Case Numbers: 2202211/2020
2204440/2020
2205570/2020

EMPLOYMENT TRIBUNALS

BETWEEN

Claimants	**and**	**Respondent**
Mr D Antwi & others		**The Royal Parks Ltd**

HELD AT: **London Central (by CVP)**
ON: **31 March 2021**
BEFORE: **Employment Judge Elliott**
APPEARANCES:
For the claimants: Mr C Khan, counsel
For the respondent: Mr D O'Dempsey, counsel

JUDGMENT ON PRELIMINARY HEARING
(HEARD REMOTELY VIA CVP)

The judgment of the tribunal is that:

1. Claim 2205570/2020 is not about the "same matter" as claim 2202211/2020 and was presented with a valid Early Conciliation Certificate.

2. It is just and equitable to extend time in claim number 2204440/2020.

REASONS

1. This decision was given orally on 31 March 2021. The respondent requested written reasons.

2. There are three ET1 claim forms. Case number 2202211/2020 was issued on 13 March 2020; case number 2204440/2020 on 22 July 2020 and case number 2205570/2020 on 22 August 2020. The claims are for indirect race discrimination.

The format of this hearing

3. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The tribunal considered it as just and equitable to conduct the

hearing in this way particularly as the London Central Employment Tribunal building is currently closed.

4. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.

5. The parties able to see and hear what the tribunal saw and heard. From a technical perspective, there were no difficulties of any significance.

6. No requests were made by any members of the public to inspect any witness statements or for any other written materials before the tribunal.

7. The participants were told that is an offence to record the proceedings.

The issues for this hearing

8. The issues for this hearing were identified at a Case Management Hearing before Employment Judge Snelson on 24 February 2021. The hearing was to consider the following:

   (a) Whether the claims pursued under case no. 2205570/2020 should be rejected due to an invalid ACAS Early Conciliation certificate, by reason of the claims being the "same matter" as the claims pursued under case no. 2202211/2020;
   (b) Whether Mr Alarcon-Castro's claim pursued under case no. 2204440/2020 should be dismissed for lack of jurisdiction (time), alternatively struck out as having (on time grounds) no reasonable prospect of success; and
   (c) Such other case management matters as may be necessary, including those relating to the final hearing on 19-24 August 2021, following determination of those preliminary issues.

9. There is a full merits hearing listed to take place from 19 to 24 August 2021.

Witnesses and documents

10. There was an electronic bundle of documents of 164 pages containing the pleadings and the Orders in this case.

11. There were two witness statements on the claimants' side: Mr Alex Alarcon Castro, a claimant and Mr Cormac Devlin, a legal case worker with the union United Voices of the World (UVW). The respondent had no cross-examination for either witness so the witness evidence was accepted as unchallenged. There were some documents attached to Mr Castro's statement.

12. There were Skeleton Arguments from counsel to which they spoke. They are not replicated here. All the submissions and authorities referred to were fully considered, whether or not expressly referred to below.

Findings

<u>The Early Conciliation issue</u>

13. The following chronology is not in dispute.

14. On 2 March 2020 Early Conciliation (EC) was commenced against the respondent in respect of 16 claimants. The certificate was issued on 13 March 2020 and the ET1 was presented on 13 April 2020. This is case number 2202211/2020. It is a claim for indirect race discrimination. The respondent is a body responsible for maintaining London's eight Royal Parks. It outsourced some of its park maintenance services. The claimant's case is that they, as the outsourced workers receive less pay and contractual benefits than those directly employed by the respondent. They rely on section 41 of the Equality Act as being contract workers in relation to the respondent. They plead that this has a disparate impact on "*BME staff*". They complain about the rate of pay as they say they received the National Minimum Wage whereas those directly employed were on a minimum of not less than the London Living Wage.

15. On 15 June 2020 EC was again commenced against the respondent, the certificate was issued on 16 June 2020. Proceedings were issued on 22 July 2020 in case number 2204440/2020. The Grounds of Complaint were the same as for case number 2202211/2020. This was just in relation to claimant Mr A Castro. This claim is not relevant to the EC issue, it is relevant to the time point.

16. EC was commenced on a third occasion on 22 June 2020 with the certificate issued on 22 July 2020. This resulted in the presentation of the ET1 on 22 August 2020 in case number 2205570/2020. They are the same claimants as for claim 2202211/2020 plus Mr Castro. There were 17 claimants in total for this claim. The particulars of claim were at page 74 of the electronic bundle.

17. Claim 2205570/2020 is not exactly the same as claim 2202211/2020 which both sides agreed was the heart of the dispute.

18. Part of the third claim 2205570/2020 cut and pasted from claim one, 2202211/2020, the particular disadvantage (section 19 Equality Act) without referring to the PCP relied upon in the third claim. The PCP in the third claim is referred to as the "*Furlough PCP*".

19. I saw Amended Particulars of Claim dated 20 August 2020 at page 53 of the electronic bundle. This was the claimants' proposed amendment to claim 3 (2205570/2020) to address the drafting error that claim.

20. The issue was a comparison with the Grounds of Complaint in claims one and three and deciding upon whether they were the "*same matter*" or not. If they were the same, then the claimants' sought to rely on the discretion in Rule 12(2ZA) of the Employment Tribunal Rules of Procedure 2013 to the effect that it would not be in the interests of justice to reject the claim and invoking such a discretion.

<u>The submissions on the EC issue</u>

<u>The respondent's submissions</u>

21. Both sides agreed that the ***Akhigbe*** case (see below) set out the relevant framework for the tribunal. The respondent said that the starting point was that it was clear from the authorities that a single matter can comprise a variety of assertions, allegations

and causes of action and accepts that a new certificate is not needed just because the events relied upon post-date the EC Certificate. "*Matter*" is an ordinary English word and does not need to be given an artificially restricted meaning.

22. Paragraphs 49 of ***Akhigbe*** sets out some examples or guidance as follows:

> *"49 A number of commonplace examples may help to illustrate the point. Claimants quite often bring a discrimination claim followed a little later by a victimisation claim; the latter claim founded on the protected act of bringing proceedings in the former claim. Does the victimisation claim relate to the same matter as the original discrimination claim? It is a question of fact and degree but the probable answer is yes; the "matter" is the dispute arising out of the employment relationship and the alleged discrimination and subsequent alleged victimisation.*
>
> *50 The same reasoning is likely to apply where, for example, a disability discrimination claim is brought relying on alleged detriments during employment; and then a few months later a further disability discrimination claim is brought relying on dismissal for reasons connected with the disability. In both examples, it should not in principle make any difference whether the second claim is made by amending the ET 1 presented in the first claim or by presenting a second claim in a separate ET 1."*

23. Paragraph 51 dealt with the other side of the line and said as follows:

> *"Cases that fall the other side of the line would be those where the connection between the first and second claims is merely that the parties happen to be the same: such as, in Mr Akhigbe's example, a whistleblowing claim followed up with a claim for unpaid wages where the withholding of wages is put forward as a separate issue and not a connected issue such as a further detriment suffered as a result of the whistleblowing. In such a case, there is merit in a further conciliation opportunity that may help settle the unpaid wages claim."*

24. The respondent said it was necessary to look at the subject matter of the first and the second claim. The tribunal had to look at the relationship between the two in order to decide whether it was "*relating to"* the same *"matter"* within section 18A. in ***Akhigbe*** "*The second claim reiterated and amplified the first claim and then added to it a race discrimination claim grounded in contentious events that allegedly occurred during and after the short period of the Claimant's employment*" (paragraph 56).

25. In ***Akhigbe*** Kerr J said at paragraph 56: *"I do not think it could sensibly be said that the second claim introduced a new and different "matter" because of the introduction of the new race discrimination claim. That claim was grounded in the same disputed factual matrix as the first. It was not based on different and subsequent unconnected events involving the same parties".*

26. The respondent said that even taking at its highest the claimants' analysis of the claims at paragraph 7 of their Skeleton Argument, the claims were similar.

27. On Rule 12 of the Employment Tribunal Rules of Procedure the respondent said that the substantive defect was that claim 225570/2020 was the same matter as claim 2202211/2020, so that the second EC certificate was a nullity. Under Rule 10(1)(c) the respondent said that the later EC certificate was not a valid certificate or alternatively was a nullity so that claim 2205570/2020 did not contain an EC number such that the tribunal should reject that claim. Under Rule 12(1)(c) the same point was made.

28. The respondent said that to the extent that the claimants said it should be considered under Rule 12(1)(da) and 12(2ZA) these Rules were not in force at the date the claims were presented. The respondent submitted that the claims must be considered as at the date of their presentation and the Rules that brought in discretion to admit the claim were not in force.

29. To the extent that the claimants submitted that Rule 10(1)(c) and 12(1)(c) were not in play, was because the ET1 did include an EC number. The respondent submitted that claim 2205570/2020 did not include an EC number because the second certificate was invalid. The respondent relied on paragraph 21 of ***Serra Garau*** (below) which held in that case that the second certificate was not a certificate falling within section 18A(4) Employment Tribunals Act 1996.

The claimant's submissions

30. On the issue of whether the claims were the same matter, there was no dispute on the law, it was a matter of fact and degree. The claimants said although they were parallels, they were not the same matter. The claimants said that if the word "*matter*" was considered in an "*elastic*" manner, then it could be said that they were the same matter, but on looking at it, it was necessary to consider the PCPs in claim 1 and the PCPs in claim 3 and to ask whether they were the same. The claimants said they were not the same. In claim 1 it related to hourly pay and other terms and conditions of the contract, such as holiday pay, sick pay and the like.

31. Claim 2205570/2020 was said to be founded on a different matter where the claimants took a 20% pay cut during Furlough. The claimants accepted that it could be regarded as remuneration, but on the factual matrix it went to different decision making processes at different times.

32. The claimants submitted that the decision making and the processes were different and only came into being because of the Government's introduction of the Furlough Scheme in March 2020. From the claimants' perspective the impact of the decisions were said to be different. The PCPs in claim 2202211/2020 affected the claimants in their normal day to day work and the PCP in 2205570/2020 affected them for a confined and discrete period whilst they were on Furlough which was I was told was until 22 August 2020.

33. The claimants submitted that the decision not to "top up" their pay from the Furlough rate of 80%, to full pay was made in March 2020 and was a fresh decision. It was not something which evolved out of the decision made upon awarding of the contract in November 2014. The claimants distinguished the example in ***Akhigbe*** where a victimisation claim is brought on top of a discrimination, because in that case the second claim evolves out of the first claim. The protected act is the bringing of the discrimination claim and "*gives birth to*" the second claim. In the present case there was a decision in November 2014 which was partially reversed in December 2019 regarding minimum pay and a "*hiatus*" of four months to March 2020 when a fresh decision was made on a different issue.

34. On Rule 10(1)(c)(i) the claimants said that the respondent was asking the tribunal to construe this in a strained way. The ET1 in 2205570/2020 did contain an EC number.

35. The claimants accepted that the decision on the Rules would follow from the decision on whether or not it was the "*same matter*".

36. On Rule 12(2ZA) the claimants said it was introduced to address the scenario of the wrong EC number and if I was against the claimants on the "*same matter*" point, the procedure was that under Rule 12, the administrative office in the tribunal refers the ET1 to a Judge. The claimants believed this would have happened at around the same time as the ET2 was sent to the parties which was on 16 October 2020 when the claim was accepted and served. The claimants considered that acceptance and service were simultaneous. The claimants' submission was that the effective date was when the Judge made the decision because the Rule 12 talks about the papers being "*referred to a Judge*". On the discretion, the claimants said that there was no interests of justice point in the respondent's favour. Therefore the discretion went in their favour.

37. The claimants said that the respondent was asking the tribunal to reject the claim retrospectively and to apply "old" Rules.

Findings on the time point

38. The claimant Mr Castro accepted that the part of his claim that relates to his rate of pay is prima facie out of time and that the issue was whether it is just and equitable to extend time (Skeleton Argument paragraph 10). Mr Castro relied upon his explanation given in his witness statement that he had not properly appreciated that he was able to join the group action until "*later on*".

39. Having considered the witness evidence from Mr Castro I find as follows. On 23 April 2020 he received a WhatsApp message sent by his trade union representative Mr O'Keeffe asking if he could have "*the dates you took a holiday between October 2019 and now"*. Mr Castro did not know why he was being asked for this information but he provided it.

40. On 24 April 2020 Mr Castro received a further WhatsApp message from his union informing him of press coverage about a discrimination claim being brought by a number of his colleagues against the respondent. Mr Castro read the information he was sent, which was attached to his witness statement. He understood that his colleagues were bringing a claim of indirect race discrimination based on the fact that outsourced workers such as himself were on inferior terms and conditions to in-house or directly employed staff. He said he understood that the outsourced staff tended to be black and directly employed staff tended to be white. He said he was pleased to see that his colleagues were pursuing this claim as he thought it would benefit everyone.

41. Mr Castro said that he understood that only his black colleagues would be able to recover compensation. He did not see that Mr Marro, a white Italian colleague, was a claimant although he accepted that it was mentioned in the information that he saw which referred to "*one white Italian*". The information he was sent also referred to the claimants as being "*mostly black African".* It did not say that all the claimants were black African. He thought no more about it until June 2020.

42. On 10 June 2020 Mr Castro was contacted by Mr Cormac Devlin, a trade union case worker. Mr Devlin had noted that Mr Castro had replied to the original question put to him on 23 April 2020 about holiday dates. Mr Castro's evidence was "*I did not wish to join this claim*" (statement paragraph 4).

43. On 12 June 2020 Mr Castro told Mr Devlin that he wished to be part of the discrimination claim but not the holiday pay claim. Mr Castro's evidence was that any delay after 12 June 2020 was due to Mr Devlin and I find that this was the case.

44. Mr Devlin commenced Early Conciliation for Mr Castro on 15 June 2020 and an EC certificate was issued on 16 June 2020. On 22 July 2020 Mr Castro's ET1 was presented.

45. Mr Devlin explained the delay between receiving the EC certificate on 16 June 2020 and issuing the claim on 22 July 2020 as follows – taken from his unchallenged witness statement at paragraph 6:

> *"The delay between receiving the Early Conciliation certificate on 16 June and issuing the claim was attributable to the following. My understanding of the discrimination claim was that it concerned an ongoing double standard maintained by the Respondent in respect of the terms and conditions of outsourced workers. I understand there is no time issue taken in relation to terms other than their hourly rate of pay. In respect of the hourly rate of pay, and the limitation issue in relation to that, I was either unaware that the Respondent had decided in December 2019 to increase outsourced workers' pay to bring it in line with the London Living Wage or I did not appreciate the significance of this fact for limitation. This oversight was due to: (i) my being in the job for a short period of time; (ii) my lack of knowledge of the history of the dispute at the Royal Parks; and / or (iii) trying to manage a heavy caseload of complicated claims while working two days per week and studying full-time for exams taking place over the summer."*

46. Mr Devlin began work for the union as a legal case worker on 15 May 2020. He has degrees in law but this was his first time working in legal practice. He worked 2 days per week. He worked in an assisting role and I find based on this that he was supervised or had access to supervision.

47. Nothing was mentioned in the claimant's witness evidence about knowledge of time limits. Lack of knowledge of time limits was not relied upon.

The relevant law

48. Under section 18A(1) Employment Tribunals Act 1996 there is a requirement for a prospective claimant to enter a into Early Conciliation with ACAS before presenting a claim by providing certain prescribed information to ACAS in the prescribed manner "about that matter".

49. Rule 10(1)(c) of the Employment Tribunal Rules of Procedure 2013 provides that a tribunal shall reject a claim if it does not contain an EC number or states that one is not required or that an exemption applies.

50. Rule 12 provides as follows:

The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be—

(a) one which the Tribunal has no jurisdiction to consider; . . .

(b) in a form which cannot sensibly be responded to or is otherwise an abuse of the process;

[(c) one which institutes relevant proceedings and is made on a claim form that does not contain either an early conciliation number or confirmation that one of the early conciliation exemptions applies;

(d) one which institutes relevant proceedings, is made on a claim form which contains confirmation that one of the early conciliation exemptions applies, and an early conciliation exemption does not apply;

[(da) one which institutes relevant proceedings and the early conciliation number on the claim form is not the same as the early conciliation number on the early conciliation certificate;]

(e) one which institutes relevant proceedings and the name of the claimant on the claim form is not the same as the name of the prospective claimant on the early conciliation certificate to which the early conciliation number relates; or

(f) one which institutes relevant proceedings and the name of the respondent on the claim form is not the same as the name of the prospective respondent on the early conciliation certificate to which the early conciliation number relates].

(2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (a)[, (b), (c) or (d)] of paragraph (1).

[(2ZA) The claim shall be rejected if the Judge considers that the claim is of a kind described in sub-paragraph (da) of paragraph (1) unless the Judge considers that the claimant made an error in relation to an early conciliation number and it would not be in the interests of justice to reject the claim.]

51. Rules 12(1)(da) and 12(2ZA) came into force on 8 October 2020 as a result of Regulation 1(2) of the Employment Tribunals (Constitution and Rules of Procedure) (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2020 (SI 2020/1003).

52. In ***Compass Group UK & Ireland Ltd v Morgan 2016 IRLR 924*** Simler P held that an EC certificate issued to a prospective claimant prior to the termination of her employment, relating to a grievance about demotion, could cover a subsequent claim, relating to constructive dismissal and failure to make reasonable adjustments, without the need to go through the EC process again. The EAT accepted that there was a sufficient connection between the matters to which the EC certificate related and those that were the subject of the subsequent claim even though the facts relating to the dismissal had not taken place at the time the EC process was commenced. The claim form relied upon all the matters raised as breaches of the implied term of trust and confidence that had formed part of the matters notified to ACAS on the first claim. The word “matter” is to be interpreted broadly and can

encompass events that post-date the original claim – in that case the dismissal.

53. Simler P said at paragraph 25: "*In most cases, the parties will know what facts or matters were in issue between them. Respondents will need some good and compelling basis for challenging fulfilment with the s.18A(1) requirement. Where such a challenge is made, it will be for a tribunal to determine these questions of fact and degree".*

54. ***Compass*** was applied in ***Akhigbe v St Edwards Home Ltd EAT/0110/18*** where Kerr J held that the Employment Tribunal had erred in rejecting a second claim brought by the same claimant against the same two respondents. It was held that the first and second claims were claims relating to the same matter for the purposes of early conciliation under section 18A(1). The claims did not relate to different matters and it was a question of fact and degree. At paragraph 56 Kerr J said: *"I do not think it could sensibly be said that the second claim introduced a new and different "matter" because of the introduction of the new race discrimination claim. That claim was grounded in the same disputed factual matrix as the first. It was not based on different and subsequent unconnected events involving the same parties".* Therefore a fresh EC certificate was not required. It is necessary to look at the relationship between the subject matter of the first and second claims. The second claim was struck out in those proceedings not because of the EC certificate issue but because the second claim was considered an abuse of process.

55. In ***Revenue and Customs Commissioners v Serra Garau 2017 ICR 1121*** the EAT said there was no legislative provision for a claimant to seek a second EC certificate in relation to the same matter, for example to use this to extend a time limit. Where multiple EC certificates are issued by ACAS in relation to the same matter, it is only the first in time which will be relevant for the purposes of section 207B Employment Rights Act 1996. This is the section which deals with the extension of time provisions that can apply when Early Conciliation takes place.

56. The EAT said at paragraph 18 of ***Serra Garau*** "*Only one mandatory process is enacted by the statutory provisions. The effect of the provision is to prevent the bringing of a claim without first obtaining an early conciliation certificate*". At paragraph 20 Kerr J said: *"only one certificate is required for "proceedings relating to any matter" (in section 18A(1)). A second certificate is unnecessary and does not impact on the prohibition against bringing a claim that has already been lifted".* Kerr J said it followed from this that only one certificate is required for "*proceedings relating to that matter*" in section 18A(1). It was held that a second certificate was not a "certificate" within section 18A(4). A second certificate did not trigger the modified limitation regime in section 207B ERA or equivalent in section 140B Equality Act 2010.

57. The phrase "*about that matter"* is to be given a broad interpretation, referring to the overall dispute that may give rise to the proceedings.

58. The decision of the EAT in ***E.ON Control Solutions Ltd v Caspall EAT/0003/19*** holds that under Rule 12 a claim has to be rejected if there is an incorrect EC number. The EAT held that the failure to include an accurate ACAS EC number was of a kind described at Rule 12(1)(c) of the Employment Tribunal Rules of Procedure 2013.

Therefore under Rule 12(2), the tribunal was required to reject the claims. This was a mandatory requirement that was not limited to a particular stage of the proceedings. This meant that there was no valid claim before the tribunal so there was no power to allow the claimant to amend. Furthermore Rule 6 could not import a discretion into a mandatory Rule. This position has since been changed as a result of Rule 12(2ZA) above.

Time limits

59. Section 123 of the Equality Act 2010 provides that:

(1) ……..proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 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.

60. The just and equitable test is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that a tribunal will exercise its discretion to extend time. It is the exception rather that the rule - see ***Robertson v Bexley Community Centre 2003 IRLR 434.***

61. There has been a tendency in time limit cases to consider the factors set out by the EAT in ***British Coal Corporation v Keeble 1997 IRLR 336*** reflecting the provisions of section 33 of the Limitation Act 1980 in relation to extending time for personal injury claims. This has been cautioned against, most recently by Lord Justice Underhill in the Court of Appeal in ***Adedeji v University Hospital Birmingham NHS Foundation Trust 2021 EWCA Civ 23,*** where he said (at paragraph 37): "*The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular …… "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."*

62. The Court of Appeal in ***Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 IRLR 1050*** *said that "factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."*

63. The tribunal must therefore consider:

(i) The length and reasons for the delay
(ii) The extent to which the cogency of the evidence is likely to be affected by the delay
(iii) The prejudice that each party would suffer as a result of the decision reached

64. The tribunal has a broad discretion to extend time in discrimination cases if it is just and equitable to do so, but it remains for the claimant to persuade the tribunal that the discretion should be exercised - ***Chief Constable of Lincolnshire Police v Caston 2010 IRLR 327***

Conclusions on the EC issue

65. The parties were in agreement that the task for the tribunal was to decide whether claims 2202211/2020 and 2205570/2020 were relating to the "*same matter*" and that it was a question of fact and degree for the tribunal to consider.

66. I considered in particular the examples given in the ***Akhigbe*** case at paragraphs 50 and 51 alongside the subject matter of these two claims. The example given in paragraph 50 is commonly seen – the claimant complains of disability discrimination whilst in employment and then a few months later brings a further disability discrimination claim for dismissal, relying on reasons connected with the disability. That was regarded by the EAT as being part of the same matter.

67. On the other side of the line the example is of a whistleblowing claim and then a separate claim about unlawful deductions from wages which is not relied upon as a whistleblowing detriment. In that case Kerr J said that there was "*merit in a further conciliation opportunity that may help settle the unpaid wages claim*".

68. The present case is not quite as cut and dried as these two examples. Part of the defence relied upon by the respondent is the section 23 Equality Act point about a material difference in the circumstances of the directly employed staff and the outsourced employees.

69. Taking this into account, I have also considered the scope of the first claim which stemmed from the tendering process in November 2014 and the decision which arose from that as to the rate of pay, sick pay, holiday pay and maternity pay amongst other things. These were decisions made at around the time of the award of the contract in November 2014.

70. A whole new set of facts came into play in March 2020 with the onset of the pandemic and the swift introduction of the Coronavirus Job Retention Scheme, better known as the Furlough Scheme. This was brand new to each and every employer in the country. Claim 2205570/2020 is based upon the decisions made upon the introduction of that Scheme and its impact. Discussions took place between the respondent and the contractor so that the service charge arrangements between them were revised. On the claimants' pleaded case the contractor was asked to reimburse the service charge and to use the Furlough Scheme to pay the claimant's at 80%. It relates to a decision not to "*top up*" the claimants' pay to 100% which was a discretion open to employers under the Furlough Scheme and not an obligation.

71. Whilst I accept that the expression "*the same matter*" is to be treated broadly, I find that the decision made in relation to the exercise of the discretion on the introduction of the Furlough Scheme in March 2020 is not "*the same matter*" as the decision on pay and benefits made on the awarding of a contract. This was a fresh decision

surrounding the exercise of the discretion in unprecedented circumstances made nearly 5.5 years later. In these brand new circumstances, never previously encountered in the employment field, I took the view, stated at paragraph 51 of ***Akhigbe,*** that there was merit in a further conciliation opportunity that may have helped to settle that claim.

72. As such, the EC certificate quoted on the ET1 in case number 2205570/2020 was not relating to the same matter as in case number 2202211/2020. It was a valid certificate and the claim was properly presented and accepted by the tribunal.

73. This means that the provisions of Rules 10(1)(c) and 12(1)(c) do not come into play as there was no substantive defect to consider and claim 2205570/2020 continues to a full merits hearing.

Conclusions on the time point on claim 2204440/2020

74. On the time point it was accepted that part of Mr Castro's claim was out of time and that the issue was whether it is just and equitable to extend time. For Mr Castro it was submitted that refusing to extend time would mean that he would be unable to receive any relief in the event of a successful discrimination claim. It was also submitted that there would be no prejudice to the respondent as it is already going to trial to defend the claims of 16 other claimants thus there was no added burden to them if this claim proceeds.

75. The out of time point only pertains to the rate of pay and not to the entire claim. It is accepted that the claim, as it relates to other contractual benefits, is within time.

76. It was not in dispute that pay differential came to an end on 12 December 2019. This is the date from which time ran. Claim number 2204440/2020 was presented on 22 July 2020. EC was from 15 June 2020 to 16 June 2020. EC does not operate to extend time because EC was commenced after the expiry of the primary three month time limit. The primary time limit expired on 11 March 2020. Therefore the claim is 4 months and 11 days out of time in relation to Mr Castro's rate of pay.

77. On the length of and reasons for delay, the claimant accepted that the reasons were not the best but that the explanation was candid and honest. The claimant Mr Castro had information before him that showed him that claimants were not limited to those who described themselves as black. The information showed him that one claimant in the group was a white Italian person.

78. By the time Mr Devlin asked the claimant on 10 June 2020 whether he wanted to be part of the claim, he was already out of time in relation to the pay differential. It took a further 6 weeks for the claim to be presented. Lack of knowledge of time limits was not relied upon.

79. Mr O'Dempsey for the respondent reminded the tribunal that it was for the claimant to satisfy the tribunal that it was just and equitable to extend the time limit and the tribunal had a wide discretion. There is no presumption that a tribunal will exercise its discretion to extend time and it is the exception rather that the rule.

80. There was no submission that the cogency of evidence was likely to be affected by

the delay and as a result of this I find that the cogency of evidence is not likely to be affected by the delay.

81. This part of the claimant is over four months out of time. Reasons have been given for the delay. These reasons are not particularly strong.

82. I have considered the relative prejudice to the parties upon the exercise of this discretion. The prejudice to the claimant will be that he is unable to pursue his claim in relation to the differential in basic pay. The respondent's submission as to prejudice was that it would add to the evidence and to the documents and that it would increase complexity and cost. The claimant disputed this. The claim will go ahead in any event in relation to 16 other claimants and the principles are the same for all of them. I find that the complexity, cost and length of the hearing will not be appreciably increased if this part of Mr Castro's claim proceeds. His claim proceeds in any event in relation to other contractual benefits.

83. The respondent could not direct me to any appreciable prejudice that they would suffer in the event that this part of Mr Castro's claim proceeds. The claimant is not a high earner and he would lose the opportunity to recover backpay in the event that the group claim succeeds. He has an ongoing claim on other related matters in any event. I have found that the cogency of evidence is not likely to be affected by the delay. Although the reasons for the delay are not persuasive on their own, when weighing the balance of prejudice, the fact that the trial will not be extended and that costs will not be appreciably increased, I find that the balance lies in favour of the claimant. I exercised the discretion in the favour of the claimant and extended time for the presentation of his claim in relation to the pay differential.

84. All of claim 2204440/2020 proceeds to the full merits hearing.

85. I expressed my thanks to both counsel for the high standard of their work on this case which was of great assistance to the tribunal.

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Employment Judge Elliott
1 April 2021

Order sent to the parties on

01/04/2021..

for Office of the Tribunals