EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON CENTRAL**

BEFORE: **EMPLOYMENT JUDGE F SPENCER**

BETWEEN: **Mr. A Kollikho** **CLAIMANT**

AND

Burberry Limited **RESPONDENT**

OPEN PRELIMINARY HEARING BY VIDEO

ON: **14th March 2022**

Appearances

For the Claimant: In person
For the Respondent: Mr Singer, counsel

JUDGMENT

The Judgment of the Tribunal is that:

(i) it has no jurisdiction to consider the Claimant's claims, all of which were presented out of time; and

(ii) the Respondent's application for the Claimant to pay its costs of attendance at today's hearing is refused.

REASONS

These written reasons are given at the request of the Claimant.

1. This was a preliminary hearing by video. The Claimant had written to the Tribunal asking for the hearing to be by telephone, as an adjustment to assist with his disability, but had not responded to a letter of the same day from the Tribunal asking him to explain why or how this would assist him. He did not renew that application during this hearing and was able to participate effectively by video.

The claim and issues

2. On 7 December 2021 the Claimant, Mr A Kollikho, presented a claim to the Employment Tribunal. The Claimant had contacted ACAS on 12 November 2021, with the Early Conciliation certificate being issued on 7 December 2020. In his claim form the Claimant had ticked the boxes for unfair dismissal, race discrimination, discrimination because of sexual orientation, sex discrimination, disability discrimination and "other payments", (taken to mean unpaid wages). There were very few particulars or details provided. The box asking for details of the dates of his employment was not completed.

3. The Claimant now accepts that he was employed by the Respondent from 2 July 2012 to 11 April 2014. His claim was therefore presented nearly 7 and a half years after the end of his employment with the Respondent.

4. On the application of the Respondent (set out in paragraphs 5 to 20 of its Response) today's open Preliminary Hearing was listed to consider

    a. whether the Tribunal had jurisdiction to hear the Claimant's various complaints, as his complaint had been presented over seven years out of time.

    b. In addition, and subject to the determination of that question, whether the Tribunal had jurisdiction to consider a claim of unfair dismissal as the Claimant did not have two years continuous employment.

    c. Finally, the Respondent sought a strike out of the Claimant's claims on the basis that he had failed properly to particularise all of his claims, which had no reasonable prospects of success.

5. I had before me a small bundle of documents prepared by the Respondent. This included a witness statement provided by the Claimant which, for the main part, provided further particulars of his claim, rather than an explanation of the lateness of his claim. I also had an email from

the Claimant to the Tribunal dated 24th February 2022 which referred to the Limitation Act 1963 and included the following

"*The limitation act 1963 states there are provisions that are made for employees who have disabilities of which symptoms only occur some years outside of the timeframe of the abuse which has occurred, please see the NHS guidelines in the link provided: https://www.nhs.uk/mental-health/conditions/post-traumatic-stress-disorder-ptsd/overview/. Limitation 1963 act which states that the tribunal may consider claims outside of the given guidelines if an employee has to be seen as having a disability (Limitation act of 1963) an act to extend in certain cases the time-limit for bringing legal proceedings where damages are claimed which consist of or include damages or solatium in respect of personal injuries".*

6. In so far as the time points were concerned the Claimant, in his witness statement accepted that "while a fair amount of time had passed", the Respondent's behaviour "should not be overlooked in this instance especially where there may be criminal proceedings take into consideration, and again referred to the limitations act 1963 as stating that time limits may be extended at the discretion of the courts to pursue a case where a claimant has a notable identified disability."

7. I explained to the Claimant that the purpose of the hearing was to consider whether the tribunal had the power to hear his claim, given the relevant statutory provisions and explained them.

8. The Claimant had also provided two letters by way of medical evidence. One was dated 26 January 2018 from the Integrated Camden Alcohol Service, which identified that the Claimant had been seen in the service between 30 November 2016 and 5 April 17; and that he had been engaging with the alcohol service to address his alcohol use and his problems with his mental health. It said that the Claimant had diagnosed anxiety and ADHD had been using alcohol to help medicate himself and remain stable. The second letter, dated 25 July 2018, was from the psychodynamic psychotherapy service of Camden and Islington NHS Foundation Trust. This letter said that the Claimant had completed a course of individual psychodynamic psychotherapy between October 2011 and 2012, had been re-referred to the service in February 2017 and had begun a long-term analytic group in November 2017.The Claimant said that he was disabled by anxiety and depression. There was no medical evidence of PTSD.

9. During the hearing the Claimant explained that he did not consider that his claim was out time. He had PTSD which was caused by the Respondent's treatment, and it was well-known that PTSD could occur in time well after the abuse had occurred. He said that he had a disability, was on a low income and it was difficult for him to get to ACAS. He explained that he had not really thought about bringing a tribunal claim until mid-to-late 2021 and at that time he had researched his employment rights through Google

and other Internet search engines. After doing his research he had spoken to ACAS for the first time on 12 November 2021, when he began early conciliation.

10. The Claimant said that although he had felt aggrieved when he left the Respondent's employment and had brought a grievance, he did not know that he had the right to bring a claim and that the Respondent had not given him any information about this possibility. It was his first full-time permanent job.

11. After the Claimant left the Respondent's employment he went straight into another job where he had worked for a year as a studio coordinator. At present he remains out of work and is in receipt of Universal Credit and a personal independence payment.

12. Although Mr SInger had no instructions on the point, the Claimant told the Tribunal that all of the individuals named in his witness statement, other than Ms Somerville, had moved on to other jobs.

13. In its Response the Respondent said that it had, in line with its Data Retention Policy, deleted the Claimant's file after seven years following the termination of his employment.

The law

14. Insofar as the Claimant's claim of unfair dismissal is concerned Section 111(2) of the Employment Rights Act 1996 (the Employment Rights Act 1996) provides that an Employment Tribunal shall not consider a complaint of unfair dismissal unless it is presented to the Tribunal:

    a. before the end of the period of three months beginning with the effective date of termination; or

    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 months.

15. Section 23 of the Employment Rights Act 1996 provides that an employment tribunal shall not consider a complaint of unpaid wages, unless the complaint is presented within 3 months of the date of the deduction of wages. There is a limited discretion to extend time in the same terms as set out above

16. The burden of proof for establishing that it was not reasonably practicable to present the claim in time is on the Claimant. The issue is whether it was reasonably practicable for the Claimant to have presented his claim (or contacted ACAS) within the three-month time frame. Reasonably practicable does not mean reasonable, nor does it mean simply physically possible, but means something like "reasonably feasible". Individuals who have acted "reasonably" may fall foul of the time limit provisions. As Lady

Smith in Asda Stores v Kauser EAT 0165/07 explained: "The relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case, it is reasonable to expect that it was possible to have been done." The Supreme Court observed in Gisda Cyf v Barratt 2010 UKSC 41 (para 8) that the exception is to be narrowly construed and sparingly applied.

17. The Claimant also claims discrimination on various grounds. Complaints of discrimination should also be presented within 3 months of the act complained of. Section 123 of the Equality Act 2010 provides that, subject to extensions to allow for early conciliation, (which do not apply in this case) complaints of discrimination may not be brought after the end of – "(a) the period of three 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."

18. The just and equitable test gives the Tribunal a much broader discretion to extend time than the test of "not reasonably practicable" which I have referred to above. In considering whether it would be "just and equitable" to extend the relevant time limits, all the circumstances are relevant including the balance of hardship, prejudice and the possibility of a fair trial. In this context, the extent and reasons for the delay will nearly always be relevant factors. In British Coal Corporation v Keeble the EAT referred to a list of factors in the Limitation Act 1980 as a useful guide, but this list is a guide and not a legal requirement. In Robertson v Bexley Community Centre 2003 IRLR 434 the Court of Appeal reviewed the law and principles which should guide Tribunals in deciding whether to exercise their discretion to extend time. The Tribunal has a wide discretion. On the other hand, time limits are jurisdictional, and it is for a Claimant to persuade a Tribunal to accept a late Claim.

19. In all cases the time limits for bringing a tribunal claim will be "stopped" at the point in time when ACAS receives the early conciliation request and will only resume when the prospective claimant receives the early conciliation certificate. However, a claimant does not get the benefit of any extension of time if (as in this case) the limitation period has already expired before claimant contacts ACAS.

Conclusions

20. As I explained to the Claimant, time limits for bringing claims in the Employment Tribunal are short. As the Claimant had not contacted ACAS within the primary limitation period, he could not benefit from the extension of time provided in section 207B of the Employment Rights Act 1996 (or section 140B of the Equality Act 2010).

21. The Claimant arguments were

    a. the time limits were too short

b. he did not know about his rights

c. he was disabled

d. under the limitation act 1980 there was a limitation period of six years.

e. Under the limitations act 1963 a time limit could be extended at the discretion of the court to pursue a case where a Claimant has a notable and identified disability.

22. Employment Rights Act claims. I do not accept that it was not reasonably practicable for the Claimant to have presented his claim in time. A prospective claimant's ignorance of his rights does not mean that it is not reasonably practicable to present a claim in time. When he left the Respondent's employment in April 2014 the Claimant knew of all the factual issues which he now says amounted to unlawful treatment at the time. He was aggrieved. He could have done research. The existence of the Employment Tribunal is well-known. Rights and the possibility of action are easily accessible via search engines.

23. Disability may be a factor in the exercise of my discretion if it goes some way to explaining the delay. Although the Claimant says that he was disabled at the time (i) there is no medical evidence to indicate that he would not have been able to enquire as to his rights to bring a claim at the time (i.e. in the three months after he left the Respondent's employment) and (ii) he was able to take up another full-time job. I find that he would have been capable of doing the relevant research at the time.

24. As I explained to the Claimant time limits in the Tribunal are set out the relevant statutory provisions referred to above. The limitation acts to which he refers do not apply to claims in the Employment Tribunal, save only thatiIn British Coal Corporation v Keble the EAT suggested that in considering the exercise of its discretion the factors listed in section 33 of the Limitation Act 1980 would be a useful guide.

25. I have a wider discretion to extend time for claims of discrimination. The test is whether it would be just and equitable to allow the claim to proceed. I concluded that it would not be.

26. In this case the claim is very substantially out of time. In the context of a three-month time limit, a delay of seven years is very lengthy. If the Claimant considered that he had been unfairly or unlawfully treated, then it was incumbent upon him to research his rights. The existence of employment tribunals and employee rights is widely known. Although the Claimant says he was disabled, he was able move on to another job as a studio coordinator. As I have already said I conclude, on the balance of probabilities and in the absence of any clear medical evidence, that the Claimant would have been able to conduct that research and put in a claim at the time.

27. In considering the balance or prejudice between the parties, the balance falls on the side of the Respondent. The Respondent has destroyed the Claimant's personnel file and, as the Claimant himself acknowledges, most of the individuals about whom the Claimant claims have left the Respondent's employment. After a delay of more than 7 years memories are likely to have faded. There would be significant prejudice to the Respondent in having to deal with such historic allegations. It was most unlikely that there could be a fair hearing given the delay. On the other hand, the Claimant had taken no action for seven years and was not able to explain in any specific terms why he could not have brought his claim sooner.

Application for costs

28. After I had given my oral decision, the Respondent applied for costs against the Claimant under Rule 76 of the Employment Tribunals Rules of Procedure 2013.

29. The Tribunal has power under Rule 76(1) to make a costs order against a party in respect of legal costs where it considers that a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing or in conducting the proceedings, or if the claim or the response had no reasonable prospect of success. If the Tribunal considers that the circumstances set out in Rule 76(1) apply it may make a costs order against a party if it considers it appropriate to do so.

30. As is apparent from the wording of these rules, this consideration involves the application of a two-stage test, entailing the Tribunal first inquiring whether the conduct in question falls within the terms of the rule and, if it does, the Tribunal then asking whether it is appropriate to exercise its discretion in favour of awarding costs against that party.

31. If a Tribunal decides to make a costs order it may either specify a sum (not exceeding twenty thousand pounds) which the paying party must pay to the receiving party, or may order the paying party to pay the receiving party the whole or a specified part of the cost of the receiving party to be assessed in the County Court in accordance with the Civil Procedure Rules 1998 or by an Employment Judge applying the same principles. The Tribunal may have regard to a party's ability to pay in considering whether to make a costs order or how much that order should be (Rule 84).

32. An award of costs is the exception and not the rule in the employment tribunal (Lord Justice Mummery in Barnsley Metropolitan Borough Council v Yerrakalva 2012 IRLR 78).

33. Rule 84 ETR 2013 provides that "in deciding whether to make a costs order….and if so in what amount, the Tribunal may have regard to the paying party's…ability to pay". This wording indicates that a Tribunal is not obliged to take account of the paying party's means; though if it decides

not to do so, the reasons for this decision should be explained: *Jilley v Birmingham & Solihull Mental Health NHS Trust* EAT 0584/06.

34. For the Respondent Mr Singer submitted that the Tribunal should make a costs order against the Claimant. He had acted unreasonably in bringing proceedings which were so significantly out of time and, in the light of that, it was clear that his claim had no reasonable prospect of success. A claim which was made by seven years and five months late was extraordinary.

35. He submitted that the Claimant had been warned of the possibility of costs being ordered against him by the Respondent and, more significantly by Employment Judge Baty. He referred to the letter sent by the Tribunal to the parties dated 24 February 2022 in which Judge Baty opined that "the chances of the Tribunal taking the view that it should not strike [the claim] out is minimal" and that the Claimant "may want to reflect on whether he should withdraw his claim rather than put the parties to the cost in terms of time and expense of preparing for and attending the hearing." In that letter the Claimant had also been warned that (although costs in the tribunal were rarely awarded) the tribunal might order one party to pay the other party's costs, if that party had behaved unreasonably or brought proceedings which had no reasonable prospect of success.

36. Mr Singer submitted that the Claimant should have heeded the Tribunal's warning. The Respondent sought an order that the Claimant should pay the Respondent's costs of £3,250 (£1,000 for Mr Singer's fee, £1500 for the cost of submitting the Response and £750 for the solicitors' costs in preparing for todays hearing).

37. The Claimant submitted that he had not been unreasonable. He said he put in his claim as soon as he could, that he had done all that he could, and that the Respondent failed to settle with him. He said that he had a disability but did not have did not have the relevant knowledge or finances to present his claim earlier. He said he had reflected on the Tribunal's letter, but the Tribunal had accepted his claim when he presented it -so he therefore considered (i) that he had a case and (ii) that the Limitation Act 1963 allowed extensions in cases where there was a disability.

38. I asked the Claimant about his finances, and he said he was not working, and was in receipt of universal credit and personal independence payments; with an income of about £500 a month and his rent was covered. He had no savings.

39. Conclusion as to costs. I do consider that the claim had no reasonable prospect of success, so that Rule 76 gives the Tribunal power to order the Claimant to pay the costs. I do not accept that the Claimant had put in his claim as soon as he could, as he submits. The acceptance of a claim by the Tribunal is not an indication that the Tribunal considers it is a valid claim.

40. However, I also concluded that it was not appropriate in this case to exercise my discretion to make an award of costs. In deciding not to do so I have taken into account the Claimant's limited means, the fact that the case has concluded at an early stage, and the fact that the Claimant has not been in receipt of any legal advice. I accept that he may have genuinely, but mistakenly, considered that this claim could have proceeded notwithstanding the delay.

Employment Judge Spencer
22 March 2022

JUDGMENT SENT TO THE PARTIES ON

22/03/22.

FOR THE TRIBUNAL OFFICE