Case Number: 3220022/2020

EMPLOYMENT TRIBUNALS

Claimant: **Mr O I Okeke**

Respondent: **CIS Security**

Heard at: **East London Hearing Centre**

On: **8 June 2021**

Before: **Employment Judge Lewis**

Representation:

Claimant: Mr Uduje (Counsel))

Respondent: Mr Alex Morvan (Solicitor)

RESERVED JUDGMENT

1. **The Claimant's claims for ordinary unfair dismissal and failure to pay holiday pay are dismissed for lack of jurisdiction having been brought outside the time limit provided under Section 111 of the Employment's Right Act 1996 and Section 23 of that Act.**

2. **The claim for race discrimination is also dismissed for lack of jurisdiction, being brought outside three months of the last act complained of and the Tribunal being satisfied it is not just and equitable under Section 123 of the Equality Act 2010 to extend time.**

REASONS

1 The hearing was heard by video link, the Claimant was represented by skilled Counsel who did his best to present the claims in their best light. The Claimant's statement which ran to some 46 paragraphs was only served on the morning of the Tribunal hearing and there was delays whilst the Respondent's representative and the Employment Judge took the opportunity to read the statement together with the supporting documents. Although the hearing was listed to deal with the preliminary matter of whether the claims had been brought in time, the statement did not confine itself to those matters.

2 The claim was received by the Tribunal on 25 November 2020, following a period of early conciliation from 18 November 2020 to 19 November 2020. The Claimant described his employment as starting on 24 June 2014 and finishing on 26 February 2020. On his own account he did not contact ACAS in respect of early conciliation until almost 9 months after the end of his employment. Having failed to contact ACAS within the 3 months from the last date of his employment or the last act of complained of, he does not benefit from the extension of time in respect of ACAS conciliation.

The Claimant's evidence

3 The Claimant explained that from March through to August 2020 he was trying to deal with his appeals. Between August and November 2020 he had told me he had time-off from Covid and was not too well and he was trying to find a solicitor, which he found difficult during the period of lock down. The Claimant stated that he needed someone that he could hear and who could understand him as he had some hearing difficulty, and he only secured the solicitor that he is with now in November. He cannot remember the exact date.

4 The Claimant accepted that he was represented by his Union throughout the disciplinary, at the date of dismissal and afterwards. He suggested to the Tribunal that he had not sought advice from his Union about raising a claim, that they were not a solicitor and they were not his advisers. The Claimant told the Tribunal that he was still a member of his Union (the GMB) and he was up to date with his dues. He was represented by his Union in 2019 and contacted them again in 2020. He accepted that he contacted them in respect of the disciplinary hearing, and they attended with him. He contacted them again in March in respect of the appeal and t they knew that he had been dismissed in March 2020. He told me that he had not received any advice at all from them about bringing a claim to the Tribunal.

5 The Claimant was asked to be more specific as to the periods of ill health and when he suffered from Covid. He was vague and the answers that he gave varied from June to March to April to November. He suggested that he had provided some evidence in support of being ill with Covid, however when asked about this the letter he referred to was in fact a letter from the NHS Test and Trace in November 2020 informing him that he that he should self-isolate having been in contact with someone else who had Covid. He was advised to isolate from 7 November to 29 November2020. He received a further letter form the NHS in February 2021 advising him that he was someone who should be shielding because by then he was 75 years old.

6 The Claimant accepted that he did not say that he was too ill to go through with the appeal in August 2020 and he had not asked for an adjournment then. He said he was not feeling all that well but he still attended.

7 It was pointed out to him that he had submitted the claim during the period where he said he was suffering from the effects of Covid (November 2020). The Claimant response was that it was his solicitor who had submitted the claim and he had given them instructions by phone. When asked why he had not instructed any solicitor earlier, he explained that all the ones he called were not open and he could not get through to anybody. He provided two names of firms that he had tried to contact in the period from his dismissal to the period when he successfully contacted solicitors who represent him now. He had tried in August 2020, he said for advice about going for the appeal, he was unclear whether he had

contacted them before or after the appeal outcome, but he wanted advice to help with his case. He was not happy with the way he was treated and was seeking advice for a claim of unfair dismissal. He was not very sure if he knew about whether he could bring a claim to the Employment Tribunal. He accepted he knew that Employment Tribunals existed but he maintained he was a lay man and not very sure of everything. He is not very good with the internet and there is no computer at home with access to the internet. He only has a mobile phone.

8 He lives with two sons, aged 15 and 17 but they are not allowed to use gadgets. He explained he did not ask sons for any assistance of getting onto the internet; he was calling his former co-workers and asking them for solicitors' details. He told me that he did not use the internet cafes near him to look for advice or information on bringing a claim because those around him were all closed. In cross-examination it was suggested that in fact he was in contact with the Respondents using his email in the period of August and April and subsequently in the middle of the lock down he was also communicating with them by email and so must have had access to the internet. He accepted that he done that by going to an internet café near where he lived.

Submissions

9 Mr Morvan addressed the Tribunal on the basis that the Claimant was out of time. He had been represented by his Trade Union throughout the disciplinary which led to his dismissal, had been advised by them during the disciplinary and at the appeal stage. The Claimant was a supervisor who had access to the internet throughout his employment and subsequently could be shown to have internet access through his responses by email. He had provided no factual evidence of any ill health from the period March to November of 2020 and the only evidence he had provided was in respect of self-isolation in November 2020 which was in fact the period during which the claim was issued. The Claimant had every opportunity to seek advice. There was no basis for suggesting that it was not reasonably practicable for him to have brought his claim within 3 months, or that he brought it within such reasonable time thereafter; nor was there any basis to suggest that it would be just and equitable to extend time to bring a race claim.

10 Mr Uduje referred to the case of *Marks & Spencer Plc v Williams Ryan* and I was asked to accept that Mr Okeke was wholly ignorant of his right to bring the claim and that his hearing impairment also had implications for his ability to take advice over the phone as he had explained in his evidence. He had made a number of calls in August and September and only reached his solicitor in November. It was submitted that the Claimant's conduct revealed his ignorance of his rights; it was clear that he wanted to appeal the process and seek advice and that he subsequently brought a claim, but, it was not reasonably practical for him to bring his claim when he did not know about his rights and he was engaging with the Respondent in the process of the appeal and when he was not well during the relevant period. It was submitted that the Claimant did take steps during August and October to take advice, that his ignorance of rights and time limits was reasonable, that there is a distinction between advice from a skilled and unskilled adviser and that his Trade Union could not be treated as a skilled adviser. There is no evidence of their level of experience.

11 From August 2020 he had taken steps to seek the names of solicitors from his colleagues and his actions were consistent with his claimed ignorance of his rights and time limits and his understanding of the role of his Trade Union simply to assist in the internal

process. It was submitted that applying *M&S v Williams Ryan*, it was not reasonably practical for him to bring this claim in time and he did so within a reasonable time thereafter, it being submitted within days of him contacting his now solicitors.

12 In respect of Section 123, it was submitted on the Claimant's behalf that the length of delay was not such that the cogency of the evidence likely to be relied on by the Respondent would be adversely affected; that the Respondent had not suggested that there was any effect on the cogency or on the possibility of a fair hearing. That the race discrimination claim should be heard not dismissed on technical grounds. The allegations set out in the ET1 are very specific and as a matter of policy they ought to have been dealt with and allowed to go ahead. It was understandable that the Claimant had not raised his complaints of race discrimination at the time as he did not want to become a target for his employer and that the balance of hardship fell in favour of it being just and equitable to extend time for the Claimant.

Relevant law

Time limit for "not reasonably practicable" claims

13 By Section 111(2) **[section 23(2)]** of the Employment Rights Act 1996 a Tribunal shall not consider a complaint unless it is presented to a Tribunal:

13.1 Before the end of the period of 3 months beginning with the effective date of termination or;

13.2 Within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to have been presented before the end of that period of 3 months

14 The burden of proof in showing that it was not reasonably practicable to present the claim in time rests upon the Claimant; see Porter v Bandridge Ltd [1978] ICR 943 CA. If the Claimant does succeed in doing so then the Tribunal must also be satisfied that the time in which the claim was in fact presented was in itself reasonable. One of the leading cases is Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119 CA in which May LJ referred to the test as being in effect one of "reasonable feasibility" (in other words somewhere between the physical possibility and pure reasonableness).

15 In Adsa Stores Ltd v Kauser EAT 0165/07 Lady Smith described the reasonably practicable test as follows: "the relevant test is not simply looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done".

16 A number of factors may need to be considered. The list of factors is non-exhaustive but may include:

16.1 The manner and reason for the dismissal;

16.2 The extent to which the internal grievance process was in use;

16.3 Physical or mental impairment (including illness – see Shultz v Esso [1999] IRLR 488 CA, a case concerning a claimant suffering from a depressive illness, as to the approach for the Tribunal to adopt when determining the "reasonably practicability" question):

16.4 Whether the Claimant knew of his rights. **Ignorance of the right to make a claim** may make it not reasonably practicable to present a claim in time, but the claimant's ignorance must itself be reasonable. In such cases the Tribunal must ask: what were the claimant's opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? See Dedman v British Building and Engineering Appliances Ltd 1974 ICR 54 CA. In other words, ought the claimant to have known of his rights? **Ignorance of time limits** will rarely be acceptable as a reason for delay and a claimant who is aware if his rights will generally be taken to have been put on enquiry as to the time limits.

16.5 Any misrepresentation on the part of the Respondent;

16.6 Reasonable ignorance of fact;

16.7 Any advice given by professional and other advisors (such as the CAB). Aa claimant's remedy for incorrect advice will usually lead to a remedy against the advisors and the incorrect advice unlikely to have made it not reasonably practicable to have presented the claim within the statutory time limit. See for example: Dedman (cited above); Wall's Meat Co Ltd v Khan 1979 ICR 52 CA.

16.8 Postal delays/losses

16.9 The substantive cause of the Claimant's failure to comply.

Just and equitable extension

17 Section 123(1) of the Equality Act 2010 provides that a complaint 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 Tribunal thinks just and equitable. Under section 123(3) conduct extending over a period is to be treated as done at the end of the period; and failure to do something is to be treated as occurring when the person in question decided on it. Under section 123(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something (a) when P does an act inconsistent with doing it; or (b) If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

18 In Robertson v Bexley Community Centre [2003] IRLR 434 the Court of Appeal stated that when Employment Tribunals consider exercising the discretion under section 123(1)(b) there is no presumption that they should do so unless they can justify failure to exercise the discretion. A Tribunal cannot hear a complaint unless the Claimant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule. In accordance with British Coal Corporation v Keeble [1997] IRLR 336 a Tribunal may have regard to the following factors: the overall circumstances of the case; the prejudice that each party would suffer as a result of the decision reached; the particular length of and the reasons for the delay, the extent to which the cogency of evidence is likely

to be affected by the delay; the extent to which the Respondent has cooperated with any requests for information; the promptness with which the Claimant acted once he knew of facts giving rise to the cause of action; the steps taken by the Claimant to obtain appropriate advice once he knew of the possibility of taking action. The relevance of each factor depends on the facts of the individual case and Tribunals do not need to consider all the factors in each and every case; see Department of Constitutional Affairs v Jones [2008] IRLR 128.

18.1 The claimant bears the burden of persuading the tribunal that it is just and equitable to extend time. There is no presumption that time will be extended, however, nor is there any magic to that phrase and it should not be applied too vigorously as an additional threshold or barrier;

18.2 The tribunal takes into account anything which it judges to be relevant and may form a fairly rough idea of whether the claim appears weak or strong. It is generally more onerous for a respondent to be put to defending a late, weak claim and less prejudicial for a claimant to be deprived of such a claim;

18.3 This is the exercise of a wide, general discretion and may include the date from which a claimant first became aware of the right to present a complaint. The existence of other, timeously presented claims will be relevant because it will mean, on the one hand, that the claimant is not entirely unable to assert his rights and, on the other, that the very facts upon which he seeks to rely may already fall to be determined.

18.4 In considering whether it is possible to have a fair trial of the issues, the Tribunal will take into account the general prejudice that inherently follows from being required to respond to a claim which is presented out of time (the prejudice of meeting the claim) and any prejudice to the evidence caused by the delay (the forensic prejudice);

18.5 There is no requirement to go through all the matters listed in section 33(3) Limitation Act 1980, provided no significant factor has been left out of account, **British Coal Corporation v Keeble** (length and reason for delay, effect on the cogency of evidence, cooperation between the parties and steps taken once the party knew that it had a possible cause of action).

Conclusions

Reasonably practicable

19 Having carefully considered the evidence from the Claimant and the eloquent submissions on his behalf, I am not able to find that it was not reasonably practical for him to have brought his claim in time despite the arguments put forward by Mr Uduje on his behalf. I am satisfied that the Claimant was not, or ought not to have been, so ignorant of his rights as to not be aware of any applicable time limits. He had the services of a Trade Union Representative who represented him at his disciplinary and assisted him with his appeal. The Claimant's explanation of being unwell, when examined more closely, did not relate to the relevant period under consideration and there is no evidence to suggest that he was in fact ill with Covid during that period or indeed so unwell as to not be able to seek

advice. Although he states he was looking to seek advice in August he did not in fact make contact with his current firm of solicitors until November, despite August not being a period where lock down was in effect. I am not satisfied that his hearing problems amount to sufficient impediment or explanation for the delay in instructing solicitors. I am satisfied that the Claimant could have either sought advice or looked online, using the internet cafes to which he accepted he had access during the relevant time. I do not find that it was not reasonably practicable for him to have issued his claim in time. I find his claims of unfair dismissal and failure to pay holiday pay are out of time and therefore fall to be dismissed.

Race Discrimination

20 In respect of the claim for race discrimination I have considered whether it is just and equitable to extend time. Having heard the evidence of Mr Okeke I do not find that there is any real explanation for his delay, for the reasons set out above. I am satisfied that the claims which have been introduced in his claim form were not matters that were raised with his employer at the time, although that is not decisive in itself I consider it is a relevant factor that the complaints were not considered by the Claimant to be so significant or pressing that he raised them at the time. Nor did he take steps to take advice at the time, if he was not satisfied that his Union were able to advise him he could have taken advice from solicitors either during the course of his disciplinary, during the course of his appeal or in the three months following his dismissal.

21 Whilst, if found to have happened, the comments alleged to have been made about the Claimant are serious the fact that they were not mentioned at the time and no grievance was raised is a relevant factor in assessing their credibility. Having heard from the Claimant I have taken in to account his credibility in considering the merits of the claims for race discrimination and in weighing up the balance of hardship. The discrimination claims appear weak, the Claimant's own statement provides an explanation for at least some of the treatment about which he complains (that it was treatment afforded to the TUPE'd staff) which is unrelated to race.

22 Whilst there is no evidence of actual prejudice to the cogency of the evidence, there is general prejudice to the Respondent in being required to answer a claim of which it had no knowledge until the day that the Claimant presented the claim form to the Tribunal. I find that the balance of prejudice to the Respondent in facing these claims out of time, particularly when it was not able to investigate them at or closer to the time, outweighs the prejudice to the Claimant in not being able to pursue the claims which appear to have little merit. I do not find it just and equitable to extend time.

23 The claims are therefore dismissed.

Employment Judge Lewis
Date: 25 November 2021