be dismissed for want of jurisdiction and thence there would be nothing left to amend.

40. Nevertheless, if the Rodway Claimants surmounted that hurdle, made plain, and I gather by now there was an amended response, is that the reliance upon the Blacklisting Regs was for reasons essentially because there is no list which has been produced and circulated and in particular to other agencies or employers thus meaning the Respondent does not fall foul of the regulations. This is also taken up by Mr Gott QC today in his written submissions. For reasons which are now plain, I do not need to address the merits of the application to amend, unless I rule in favour of the Rodway Claimants on the out of time issue unless Mr Toms persuades me that it is not engaged.

41. In any event, on 5 June 2019 EJ Slade heard the application to amend and granted it. On 22 July 2019 she gave full written reasons. The Respondent appealed, and thence, I am back to Kerr J and his judgement published on 29 July 2020 by which he granted the appeal and remitted the matter for re-hearing: hence my presiding at this hearing.

42. Now finally for my purposes and thus cross-referencing to the judgement of Kerr J and his observations relating to the EJ Sage judgement, suffice to say, that the focus was very much upon whether she erred apropos **Selkent** in terms of granting the amendment and little time if any was spent if any on what I consider to be the core out of time/ jurisdiction point. However Kerr J touched upon it in his paragraph 87:

[6]The **Selkent** approach engages the just and equitable principle including as a factor if necessary the merits of the amendment claim. The just and equitable test is less onerous than the not reasonably practicable test.

"The second aspect of the **Selkent** *guidance is that the question of time limits must be considered. In* **Selkent** *itself, emphasis was laid on whether the claimant as amended would be out of time. But it must also be relevant to consider whether the claim as originally presented was, when presented, already out of time.* ***If it was and time is not extended, there is nothing to amend.*** [7]

Submissions and the jurisprudence: further observations

43. In **Selkent** Mummery J was dealing with an application to amend which in itself was out of time. But not engaged was whether the original claim upon which the amendment would be seated was itself out of time.

44. Cross referencing to two legal authorities Mr Toms has referred me to today which he considers to be of assistance[8], they are first **Abercrombie v Aga Rangemaster Ltd (" Abercrombie")** (2014) ICR 209 at 232 to 233 paras 53 to 56 per Underhill LJ ; second: Capek v Lincolnshire County Council (2000) ICR 878 at 888 per Mummery LJ .

45. As to **Abercrombie**, leaving aside the judgement of Mr Justice apropos **Selkent** and whether an amendment is substantial as opposed to simply a re-labelling it is paragraph 54 (Bp 184) in particular that Mr Toms seeks to rely on:

"I have no problem with Silber J's starting point that the effect of section 32 of the 2002 Act is to deprive the employment tribunal in a case to which it applied of "jurisdiction". But I do not agree that the fact that a claimant has commenced proceedings in respect of a claim which the tribunal decides in due course that it has no jurisdiction to determine, is an absolute bar to an amendment which would remove that difficulty. Silber J's view to the contrary sense depends on his characterisation of the claim as a "nullity". I can see the force of the argument that if the claim were indeed a nullity in the full sense of that term ie ab initio, there would be no proceedings in being that could be the subject of an amendment. But that is not the case here. It is necessary to understand how s32 worked. As appears from section 32 (6) the tribunal was only prevented from considering a complaint if either (a) the claimant's non compliance was apparent on the face of the ET1 or (b) it decided that there had been non compliance with s32(2) in response to the respondent raising that issue " in accordance with…(employment tribunal procedure regulations) (which in practice means by an amendment under the Rules). In the present case head (a) did not apply; the claimants said nothing in the ET1 to indicate non- compliance, because they |(like the respondent) believed that a valid collective grievance had been lodged. As for head (b) it was only at the hearing itself that the employment judge gave permission to amend and was "satisfied of the breach" asserted by the respondent. Until that moment the tribunal had full jurisdiction and the proceedings were entirely valid. There is thus no question of nullity."

46. But that is the distinction from the case before me in that s32 of the 2002 Act embedded as first stop to a tribunal adjudicating on a claim compliance with the then statutory grievance procedure. It placed a barrier in the way of justice. It was abolished. Thus,

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[7] *My emphasis.*
[8] *See his submissions in particular Para 32.*

Underhill LJ's judgement has to be seen in that context. The contemporary equivalent is of course the now requirement to obtain an ACAS EC certificate before commencing the proceedings. The ET 2013 Rules of Procedure provide for rejection of a claim if there is not one. But the claim can of course be re-presented with the certificate. Albeit this may impact upon the time limit. Conversely the period of the ACAS EC cert extends time [9]. More important in terms of the before me case neither party was unaware that there was a time issue. It was apparent from the ET3 and raised at the first TCMPH by EJ Harper.

47. Second, In **Abercrombie** the claimants relied upon a collective grievance the Trade Union had raised with the Respondent as being compliant with section 32 of the Employment act 2002. The point in that case is that when the claim was actually brought to the tribunal it would have been in time, indeed it never was not in time in that sense. Late in the day the Respondent ambushed the Claimants on the basis that that there had not been compliance with section 32 apropos the collective grievance as a matter of law. Thus the Claimants sought to re-label the claim as being in reliance on failure to guarantee provision payments as per section 34 of the ERA and which was not subject to the s32 statutory grievance regime . The Judge at first instance ruled first of all that the claim fell foul of section 32 and then refused the application to amend. It is not at all surprising that in the circumstances the Court of Appeal allowed the appeal. It has to be seen in that context. None of that applies to this case. There was no falling foul of a superimposed barrier to justice, including the ACAS EC process, engaged. The three month time limit on claims such as that for non payment of wages is long established. Thus I do not find that it is on "all fours" to the scenario in the case before me. Otherwise I have not been referred to any authority at all which is all square with the scenario in this case and which goes to the heart of the Tribunal's jurisdiction, it being a creature of statute, on a wide range of of matters within the ERA including such as s98 " ordinary" unfair dismissal cases and not just claims for unpaid wages or holiday pay,

48. Thus I do not gain assistance from the reliance of Mr Toms upon **Capek v Lincolnshire County Council (2000) CA ICR at 888 per Mummery LJ** as he by then was. That case in fact focussed upon the restrictions imposed by **the Employment Tribunals Extension of Jurisdiction (England and Wales) Order** 1994 in relation to the ability to bring a proceeding in the Employment Tribunal for breach of contract before the effective date of termination. I find nothing therein that assists on the jurisprudence point before me**.**

First Ruling

49. I have rehearsed s23 of the ERA and the crucial significance of the not reasonably practicable test. Put simply unless the Employment Tribunal finds that it was not reasonably practicable to present the Claim in time and that it has been presented within a reasonable time thereafter, there is no claim before it. Thus it is for the purposes of the Employment Tribunal's jurisdiction a nullity. Thus as per Kerr J there is nothing to amend.[10] Therefore unless Mr Rodway persuades me as per s23 (4) and I extend time, the amendment application is doomed to failure and the " just and equitable" approach

[9] S207B ERA. Mr Rodway obtained a ACAS EC but it does not ride to the rescue as per s207B abd because ACAS EC started after the expiration of the three month time limit.

[10] This is also a submission by Mr Gott QC : see paragraphs 35-39 of his written submissions.

viz applications to amend and which is a less onerous test simply does not engage[11]. and thus does not need to be addressed.

Second decision on the not "reasonably practicable test

50. Thus I now come to the determine that issue and so I have heard the sworn evidence of Mr Rodway and his explanation for the late presentation which as I have already rehearsed was some eight months out of time. In terms of assessing his explanation I apply the test as set out in **Palmer and or v Southend on Sea Borough Council (1984) ICR 372 CA.** In which there was conducted a review of the then Jurisprudence. Their Lordships 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" .*

51. Subsequently Lady Smith in **Asda Stores Ltd v Kauser EAT 0165/07[12]** explained it as follows:

> *"The relevant test is not simply a matter of looking at what was possible but to ask whether, on the focus of the case as found, it was reasonable to expect that it was possible to have been done."*

52. As to what are described by the learned authors of the IDS Handbook as "multifarious reasons are adduced for later presentation" the most frequent engaged before the Employment tribunal are then set out commencing at paragraph 5.44.

53. I repeat that it is not a just and equitable test and the merits of the claim are not engaged unlike when dealing with an amendment as per **Selkent.**

54. Having heard Me Rodway's evidence I find as follows.

55. Mr Rodway has worked in the railway industry for many years and been an effective trade unionist. He knows the collective agreements by heart. He took much store by the collective machinery for resolving disputes in the railway industry. These are long standing collective agreements and I am well aware of the importance of the same.

56. Thus, he said he set great faith in the mechanism for resolving industrial disputes. Mr Cash had set out the RMT's position on 9 December 2016 and which could not have been interpreted otherwise than an ultimatum. As it is insofar as I have any documentation the RMT didn't do anything until c. April 2018 when Thompsons got involved. There is no evidence that prior thereto he was wrongfully advised to delay issuing proceedings. And even if he had been it would not ride to the rescue; as to which see the seminal jurisdiction viz lawyers at fault and the not reasonably practicable test encapsulated in **Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, CA per Lord Denning MR**. This rule is commonly referred to as the "Dedman principle."

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[11] For further commentary on the not reasonably practicable test see IDS Employment Law Handbook: Employment Tribunal Practice and Procedure May 2014 edition, commencing para 5.41 .

57. I bear in mind that Mr Rodway brought this claim as an individual. So what is he saying? Essentially, that he hoped and expected the RMT to deal with these issues via the collective mechanism, so he sat back with faith in that process to start with, but then subsequently lost it because there was no progress.

58. Was this someone who was ignorant of facts? The only point that that might engage here is that he thought the non-payment of back-dated holiday pay was a continuing act. However, it isn't for the reasons I have already given. Otherwise, Mr Rodway is conversant with the Tribunal process and has previously brought a claim in the employment tribunal. He is an engaging man who is vigorous in maintaining his convictions as regards the merits of trade unionism and the rights of his colleagues. He is the epitome of an experienced union official.

59. There was no physical impediment that was standing in his way – that is obvious. He knows about employment tribunals – that is clear. The issue then is whether it was not reasonably feasible for him to have issued his claim earlier apropos **Palmer.** Mr Toms would argue it wasn't reasonably feasible given the context and Mr Rodway's mind set as regards the merits of awaiting a resolution via the collective process. He would say this was understandable and therefore his decision to bring the claim when he did because he could not see any progress was in that sense reasonable – i.e. it was not reasonably practicable because there was that "impediment" standing in his way.

60. But, I observe, if there was engaged such as a protracted internal appeal following such as invoking the collective agreement, and I have no evidence to that effect, then it would not assist in terms of the not reasonably practicable test. See para 5.79 of the IDS handbook and the refence to **Bodha v Hampshire Health Authority 1982 1CR 200, EAT** and which was expressly approved in **Palmer**. The point being that the fact there may be a protracted process is not in itself sufficient grounds alone to constitute not bringing the proceeding within the time limit.

61. This is a difficult judgment call. On the one hand I am impressed by Mr Rodway. However, on the other hand, the time limits should be strictly applied. Hence the definition of not reasonably practicable. The burden is on Mr Rodway. Mr Gott QC says, there is no reason why Mr Rodway could not have brought this claim within the time limits. Instead he waited until nearly a year after the cause of action arose. Why not put the claim in and hold the position? It would have focussed minds as part of the collective process.

62. Balancing all those factors as I do, and bearing in mind the burden of proof is on the Claimant, I have concluded that there was no impediment that stood in the way, such that it was not reasonably feasible for him to have brought his claim earlier than he did. Although I may have concluded that in the first 3 months it was not practicable to have brought his claim, leaving it as long as he did without being proactive (and there are no documents to show that he was) I find, overall as regards this claim – it was reasonably practicable to have presented this claim well before it was presented. The claim is therefore out of time and must be dismissed.

Conclusion

63. Thus, it means is that the only claim currently before the Tribunal is dismissed. Thus, I conclude that there is no claim upon which the amendment can seek to rely.

64. Therefore, it means that I also refuse the amendment.

Ajayi

65. The Ajayi claim needs a preliminary hearing re: application to amend the response and the Claimants' objections. Second, it may well be that the Respondent will seek a preliminary hearing on the basis that the claim should be struck out as misconceived in law. Thus, there needs to be listed via CVP at least a case management discussion. Dates to avoid viz Counsel need to be obtained and a direction made that the parties provide an agreed agenda. They also need to be consulted on the time estimate for that hearing.

Footnote

66. Post dictating these reasons I received from the parties the agreed note of my extempore reasons. These reasons elaborate thereupon as written reasons were requested by the Claimants at the hearing. The substance of my decision has not changed. What I have done is to provide more detail for those extempore reasons.

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Employment Judge Britton
Date: 15 November 2020