EMPLOYMENT TRIBUNALS

Claimant: **Mr R Garrett**

Respondent: **Bidvest Noonan (UK) Ltd**

Heard at: **East London Hearing Centre**

On: **18 January 2021**

Before: **Employment Judge Lewis**

Appearances

For the Claimant: **In person**
For the Respondent: **Ms G Rezaie**

JUDGMENT

1. **The claim for breaches of the Working Time Regulations 1998 was brought outside the time limit provided in the Regulations and is dismissed.**

2. **The claim for age discrimination was brought outside the time limit provided in the Equality Act 2010, it would not be just and equitable to extend time, and the claim is dismissed.**

REASONS

1. The claim was listed for a preliminary hearing on 18 January 2021 to consider whether the claims of (1) breaches of Working Time Regulations 1998 and (2) age discrimination had been brought in time and if not whether time should be extended. At that hearing I made case management orders in respect of the provision of further evidence and representations from the parties. Unfortunately due to a combination of a lack of administrative resources and the volume of cases at the tribunal, there has been a substantial delay following the submission of the further evidence and representations before I have been able to give the matter further consideration and I apologise to the parties for the delay.

Whether the claim has been brought in time

2. The Claimant was employed from 15 December 2019 to 28 February 2020 throughout which time he was 17 years old. The Claimant brought complaints of age discrimination and breaches of the Working Time Regulations in respect of working excessive hours (45 to 50 hours a week) and being denied the minimum 12 hour rest breaks between shifts (daily rest breaks) to which 17-year-olds were entitled, the Claimant alleged that there were breaches of health and safety provisions for his age and this resulted in his dismissal.

3. The Respondent's case is that the Claimant was employed as a pot washer and cleaner and that he was dismissed during his probationary period when he did not meet the standards expected of the role. The Respondent also contends that between 16 December 2019 and 24 January 2020 the Claimant was working two different shift patterns which were broadly: the morning shift as a cleaner – starting between 5 am and 7 am and ending no later that 12.30 (the morning shift); and the afternoon shift as a pot washer -starting at 4pm and ending at 10.30 pm; he would occasionally work additional hours during the afternoon shift, either in addition to or instead of the morning shift. From 25 January 2020 to 26 February 2020 the Claimant only worked the morning shift - starting between 5 am and 9 am and finishing no later than 3.30 pm. The Respondent relies on Reg 10 (3) for the periods in which the Claimant was working split shifts which were split up over the course of any working day. The claimant says the last time he worked in breach of working time regulations was 9 February 2020 when he worked 5 am to 6 pm

4. The Claimant accepted that his hours had been being reduced from 25 January 2020, he said that this was because he complained to his supervisor about his hours in December. He complains that as a result of raising the issue with his hours he was removed from the role as pot wash, which was the role he had been recruited for and left only with the cleaning role. It appears likely that last date of a potential breach of the Working Time Regulations 1998 in respect of hours and rest breaks was on 9 February 2020.

5. The Claimant lodged a grievance on 25 January in writing and by email complaining about his treatment by his colleagues, a meeting was arranged for 3 March which was rearranged at his request to another date in March but did not go ahead due to Covid-related reasons. The Claimant chased the matter up on a number of occasions, at least five occasions he says, the grievance was not dealt with until June 2020. The Claimant explained that he had been told by someone called Jo in the Respondent's HR department that he should wait for the grievance, and the appeal. He did not seek to suggest that they had specifically advised him in respect of the time limits in relation to bringing a tribunal claim. He had spoken to them about his employment and its termination and was told that he didn't have sufficient qualifying service to bring a claim, that he needed to wait for the outcome of the internal processes and that he was currently still on the payroll i.e. the computer system.

6. The Respondent disputes there was a suspensive nature to any grievance or appeal. Nor did the Respondent accept that the grievances had anything to do with the claims that the Claimant brought; there is no reference to the Working Time Regulations, nor specifically to age. The Claimant alleged he was being abused by colleagues who

were trying to get him sacked. The Respondent also disputes that its HR department gave the Claimant any advice about time limits or that it was under any obligation to do so.

7. The Claimant contacted ACAS and started early conciliation on 25 June 2020 and presented his claim form on the same day, 25 June 2020. ACAS issued an early conciliation certificate on 2 July 2020. The claim was rejected by the Employment Tribunal on 5 August 2020, under rule 10 of the Tribunal's Rules of Procedure 2013 due to lack of an ACAS early conciliation number. The Claimant responded on 14 August 2020 by email attaching his early conciliation certificate. The tribunal staff wrote to him by email 1 September 2020 explaining that he is was required to amend his original claim form by inserting the early conciliation certificate number in box 2.3 and send the amended claim form back to the tribunal, informing him that only then could the tribunal issue the claim. The Claimant resubmitted his claim form on 23 September 2020 having amended it as instructed by including the early conciliation certificate number. The claim was accepted as at 23 September 2020.

8. The Claimant contends that his age was referred to in his grievance but accepted he did not refer to the Working Time Regulations or rest breaks. He had already raised his hours with his supervisor previously in December 2019 and that is in part what led to the change in his shift pattern in January. He maintains that he did mention the lack of breaks in the meeting that he had with Keith Bennett the operations manager on 16 June, which was his appeal against dismissal and that he made reference to the age in his grievance. The Claimant alleges that after he complained about his hours he was taken off pot washing duties and only left with cleaning duties which was unfair as he was hired as a pot washer was only doing cleaning as a favour because the Respondent was short of staff.

9. The Claimant was giving an opportunity to provide a witness a statement and any supporting evidence (e.g documents, letters or reports) that he wanted me to consider (including confirmation that he is a carer for his sister and what that entails) to give a clear explanation of why he says it was not reasonably practicable for him to bring his claim under the Working Time Regulations in time, that is by 27 May 2020, what steps he took to bring it within a reasonable time thereafter and why it would be just and equitable to extend time in respect of his claim for age discrimination. The Respondent was provided with an opportunity to address that evidence and make any representations.

Time limits under the Working Time Regulations 1998

10. Regulation 30 provides

> (1) A worker may present a complaint to an employment tribunal that his employer—
>
> (*a*) has refused to permit him to exercise any right he has under—
>
> [(i) regulation 10(1) or (2), 11(1), (2) or (3), 12(1) or (4), 13 or 13A;]
> (ii) regulation 24, in so far as it applies where regulation 10(1), 11(1) or (2) or 12(1) is modified or excluded;
> [(iii) regulation 24A, in so far as it applies where regulation 10(1),

11(1) or (2) or 12(1) is excluded; or
(iv) regulation 25(3), 27A(4)(*b*) or 27(2); or]

(*b*) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1).

(2) [Subject to regulation …30B an employment tribunal] shall not consider a complaint under this regulation unless it is presented—

(*a*) before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;

(*b*) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months.

Time limits under the Equality Act 2010 (age discrimination claim)

11. **Section 123 provides**

(1) [Subject to [[section 140B]]] 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.

…

(3) For the purposes of this section—

(*a*) conduct extending over a period is to be treated as done at the end of the period;
(*b*) failure to do something is to be treated as occurring when the person in question decided on it.

(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.

12. The three month time limit would ordinarily expire on **27 May 2020** *at the latest* (3 months from the Claimant's last day of employment on 28 February 2020, ***if*** any of the matters companied of were ongoing breaches or acts continuing up to the end of his employment). To obtain the benefit of an extension to the time limit provided to allow for Early Conciliation the Claimant would have had to contact ACAS to start early conciliation before the 27 May 2020. The Claimant did not contact ACAS until 25 June 2020, by which date his claims were outside the primary time limit. He therefore does not benefit from the extension of time to facilitate early conciliation provided for in the Working Time Regulations 1998 (Regulation 30B), or in the Equality Act 2010 (section 140B).

13. The claims were brought 3 months and 27 days **after** the expiry of the primary three month time limit under the Equality Act 2010 for any acts of discrimination continuing to the date of dismissal and over 4 months after the expiry of the primary time limit in respect of complaints under the Working Time Regulations.

Test of reasonable practicability

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,);

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? 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). A 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.

17. The general thrust of the cases is that where a claimant awaits the outcome of an internal appeal before issuing a claim, and thereby misses the statutory deadline, they will face an uphill struggle to convince a tribunal that it was not reasonably practicable to have lodged it in time. There must be some factor, beyond the mere invocation of an internal appeal process, which justifies the failure of the claimant to meet the primary time limit (see Palmer v Southend-on-Sea Borough Council [1984] IRLR 119, [1984] ICR 372*, CA*; Bodha (Vishnudut) v Hampshire Area Health Authority [1982] ICR 200*, EAT*; Times Newspapers Ltd v O'Regan [1977] IRLR 101, *EAT*; Singh v Post Office [1973] ICR 437*, NIRC*). In the *Bodha* case, in a passage expressly approved by the Court of Appeal in *Palmer*, Browne-Wilkinson J said:

> "There may be cases where the special facts (additional to the bare fact that there is an internal appeal pending) may persuade an [employment] tribunal, as a question of fact, that it was not reasonably practicable to complain to the … tribunal within the time limit. But we do not think that the mere fact of a pending internal appeal, by itself, is sufficient to justify a finding of fact that it was not "reasonably practicable" to present a complaint to the … tribunal'.'

A reasonable period thereafter

18. Where the claimant satisfies the tribunal that it was not reasonably practicable to present his claim in time, the tribunal must then proceed to consider whether it was presented within a reasonable time thereafter. Claimants are expected to make their applications as quickly as possible once the obstacle that has prevented them making their claims in time has been removed.

19. The question of whether an employee has presented their claim within a reasonable time of the original time limit is a question to be determined objectively by the employment tribunal taking into account all material matters see *Westward Circuits Ltd v Read* [1973] ICR 301, NIRC.

20. In *Cullinane v Balfour Beatty Engineering Services Ltd* UKEAT/0537/10 the then president of the EAT said:

> *"…The question at "stage 2" is what period – that is, between the expiry of the primary time limit and the eventual presentation of the claim – is reasonable. That is not the same as asking whether the Claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted – having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months. If a period is, on that basis, objectively unreasonable, I do not see how the fact that the delay was caused by the Claimant's advisers rather than by himself can make any difference to that conclusion."*

21. What I take from these authorities is that, in assessing whether proceedings have been brought within a reasonable period after the expiry of the original time limit, it is necessary to have regard to all relevant matters including, where appropriate, the factors that made it not reasonably practicable to present the claim in time. Whether or not they remained operative may be an important matter.

Just and equitable extension

22. 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.

23. If the claim is presented outside the primary limitation period (that is, after the relevant three months), the tribunal may still have jurisdiction if, in all the circumstances, it is just and equitable to extend time. The following principles can be derived from the case law:

24. Section 140B provides for an extension of time to facilitate conciliation before institution of proceedings.

25. The claimant bears the burden of persuading the tribunal that it is just and equitable to extend time. 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 it is satisfied that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule. 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.

26. Factors which are almost always relevant are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing it or inhibiting it from investigating the claim while matters were fresh). Abertawe Bro Morgannwg v Morgan [2018] EWCA Civ 640 CA

27. 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.

28. 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.

29. As identified in Miller v Ministry of Justice UKEAT/003/004/15 (at paragraph 12), there are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses.

30. 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 [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.

Conclusions

Reasonably practicable or such further period as is reasonable (Working Time Regulations 1998)

31. In assessing whether it was not reasonably practicable to meet the primary time limit the first question I have to consider is why that time limit was missed.

The Claimant's explanation

32. The Claimant explained that he had been waiting for the outcome of his grievance and his appeal against his dismissal. He received the outcome of his grievance on 23 June 2020 and the appeal against the dismissal on 25 June 2020. His mother advised

him to contact ACAS. He then contacted ACAS on 25 June 2020 and submitted the claim on the same day.

33. I did not reach the conclusion that it was not reasonably practicable for the Claimant to have brought the claim before 25 June 2020 *on account of the fact that the Claimant had been ignorant of his rights as he had allegedly been advised by the Respondent's HR department that he would not have qualifying service to pursue an unfair dismissal claim* [Respondent's submission 12 February 2021 at 1.5] The Claimant had expressly stated at the hearing that the HR department had not given him any advice in respect of time limits.

34. At the hearing on 18 January 2021 I indicated that I was minded to accept that it was not reasonably practicable for the Claimant to present his claim before 25 June but I would still have to consider whether he presented his claim within a reasonable further period. The Claimant referred to his family's circumstances, including his mother's ill health, that she had had Covid during the relevant time, that he was her carer and also having to look after his younger sister to explain his delay: he was given the opportunity to provide evidence in support of this explanation.

35. Having had the opportunity to consider the explanation from the Claimant and the Respondent's representations in response, I have revisited my provisional view. I am satisfied that the Claimant was aware in general terms about rights in respect of working hours and not to be discriminated against because of age, he told me that he mentioned those things in his meetings about his grievance and his appeal against his dismissal. I remind myself that where a claimant is generally aware of his or her rights, ignorance of the time limit will rarely be acceptable as a reason for delay, however I have taken into account the Claimant's age and circumstances, that he was young and inexperienced, and ignorant of the process of applying to an employment tribunal , I am satisfied that it was reasonable for him as a lay person to defer investigating the possibility of recourse to litigation until the appeal process was concluded.

Further reasonable period

36. Despite his family circumstances the Claimant was able to act promptly on 25 June and contacted ACAS and issued his claim on the same day, this is in contrast to the period between 5th to 14 August and 1st to 23 September which needs to be explained. I took into account the Claimant's young age and what he has told me about his family's circumstances and the evidence provided in respect of those when considering whether the Claimant presented his claim within a reasonable time after the after the time limit expired.

37. I accept the Respondent's submissions that the evidence provided by the Claimant points to his caring responsibilities for his sister and his mother's ill-health persisting before April 2020 and do not explain the delay in the relevant period concentrating on August and September 2020. I accept the Respondents submissions at paragraphs 3.1 to 3.9 of their letter of 12 February 2021, although I am applying the test of whether the further period was reasonable not whether it was reasonably practicable [as referred to at paragraph 3.7 of the submissions].

38. I do not find that the Claimant has satisfactorily explained the further period of delay, in particular it was not reasonable to take three weeks to resubmit his ET1 with his Early Conciliation reference number. I am satisfied that by that time the Claimant ought to have been aware of the need to act promptly to remedy the defect in his claim, that he was aware, or ought to have been aware of the time limits and that his claim was out of time, and that his had been rejected. I find that it is reasonable to expect him to act promptly to remedy the defect. He has not explained the why it took him three weeks to do so. I am unable to find that the further period was a reasonable one in the circumstances.
39. The claim under the Working Time Regulations 1998 therefore falls to be dismissed.

Just and equitable (Equality Act 2010 – discrimination claim)

40. I took into account the Claimant's explanation for the delay, including that he was waiting for the outcome of his grievance and appeal against dismissal, that he had chased these up with the Respondent on a number of occasions, the Claimant's young age, the information provided about the Claimant's family's circumstances, including his mother's ill health, that she had described having Covid symptoms during the relevant time, that he was her carer and also having to look after his younger sister.

41. I reminded myself that the exercise of the discretion is the exception rather than the rule. There is no presumption that time will be extended. I also have to consider the prejudice to each party as a result of the decision reached.

42. I considered the extent to which the cogency of evidence is likely to be affected by the delay. The Respondent disputes that the Claimant raised any allegations of age discrimination either in his grievance or in his appeal against dismissal. The Respondent also disputes that any prima facie case of discrimination is raised in the claim form. It relies on the Claimant's failure to satisfactorily complete his probation period as the reason for his dismissal and the ET3 set out three areas where the Claimant's performance was found to be unsatisfactory.

43. I find that the Respondent would suffer prejudice as a result of the delay, not only in having to meet a claim which would otherwise have been defeated by a limitation defence, but also the forensic prejudice which is caused by as fading memories in having to deal with allegations of discrimination only brought to its attention many months after they are alleged to have taken place.

44. In assessing the balance of prejudice as between the Claimant and the Respondent I have taken into account that the Claimant's claim appears on its face to be weak. I am satisfied that 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.

45. Having considered the Claimant's explanation for his delay and the respective prejudice to each party I have reached the conclusion that it would not be just and equitable to extend time in this case.

Summary

46. The claims have been brought out of time, the tribunal does not have jurisdiction to hear them and they therefore fall to be dismissed.

47. The final hearing listed for the **11th, 12th, 13th of May 2022, will be vacated.**

Employment Judge Lewis
Date: 25 March 2022