EMPLOYMENT TRIBUNALS

Claimant: Mr B Dodds

Respondent: Genial Associates Limited & Ors.

OPEN PRELIMINARY HEARING

Heard at London South: by CVP **On:** 9 March 2021

Before: Employment Judge Truscott QC (sitting alone)

Appearances:

For the claimant: Mr D Parker advocate
For the respondent: Ms P Hall employment consultant

JUDGMENT on PRELIMINARY HEARING

1. The claimant was employed by West Beach Hotel Limited as at the effective date of termination. The effective date of termination was 23 October 2019.

2. The claims against West Beach Hotel Limited of unfair dismissal, failure to consult pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 and various money claims were lodged with the Tribunal outwith the time limit. It was reasonably practicable to lodge the claims in time.

3. The claimant's claims of race and age discrimination against West Beach Hotel Limited were not presented within the time limit imposed by section 123 of the Equality Act 2010 and it is not just and equitable to extend the time for the presentation of the claim.

4. Accordingly, the Tribunal has no jurisdiction to entertain the claims against West Beach Hotel Limited and the claims are dismissed.

5. The claim against Brighton Language School Limited is dismissed.

6. The claim against Genial Associates Limited is dismissed.

REASONS

Preliminary

1. This has been a remote hearing because of emergency arrangements made following Presidential Direction because of the Covid 19 pandemic. The form of remote hearing was fully video. A face to face hearing was not held because it was not practicable and specific issues could be determined in a remote hearing.

2. The claimant has brought claims of unfair dismissal, age and race discrimination, failure to consult pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 and various money claims against Genial Associates Limited. 0n 9 March 2020, the claimant sought leave to add West Beach and Brighton Language Centre as respondents. Leave was granted at the Preliminary Hearing on the 30 June 2020 by EJ Andrews but, in doing so, she reserved consideration of the issue of whether such claims are out of time and if so, whether the relevant time limit should be extended. A Preliminary Hearing was listed to determine the following issues:

a. whether the claims against West Beach Hotel Ltd and The Brighton Language Centre Ltd were submitted in time by the claimant and if not, whether time should be extended in his favour; and
b. who is/are the correct respondents to the claims?

3. When the claim came before this Tribunal on 5 January 2021, it became apparent that a key issue was the effective date of termination and there was a dispute about when that was. In the circumstances, the Tribunal continued the hearing and made further case management orders to address the additional issue.

7. On 8 March 2021, the claimant's representative intimated by email abandonment of the claim against West Beach Hotel Limited and Brighton Language School on the grounds that it would be highly unlikely that the claimant would be able to enforce any such award if so made by the Tribunal. He also intimated that he would be seeking to add Mr Sarno as an additional respondent. He did not provide a basis for so doing.

8. At the commencement of this hearing, the Tribunal strongly urged the claimant not to abandon the case against West Beach Hotel Limited. The claimant reinstated the claim and the respondent's representative confirmed that it would not be prejudiced by so doing. The Tribunal stated that it would not be considering the addition of Mr Sarno as it was not an issue for this hearing and the respondent had not had adequate notice of the application and the basis for it.

9. The Tribunal heard the evidence of the claimant and Mr Sarno for the respondent. There was a bundle of documents prepared for the hearing to which reference will be made where necessary [1-182]. In addition, the claimant provided additional documents for the bundle which the respondent had and which were spoken to in evidence but which were not available to the Tribunal until after the hearing [183-188].

Findings

1. Following a meeting with the owner of the Sprachcaffe group, Marcello Sarno, the claimant was offered a position and commenced employment on 6 April 2016. His

responsibilities covered all of the group's activities in the UK which included the following companies

Sprachcaffe Brighton (Brighton Language Centre Ltd)– English School for Foreign Students

Sprachcaffe London (Languages Plus London Ltd)- English School for Foreign Students

West Beach Hotel Ltd – company that runs the West Beach Hotel, Brighton – originally bought as a student accommodation but more and more used as a normal budget hotel for tourists and guests

Genial Associates Ltd which holds the freehold of the West Beach Hotel. It did not have a bank account or an operating PAYE scheme.

2. The companies listed in paragraph 1 were under the control of Mr Sarno [72].

3. Brighton Language Centre Ltd was a language school based in Brighton, its primary function was to provide tuition to foreign students. It was run as a summer school. Its head office was situated in West Beach Hotel, in Brighton. The hotel provided accommodation for the language students. West Beach Hotel was leased from Genial Associates Limited. The language school was making a loss as was the hotel, accordingly Mr Sarno decided to close the language school [101] and sell or lease the hotel.

4. The claimant was the UK General Manager with responsibility for administration and accounting. He was also effectively in charge of the staff in the accounts and payroll division of Brighton Language Centre which was also housed in West Beach Hotel. West Beach Hotel. At certain times of the claimant's employment, the hotel was managed by Sergio Serrano.

4. The claimant's contract of employment stated that he was employed by Brighton Language Centre Limited as UK General Manager commencing 6 April 2016 [29 -30]. The claimant was paid by Brighton Language Centre from 29 April 2016 to 25 May 2018 [81-84]. The claimant was issued with a P45 stating that his leaving date was 31 May 2018 [96-98].

5. From 29 June 2018 to 27 September 2019, the claimant was paid by West Beach Hotel Limited [85-90]. There was no written alteration to his contract. His duties remained the same as before.

6. The Tribunal has found it difficult to determine what duties the claimant was undertaking from May 2019 onwards but it finds that he was responsible for collating the documents attached to the draft lease [68-71 and 102].

7. By an email dated 1 May 2019, the claimant tendered his resignation with effect from 7 June [151]. 0n 20th May 2019, the claimant emailed to say that he had not heard from Mr Sarno about his resignation and warned him that he had accrued a substantial amount of holidays.

8. On 29 May 2019, the claimant emailed Mr Sarno noting that he had not had any response from him about his resignation and setting out his proposed payments

to staff [165]. Attached to the email was a spreadsheet [166-167] showing what the claimant proposed. Mr Sarno responded to the claimant on 30 May [168]:

> "I don't agree nothing. I don't plan to change salaries and I don't plane (sic) to have Laura as GM. I am looking at the moment for a new GM."

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9. Also on 29 May 2019, the claimant emailed Mr Sarno to inform him that he had received a call from Selina (the proposed purchaser of the lease) who wanted to send one of their directors to look around the hotel in the next few days. He said he would be happy to meet him and stay on for a few days after 7 June if it helped [169].

10. On 30 May 2019 the claimant asked when his replacement would be appointed and said that he would find out the latest day he could continue in employment [170].

11. Mr Sarno did not respond in relation to the resignation. On 4 June 2019 [174] the claimant withdrew his resignation explaining to Mr Sarno that, with Selina taking over the hotel, he intended to work through until then and take as much of his accumulated holiday to reduce costs. Mr Sarno did not respond.

12. On 18 July, Mr Sarno informed the claimant that the hotel would be closed on 30 September 2019 [102].

13. On 9 September 2019, Mr Sarno agreed that he should take his accrued holidays as he was under redundancy [106]. On 11 September the claimant emailed Lara Davies and said [110]:

> "I need the official letter (presumably from you) notifying me of my redundancy from West Beach Hotel Ltd…"

14. The claimant appears on a staff list of West Beach Hotel [183].

15. Ms Davis invited the claimant to a meeting on 24 September 2019 to discuss settlement which says [114]:

> "This letter does not amount to notice of termination of your employment, you remain employed by the Company during the period of negotiation and until the agreement has been concluded. This period commences as soon as you receive this letter, and will come to an end at a time when we have concluded negotiations (with or without reaching agreement)."

16. The claimant was paid for June, July, August and September in full [81-93].

17. On 11 October 2019, the claimant emailed to say that he needed his P45 urgently [129].

18. On 16 October, Mr Sarno wrote to the claimant inviting him to a meeting with Peninsula who are employment law consultants for the companies and confirmed [115]:

> "For clarity, this letter certainly does not amount to notice of termination of your employment and you remain employed until any such agreement has been reached via the Consultant".

19. The claimant met with a representative of Peninsula on 23 October 2019 but no agreement was reached. There was some correspondence between them thereafter [118-122].

20. The claimant received a payslip for October 2019 on 25 October 2019 [116-117] showing his usual gross pay of £4,333.33. He did not receive the sum due to him. Payslips were processed for November and December 2019 for £4,333.33 and £3,666.66 gross respectively [130-131] but he did not receive the sums shown as due to him.

21. On 26 November 2019, the claimant applied for an early conciliation certificate from ACAS against Genial Associates Limited.

22. On 18 December 2019, he lodged a claim with the employment tribunal. This claim is against Genial Associates Limited. There is space on the form to include additional respondents. It states the end of employment as 26 November 2019. Although the boxes for race and age discrimination are ticked, there is no narrative to support such claims in the long narrative provided by the claimant.

23. On 28 January 2020, he was sent backdated payslips for October to December having had the gross pay deleted showing only tax rebates [132-134]. He also received a P45 on 28 January 2020 from West Beach Hotel backdated to 15 September 2019 [98-99].

24. On 4 March 2020, the claimant applied for an early conciliation certificate from ACAS against West Beach Hotel Limited.

25. On 9 March 2020, the claimant emailed the Tribunal [148] and said:
> "…The claimant is claiming that I actually worked for West Beach Hotel Limited but, as far as I know, that company is now dormant and quite possibly being wound up - another reason why I was initially advised to pursue the freeholder of the Hotel, Genial Limited"

Submissions

26. The Tribunal heard brief oral submissions with no reference to relevant legal principles.

Law

Continuity of employment

27. Where two employers are associated employers, as defined in section 231 of the Employment Rights Act 1996, the transfer of an employee from one to the other does not break continuity and employment with the first counts against the second by section 218(6)). The definition of an associated employer applies where one of the employers involved is a company, controlled by the other employer (whether that employer is a company or an individual); or where both employers are companies, controlled by a third person (whether company or individual).

Employer

28. A party held to be the employer must meet the test in **Ready Mixed Concrete (South East) Limited v. Minister of Pensions and National Insurance** 1968 2QB 497 at 515 which requires, in essence:

(i) The servant agreeing to perform services for his master in consideration for a wage or other remuneration;
(ii) Sufficient control of the individual to make one party the master;
(iii) That other provisions of the contract are consistent with its being a contract of service.

29. The test has stood the test of time, subject to replacing master and servant with employer and employee respectively.

30. Control was held in **Ready Mixed Concrete** to include 'the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done'. Control was held in **Clifford v. Union of Democratic Mine Workers** [1991] IRLR 518 to be "an important factor in circumstances which, or any view, lack clarity" – para 10.

31. In **Secretary of State for Education and Employment v. Bearman** [1998] IRLR 431 in which the EAT reversed the Employment Tribunal and at paragraph 22 said as follows:

> "It seems to us that the correct approach would have been to start with the written contractual arrangements and to have enquired whether they truly reflected the intention of the parties. If they did, then the next question was whether on the commencement of their employment, the applicants were employees of (a) or (b). If the conclusion was that, when properly construed, on commencement of their employment the applicants were employed by (b) then the chairman ought to have asked the question:- 'Did that position change and, if so, how and when?'".

32. The Employment Appeal Tribunal has recently reviewed theses authorities in **Clark v. Harney Westwood & Riegels** 2020 UKEAT 0018/20/2112 and this Tribunal followed the helpful guidance contained therein.

Effective date of termination

33. Section 97 of the Employment Rights Act provides the statutory definition of the effective date of termination.

Time limits and extension
Not reasonably practicable to present claim in time

34. There are two limbs to this formula. First, the employee must show that it was not reasonably practicable to present his claim in time. The burden of proving this rests firmly on the claimant (**Porter v. Bandridge Ltd** [1978] ICR 943 CA). Second, if he succeeds in doing so, the tribunal must be satisfied that the time within which the claim was in fact presented was reasonable. The leading authority on the subject is the

decision of the Court of Appeal in **Palmer and Saunders v. Southend-on-Sea Borough Council** [1984] ICR 372 CA.

Just and equitable extension

35. Section 123(1)(b) permits the Tribunal to grant an extension of time for such other period as the employment tribunal thinks just and equitable. Section 140B of the Equality Act 2010 serves to extend the time limit under section 123 to facilitate conciliation before institution of proceedings.

36. The Tribunal has reminded itself of the developed case-law in relation to what is now section 123 of the Equality Act 2010. That has included a group of well-known judgments setting out the underlying principles to be applied in this area, together with recent occasions on which those principles have been applied and approved by later courts and tribunals. Particular attention has been paid to the historical line of cases emerging in the wake of the case of **Hutchinson v. Westward Television** [1977] ICR 279, the comments in **Robinson v. The Post Office** [2000] IRLR 804, the detailed consideration of the Employment Appeal Tribunal in **Virdi v. Commissioner of Police of the Metropolis et al** [2007] IRLR 24, and, in particular, the observations of Elias J. in that case.

37. The Tribunal noted in particular that it has been held that 'the time limits are exercised strictly in employment … cases', and that there is no presumption that a tribunal should exercise its discretion to extend time on the 'just and equitable' ground unless it can justify failure to exercise the discretion; as the onus is always on the claimant to convince the tribunal that it is just and equitable to extend time, 'the exercise of discretion is the exception rather than the rule' (**Robertson v. Bexley Community Centre** [2003] IRLR 434, at para 25, per Auld LJ); **Department of Constitutional Affairs v. Jones** [2008] IRLR 128, at paras 14–15, per Pill LJ) but LJ Sedley in **Chief Constable of Lincolnshire Police v. Caston** said in relation to what LJ Auld said "there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised."

38. The Tribunal's discretion is as wide as that of the civil courts under section 33 of the Limitation Act 1980; **British Coal Corporation v. Keeble** [1997] IRLR 336; **DPP v. Marshall** [1998] IRLR 494. Section 33 of the Limitation Act 1980 requires courts to consider factors relevant to the prejudice that each party would suffer if an extension was refused, including:

- the length and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;
- the extent to which the party sued had co-operated with any requests for information;
- the promptness with which the claimant acted once she knew of the possibility of taking action; and
- the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

39. Although these are relevant factors to be considered, there is no legal obligation on the Tribunal to go through the list, providing that no significant factor is left out;

London Borough of Southwark v. Afolabi [2003] IRLR 220. Indeed, rigid adherence to the factors would not be in accordance with the discretion under the Equality Act; **Adedeji v. University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23.

40. Further guidance cited to the Tribunal was that the Tribunal must not make assumptions in the claimant's favour on any contentious factual matters that are relevant to the exercise of the discretion: **British Transport Police v Norman** UKEAT/0348/14 at para 39. The lack of specific prejudice to the respondent does not mean that an extension should be granted: **Miller v Ministry of Justice** UKEAT/0003/15 at para 13. Where a claimant asserts ignorance of the right to make a claim, the same principles that are relevant to the 'not reasonably practicable' clause apply when considering a just and equitable extension (see **Bowden v. Ministry of Justice** UKEAT/0018/17 *(*25 August 2017, unreported *para* 38); **Averns v. Stagecoach in Warwickshire** UKEAT/0065/08 *(*16 July 2008, unreported*).* Accordingly, the assertion must be genuine and the ignorance – whether of the right to make a claim at all, or the procedure for making it, or the time within which it must be made – must be reasonable. It is not enough, in a case where ignorance is relied upon, for a tribunal to conclude that a claimant has not acted reasonably and promptly without specifically addressing the alleged lack of knowledge (see **Averns** at para 23). Nor is it correct to say that the only knowledge that is relevant when considering an extension of time is knowledge of the facts that could potentially give rise to a claim, not knowledge of the existence of a legal right to pursue compensation in respect of those facts; as a matter of law both kinds of knowledge are relevant and should be taken into account. Incorrect legal advice may be a valid reason for delay in bringing a claim but will depend on the facts of the case: **Hawkins v Ball & Barclays** [1996] IRLR 258 and **Chohan v Derby Law Centre** [2004] IRLR 685. In answering the question as to whether to extend time, the Tribunal needs to decide why the time limit was not met and why, after the expiry of the primary time limit, the claim was not brought sooner than it was; see **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2014] UKEAT/0305/13 unreported per Langstaff J. However, in determining whether or not to grant an extension of time, all the factors in the case should be considered; see **Rathakrishnan v Pizza Express (Restaurants) Ltd** [2016] IRLR 278.

41. The Tribunal has additionally taken note of the fact that what is now the modern section 123 provision contains some linguistic differences from its predecessors – which were to be found in various earlier statutes and regulations – concerning the presentation of claims alleging discrimination in the employment field. However, the case law which has developed in relation to what is now described as "the just and equitable power" has been consistent and remains valid. The Tribunal has therefore taken those authorities directly into account in its consideration.

42. It is also a generally received starting proposition that it is for the claimant who has presented his or her claims out of time to establish to the satisfaction of the Tribunal that the "just and equitable" discretion should be exercised in the particular case. That obligation is not just a matter of the burden of proof. It also raises the question of what is the standard of proof to be established in order to persuade the Tribunal that a period other than the normal three months should be applicable. It is

therefore a matter which requires evidence – which may be oral and subjected to cross examination or documentary.

DISCUSSION and DECISION

27. In considering the evidence, the Tribunal was aware that Mr Sarno was Mexican and English was his second language. He lived in Cuba, had business interests in various parts of the world and spent most of his time abroad. He did not have a grasp of detail and his evidence was not reliable. The claimant's evidence was more reliable but became self serving and unreliable when dealing with his employer and the end of his employment. The Tribunal concentrated on such documents as there were available to it.

43. The claimant was employed by the Brighton Language School Limited and thereafter, with continuity of employment, by West Beach Hotel Limited as Mr Sarno controlled both companies.

44. The Sprachcaffe group as described by the claimant does not constitute a legal entity. There was nothing untoward about being employed by a company within the "group". Genial Associates Limited was never the employer of the claimant and it is highly unlikely that the claimant thought it was, as he knew it did not have a bank account or an operating PAYE scheme. He had payslips that said otherwise. The claimant relies on his own evidence and the respondent's admission [145] that it employs 15 people although it did not admit to employing him. The evidence of Mr Sarno that this was a mistake is accepted by the Tribunal.

45. The Tribunal accepted the claimant's evidence about his duties and job title. Mr Sarno said that the claimant was also responsible for the running of the Language School as the "Director of Education". This was disputed by the claimant and in his evidence, he described the claimant as *primus inter pares* which is more consistent with that of General Manager with managers in the operating companies. It is also consistent with the claimant's contract.

46. It is not clear to the Tribunal what duties the claimant was undertaking from May 2019 onwards other than assisting with the lease of the hotel and, as an indicator of available work time, the claimant was using up his accrued holidays.

28. The Tribunal accepted that the claimant's resignation in May was withdrawn and although it was never confirmed in writing by the respondent, it was acceded to by it by its actings.

29. The Tribunal sought to identify the effective date of termination from the paucity of evidence available. There was no evidence to support 15 September 2019 other than the backdated P45 issued by West Beach Hotel Limited which the Tribunal discounted. The claimant was aware that his employment was coming to an end in September and stated in his ET1 that he used his holiday trying to find another job [8]. In October, he found temporary employment and asked for his P45. His employment was continued for settlement negotiations. A settlement meeting took place on 24 September and there was a further meeting on 23 October at which negotiations broke down. Although Mr Sarno's letter of 16 October does not repeat the precise narrative

in Ms Davis' letter of 24 September that the claimant will remain in employment until settlement is reached or not, the Tribunal finds that the claimant's employment ended when negotiations broke down on 23 October 2019 and that is the effective date of termination of his employment. The correspondence subsequent to 23 October seeks to remedy the salary issues and the Tribunal rejects the claimant's evidence that his effective date of termination was on any date after 23 October 2019.

30. Accordingly, the claim against West Beach Hotel Limited is out of time. If the claimant had made his claim against West Beach Hotel Limited at the same time as he did against Genial Associates Limited, his claim would have been in time. The ET1 form would have accommodated it. The Tribunal finds that the claimant was well aware of who his employer was, not least because of his payslips, but chose to claim against Genial Associates Limited because he thought that his prospects of financial recovery were better. The Tribunal does not accept his evidence that it was on receipt of the ET3 that he understood that he should claim against West Beach Hotel Limited. Even on the day of the hearing, he sought to abandon his claims against West Beach Hotel Limited as his prospects of recovery were thought to be not good. It was reasonably practicable for the claim to be lodged in time and it seems that the claimant had advice as to who to claim against at the time he was preparing his ET1 and selected Genial Associates Limited [148].

31. In relation to the age and race discrimination claims, no basis for such claims is set out in the ET1 and the same factual considerations as set out in paragraph 30 apply. Taking into account the authoritative guidance in this area, the Tribunal does not consider that it is just and equitable to extend the time for the claimant to lodge such claims against his employer.

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Employment Judge Truscott QC

19 March 2021
Sent to the parties on:
…….
For the Tribunal:
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