



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: Mr H Jani

Respondent: Elis UK Ltd

Heard at: Croydon (London South Tribunals)
By: Hybrid (face-to-face and CVP)

On: 14th January 2022

Before: Employment Judge Clarke (sitting alone)

Appearances:

For the Claimant: In Person
Interpreter for the Claimant: Ms Lodhiya (Language: Gujarati)
For the Respondent: Mr Goodwin (Counsel)

JUDGMENT

- (1) The Claimant's race discrimination claim was presented out of time and is dismissed.
- (2) The Claimant's claim relating to an unlawful deduction of wages from his back-paid wages for the year 2013-2014 was presented out of time and is dismissed.
- (3) The Claimant's claim that there has been a shortfall in his pay since 2013 is out of time and is dismissed.
- (4) The Claimant's claim for holiday pay prior to 30th December 2017 is time barred by reason of Section 23(4A) Employment Rights Act 1996 and is dismissed.

WRITTEN REASONS

Introduction

1. The Claimant is employed by the Respondent as a Linen OPD (laundry operative) at St George's Hospital. His employment with the Respondent commenced on 25th July 2008 and is ongoing. The Claimant notified ACAS under the early conciliation procedure on 29th November 2019. The ACAS certificate was issued on 5th December 2019.
2. By a claim presented to the employment tribunals on 30th December 2019 the Claimant complains that he has been discriminated against on grounds of race and that he is owed holiday pay and wages. The second claim, which is identical to the first, was received about 7th January 2020. The 2 claims were formally consolidated at a preliminary hearing on 4th August 2020.
3. The Claimant is of Indian origin. His primary grounds for asserting that he has been discriminated against are that he was treated differently from his Polish co-worker who also commenced employment with the Respondent in 2008. He also complains that he has been bullied and intimidated. The matters he relies upon are:
 - (i) His Polish co-worker received a 10 years Long Service certificate in June 2018. When he reached 10 years of service in July 2018 he did not.
 - (ii) He was off sick between 22nd October 2018 and 26th October 2018 but did not receive sick pay for this period until 4th January 2019 whereas other workers were paid immediately.
4. In respect of his claims for an unlawful deduction in respect of wages and holiday pay he relies upon the following:
 - (i) He was paid incorrectly in 2014 when he received back pay for the year May 2013 to May 2014.
 - (ii) A worker in the same band and position is paid more than he is since 2013 when the staff were transferred to the "Agenda for Change" scheme.
 - (iii) His holiday pay is calculated incorrectly, in that he is paid for 37.5 hours for a weeks' holiday pay but 42 hours is deducted from his holiday allowance so that he is owed 4.5 days annual leave (or the monetary equivalent) for each year since 2014.
5. The Respondent resists the claims by a Response (to both claims) submitted on 3rd March 2020. The Response asserts that the majority of claims are time-barred but in any event denies that the Respondent has discriminated against the Claimant because of his race or that it has made unlawful deductions from the Claimant's wages.
6. A preliminary hearing on 6th July 2020 was unable to proceed due to there being no interpreter for the Claimant. A further preliminary hearing on 4th

August 2020 was not completed as the interpreter had to leave. A case summary and list of some of the issues was agreed.

7. By an e-mail dated 13th August 2020 the Respondent made an application to strike out parts of the Claimant's claim as being out of time. Specifically, those claims which relate to race discrimination (on the grounds that the acts relied upon are not suggested to be part of a course of conduct, they are outside of the time limit in s.13 of the Equality Act 2010 and no evidence has been presented to enable the tribunal to extend time). Also, the claims for back-pay/unsociable hours pay between 2013 – 2014, sick pay between 22/10/18 and 26/10/18, and the holiday pay claim to the extent that it pre-dates 30th December 2019 as being outside the time limits in s.23 Employment Rights Act 1996.
8. Further preliminary hearings took place on 13th May 2021 (when the remaining issues were agreed) and 14th June 2021 (when the Claimant was unable to join by CVP) before the Respondent's application was heard at the open preliminary hearing on 14th January 2022.
9. By 14th January 2021, the Respondent's application had been expanded following discussions at the hearing on 13th May 2021 (and by the service of written submissions dated 24th May 2021) to include a further application to strike out the claim relating to rates of pay under the NHS Agenda for Change on the basis that it has no reasonable prospects of success. Alternatively, for a deposit order.
10. In the event, the hearing on 14th January 2021 commenced late as the interpreter did not arrive on time and it was necessary to reserve judgment.

The Hearing

11. At the hearing, the Claimant attended in person and was assisted by a Gujarati interpreter. The Respondent was represented by Counsel, Mr Goodwin.
12. I heard sworn evidence from the Claimant and his union representative, Mrs Brenda Johnson, on behalf of the Claimant and from Ms Carrington-Last (Service resource Manager) on behalf of the Respondent.
13. I was also referred to, and considered, documents and witness statements from each witness who gave oral evidence contained in a bundle comprising 114 pages. References in square brackets in these reasons are to the page numbers of this bundle.
14. In addition, I was also provided with, and referred to written submission on behalf of the Respondent and I heard oral submissions from both the Claimant and Mr Goodwin.

Relevant Law

15. Time limits for claims for bringing a claim for race discrimination are set out in s.123 of the Equality Act 2010 ("EQ 2010"). The primary time limit is within 3 months of the discriminatory act but this is extended by the ACAS early conciliation provisions – s140B EQ 2010.
16. Where the Claimant relies upon an omission rather than on a positive act of the Respondent, time runs from when the person decided not to do the act. In the absence of evidence to the contrary, someone is taken to decide on failure to do something when either they do an act which is inconsistent with them doing it or (if they do not do anything inconsistent) on the expiry of a period in which they might reasonably have been expected to do it – s.123(4) EQ 2010.
17. The Tribunal also has a wide discretion to extend time if it is just and equitable to do so – s.123(1)(b) EQ 2010. If more than 1 discriminatory act is claimed, the time limit applies to each unless there is continuing discrimination, that is conduct extending over a period, in which case time runs from the end of the period – s.132(3) EQ 2010.
18. The burden is on the Claimant to show that it is just and equitable for an extension to be granted. There is no presumption that the discretion will be exercised, extensions are the exception rather than the rule – *Robertson -v- Bexley Community Centre t/a Leisure Link [2003] IRLR 434 (CA)*.
19. When considering whether or not to exercise its discretion to grant an extension of time, the tribunal should have regard to the checklist in s.33 of the Limitation Act 1980 (as modified by the EAT in *British Coal Corporation -v- Keeble & Others [1997] IRLR 336, EAT*). The tribunal should consider the prejudice each party will suffer according to the decision reached and all the circumstances of the case and in particular:
 - (i) The length and reasons for the delay;
 - (ii) The extent to which the cogency of the evidence will be affected by the delay;
 - (iii) The extent to which the Respondent has co-operated with any requests for information;
 - (iv) The promptness with which the Claimant acted once s/he knew of the facts giving rise to the cause of action; and
 - (v) The steps taken by the Claimant to obtain appropriate advice once s/he knew of the possibility of taking action.
20. The potential merits of the claim may also be relevant to the exercise of the discretion: *Rathakrishnan -v- Pizza Express (Restaurants) Ltd [2016] ICR 283, EAT*.
21. Unauthorised deductions from wages under s.13(1) of the Employment Rights Act 1996 ("ERA") must be brought within 3 months of the deduction, or within

3 months of the last deduction where that has been a series of deductions of sufficient frequency and repetition (subject to any ACAS conciliation extension) – s. 23(2)(a) and s23(3) ERA. Where there has been a series of deductions, a gap of more than 3 months will break the series – *Bear Scotland Ltd & Others -v- Fulton & others and other cases [2015] ICR 221 EAT*.

22. The primary time limit may be extended if it was not reasonably practicable for the claim to be presented in time and it was presented within a reasonable time thereafter – section 23(4) ERA. The Claimant bears the burden of proving that it was not reasonably practicable to bring the claim in time.
23. Reasonably practicable does not mean “reasonable”, nor does it mean not physically possible but means something like “reasonably feasible” – *Palmer & anor -v- Southend-on-Sea Borough Council [1984] ICR 372, CA*.
24. What is reasonably practicable is a question of fact and should be given a liberal construction in favour of the employee, but where the reason for failing to present in time relates to ignorance of rights, the Claimant’s ignorance must be reasonable - *Dedman -v- British Building and Engineering Appliances Ltd [1974] 1 All ER 520 [1974] ICR 53*. The question is whether the Claimant ought to have known of his rights – *Porter -v- Bandridge Ltd [1978] ICR 943, CA*.
25. Ignorance of a fact that is crucial or fundamental to a claim may render it not reasonably practicable to present the complaint in time. A fact will be crucial or fundamental if, when learning it, the Claimant’s state of mind genuinely and reasonably changes from one where s/he does not believe s/he has grounds for a claim to one where s/he believes a claim is viable. Ignorance of a fact will not render it not reasonably practicable to present a claim unless the ignorance is reasonable and the change in belief is also reasonable. *Cambridge and Peterborough NHS Foundation Trust -v- Crouchman [2009] ICR 1306* and *Machine Tool Industry Research Association -v- Simpson [1988] ICR 558, CA*.
26. Incorrect advice from a trade union representative as to time limits cannot be relied upon to establish that it was not reasonably practicable to present the claim in time – *Times Newspapers -v- O’Regan [1977] IRLR 101, EAT*.
27. The existence of an internal process is not sufficient to justify not bringing the claim in time *Bodha -v- Hampshire Health Authority [1982] ICR 200* and *Palmer & anor -v- Southend-on-Sea Borough Council [1984] ICR 372, CA*. Although, where there is no advisor and/or there are other special circumstances or additional factors such as youth and inexperience, mental health difficulties or misleading behaviour by the employer, it may not be reasonably practicable to present a claim until after the internal process has been concluded – for example: *John Lewis Partnership -v- Charman EAT 0079/11*, *Webb -v- Carphone Warehouse ET Case no. 1402557/11* and *Owen & anor -v- Crown House Engineering Ltd [1973] ICR 511*.

28. Even when claims are brought in time or time is extended, claims for unlawful deductions from wages cannot be pursued in respect of deductions which took place more than 2 years prior to the presentation of the claim - s23(4A) of the ERA.
29. Tribunal Rule 37 confers on the Tribunal a discretion to strike out all or part of a claim or response, provided that the party liable to be struck out has been given a reasonable opportunity to make representations, either in writing or at a hearing (if requested), on any of the following grounds:
 - (a) That it is scandalous or vexatious or has no reasonable prospects of success;
 - (b) That the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
 - (c) For non-compliance with any of these Rules or with an order of the Tribunal;
 - (d) That it has not been actively pursued;
 - (e) That the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
30. The burden is on the Respondent to establish that the Claim has no reasonable prospect of success and should be struck out and is a fairly high one. Correspondingly, the bar for the Claimant to get over in order to be able to pursue his claim is a fairly low one.
31. Tribunal Rule 39 confers on the Tribunal a power to require a party to pay a deposit, not exceeding £1,000.00, as a condition of continuing to advance an allegation or argument if the Tribunal considers that the specific allegation or argument has little reasonable prospect of success. The Tribunal must make reasonable enquiries into the party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
32. When the Tribunal is considering whether or not to exercise its power to strike out all or part of a claim on the grounds that it has no reasonable prospects of success, or when considering whether the claim has little reasonable prospects of success for the purpose of deciding whether or not to make a deposit order, the Tribunal must consider the Claimant's claim at its highest.
33. When exercising its powers under Rule 37 or 39 the Tribunal must also have regard to the overriding objective in Tribunal Rule 2 and deal with the case fairly and justly. This requires the Tribunal to, so far as is practicable:
 - (f) ensure that the parties are on an equal footing;
 - (g) deal with the case in a way which is proportionate to the complexity and importance of issues;
 - (h) avoid unnecessary formality and seek flexibility in the proceedings;
 - (i) avoid delay, so far as is compatible with proper consideration of the issues; and save expense.

The Issues

34. The issues raised by the claims are as set out in the Case Management Orders of 4th August 2020 [36-37] and 13th May 2021 [45-46].
35. The Respondent's case for strike out and/or a deposit order is primarily based on a jurisdiction issue, namely whether or not the claims were out of time. In respect of the pay rate claim (paragraph 4(ii) above), the Respondent asserts that there are no reasonable prospects of success [49 – 59].
36. The issues arising in respect of the preliminary hearing are:
 - (i) On what date did each of the acts complained of occur?
 - (ii) Was there a series of acts? If so, which acts were within the series and when was the last act in the series?
 - (iii) Was each of the claims (or was the last act in a series) brought within the primary time limit?
 - (iv) If any ERA claim was not brought within the primary time limit, was it reasonably practicable for the Claimant to present the claim in time?
 - (v) If not, did he present the claim within a reasonable period?
 - (vi) If the race discrimination claim was not brought within the primary time limit, is it "just and equitable" to extend time for the race discrimination claim?
 - (vii) Should the rate pay claim be struck out as having no reasonable prospects of success?
 - (viii) Should any order be made in respect of the Holiday pay claim?

Background Facts

37. The facts set out below were not suggested to be particularly contentious, but where they are, they represent the Claimant's case taken at its highest.
38. Taking into account the ACAS conciliation provisions, the primary 3 month limitation cut-off means that any claims arising prior to 30th August 2019 are potentially out of time.
39. Further, any claims for unlawful deduction from wages which pre-date 31st December 2017 will be time-barred by the provisions of s.23(4A) ERA.
40. The Claimant is employed by the Respondent as a Linen OPD (laundry operative) at St George's Hospital. His employment with the Respondent commenced on 25th July 2008 and is ongoing.
41. In 2013 the Respondent implemented changes to its pay structure under a scheme called Agenda for Change ("AFC"). The purpose of AFC was to ensure that the Respondent's staff on site had pay related terms and conditions which broadly matched those of the NHS staff on site.
42. As a result of AFC, by letter dated 28th May 2014 [68] the Claimant was notified that he was being transferred to the AFC and was provided with some

revised terms and conditions. In respect of his pay rate, he was placed within Band 2, Pay Point 2.

43. The revised pay rates to reflect the AFC were backdated to May 2013 and at some point in 2014 he also received a payment of £1,280 by way of back pay for the year May 2013 to May 2014.
44. In June 2018 a Polish co-worker was given a Long Service Certificate on reaching 10 years of service. 25th July 2018 was the Claimant's 10 year anniversary of service with the Respondent. He did not receive a Long Service Certificate.
45. In September 2018 the Claimant first approached his union for advice and assistance.
46. Between 22nd October 2018 and 26th October 2018 the Claimant was off work sick. He did not receive his sick pay for this period until 4th January 2019.
47. On 12th December 2018 the Claimant saw his union representative, Brenda Johnson, who assisted him to write an e-mail to the Respondent in which he raised a number of issues including errors in holiday pay/calculations since May 2013, the delay in his sick payment and the failure to provide him with a Long Service Certificate **[88-89]**.
48. A meeting took place on 8th January 2019 between the Claimant and the Respondent during which pay issues, including errors in his 2013-2014 back pay, holiday pay and overtime pay were discussed as well as the Claimant suggesting that there was a discrepancy between his pay and that of a worker (SM) in the same band and position, with SM being paid more than him **[90-91]**.
49. On 9th January 2019 the Claimant wrote to the Respondent **[92]** regarding his long service certificate and holiday entitlement.
50. By letter dated 7th March 2019 the Respondent gave a reply to the issues raised by the Claimant **[93-94]**.
51. The Claimant raised a formal grievance on 18th September 2019 **[95-96]**. The grievance covered various pay and holiday entitlement discrepancies but did not include either of the matters the claimant asserts amounted to racial discrimination.
52. Meetings relating to the grievance took place between the Claimant and the Respondent on 18th September 2019 and 1st November 2019 and the Claimant was subsequently provided with a grievance outcome letter dated 13th November 2019 **[101-103]**. The Claimant sought to appeal the grievance outcome but issued his tribunal claim before the appeal was heard due to delays in arranging an appeal hearing.

The Evidence

53. The Claimant's evidence was to the effect that there had been a delay in starting his claim as a result of trying to resolve the issues informally and having to go through a lengthy grievance process. He had been in fairly regular contact with the Respondent regarding his various issues by e-mail and through meetings from about September 2018. He had challenged his pay rate (as compared with that of his colleague, SM) in 2018 as soon as he was aware of it. He initially went to his union in September 2018 and then again in December 2018. He also asserted that the Respondent had hindered resolution of issues by providing a pay breakdown in 2014 which suggested that he had been properly paid and then, some time later, providing a different format of how they had calculated his back pay. He also provided evidence as to his means.
54. He accepted that he knew he had been treated differently as regards the long service certificate as early as July 2018 and certainly by the time he raised it with the Respondent on 9th January 2019. He further said that he had not obtained advice from his union regarding a tribunal claim and that they had provided advice and support only with respect to dealing direct with the Respondent and with pursuing the internal grievance process. He did his own research regarding making a tribunal claim using google in December 2019 after the union raised it as a potential next step.
55. His union rep, Ms Johnson, largely confirmed the Claimant's evidence regarding the contact with the Respondent with which the union had been involved from December 2019 onwards. She also explained that after the Claimant first approached Unison in September 2018 a communication issue meant that it did not get actioned until the Claimant re-approached in December 2018. Also, that it had been very difficult to tie the Respondent down to meetings, which had been repeatedly cancelled and moved. She also indicated that employees were encouraged to resolve issues via informal or grievance process and were given some (limited) information about ACAS. She could not confidently recall when she explained this process to the Claimant, whom she had known for many years.
56. The Respondent's witness, Ms Carrington-Last, gave evidence to the effect that the Claimant raised issues regarding back pay, a shortfall in his pay/pay discrepancy, holiday pay and discrimination with her in late December 2018 and that she met with him on 8th January 2019. Also, that she wrote responding to the complaints on 7th March 2019 and it was then many months before the Claimant raised a formal grievance, the outcome of which was given on 1st November 2019. Throughout the Respondent's response had been consistent. She also referred to the pay rate comparison between the Claimant and SM for 2013 to date [105].

The Submissions

57. The Respondent made submissions in line with its written submissions [49-59] asserting that the discrimination claims are substantially out of time, the Claimant knew of his treatment in July 2018 regarding the long service certificate and by December 2018 at the latest regarding his sick pay. The Claimant knew many months before bringing his claim and there is no real explanation for delay as his attempts to resolve issues with the Respondent directly did not include these claims after March 2019. It would not be just and equitable to extend time. Evidence, particularly the Respondent's evidence required to rebut the discrimination claim if the Claimant discharges his burden of proof, will be less cogent as it is likely to turn on the decision makers reasons for actions which are not documented and memories fade over time.
58. Regarding the backpay claims, even if the Claimant did not know until 2018 that he had a potential claim, he had all the information necessary at that time to do so and it was reasonably practicable to bring the claims far earlier than December 2019 when proceedings were in fact commenced. The Respondent relies on *Bodha -v- Hampshire Health Authority [1982] ICR 200* and *Dedman -v- British Building and Engineering Appliances Ltd [1974] 1 All ER 520 [1974] ICR 53* – where a Claimant claims to be unaware of the right to bring a claim the Tribunal should investigate what opportunities he had to find out and whether he took them. In this case the Claimant had many opportunities, including having the support of his union.
59. The Respondent also submitted that in respect of the rate claim, that the Claimant cannot show a contractual right to receive the same level of pay as colleagues. At best, the Claimant can only point to an agreement between the Respondent and the NHS to pay at the same rate and that does not give the Claimant a cause of action. The Claimant was simply at a different pay point to his colleagues at times. In any event, this claim is out of time as by 1st May 2019 SM and the Claimant were on the same rate of pay and any series of deductions had come to an end. It was reasonably practicable to bring the claim in time as the Claimant knew of the difference in 2018. In respect of the holiday pay the Tribunal should record that the Tribunal has no discretion to award damages prior to 30th December 2017.
60. In his submissions, the Claimant sought to explain the delays as being due to his not having information to suspect there were issues (re the back pay/pay discrepancy) and the Respondent's long process of seeking to resolve the issues he raised. He also asserted that he was misguided by the Respondent regarding his back-pay. He had only recently found out about time restrictions for the Tribunal.

Tribunal's Reasons

In relation to the strike out application:

61. As different considerations apply, I will consider the different claims independently under the sub-headings below.

Race Discrimination Claims

62. The only 2 acts that the Claimant relies on in support of his race discrimination claim are the failure to award him a Long Service Certificate and the delay in the payment of his sick pay.
63. The Claimant's 10year anniversary was on 25th July 2018. The failure to award the Certificate was an omission. I have no evidence as to when exactly the Respondent decided not to award the certificate and the Respondent did not do any act that was inconsistent with them awarding the certificate. I find that the Respondent might reasonably have been expected to award the certificate within about a month of the anniversary. Therefore, for the purpose of considering the time limits for this act, I have taken the date on which the Respondent decided not to award the Claimant a Long Service Certificate as being 31st August 2018. This is some 12 months outside the primary limitation cut-off date of 30th August 2019.
64. The Claimant was paid weekly in arrears [87]. His period of sickness was between 22nd October 2018 and 26th October 2018. Although his sick pay was subsequently paid, the Claimant complains of the delay in payment. His pay day is a Friday, and his sick pay should have been included in his pay for the subsequent week and for the purposes of this application I therefore take the date on which this failure occurred as being 1st November 2018, some 10 months outside the primary limitation cut-off date of 30th August 2019.
65. These 2 incidents relied upon are not related acts and occurred 2 months apart. I do not find that they form a series of acts.
66. As neither act falls within the primary limitation period, I must consider whether it is just and equitable to extend time.
67. I have insufficient evidence before me to assess with any accuracy the merits of the claim. It is undisputed that the Claimant did not receive a Long Service Certificate (although a co-worker did) and that there was a delay in his receipt of sick pay. Consequently, a difference in treatment may be easily established. Even if it likely (and I make no finding as to this) that the Claimant will meet the required burden of showing a prima facie case of discrimination such as to transfer the burden of proof to the Respondent to show that it did not discriminate against him, these are not matters in respect of which I have received detailed evidence. I have been given a non-discriminatory explanation for the failure to provide a long service certificate (although the explanation is disputed by the Claimant). I do not therefore consider that the merits of the claim are sufficiently clear as to enable me to fairly place any weight on them in the in determining whether or not to exercise my discretion to extend time.

68. There is a clear prejudice to the Respondent in permitting the claims to be brought. The Respondent will have to defend a claim that is clearly out of time and which arises from events that took place approximately 3.5 years ago (and by the time the matters come to trial will be significantly older). I accept the Respondent's submission that not all of the evidence as to the reasons for any differing treatment is likely to be found in contemporaneous documents and that the substantial delay between the events and likely future trial date will potentially significantly impact the cogency of the evidence due to the impact of time on memory.
69. There is also a clear prejudice to the Claimant if time is not extended as he will not be permitted to bring what may be a meritorious claim for discrimination. At its highest, the race discrimination claim amounts to 2 discrete incidents in 2018 although the Claimants' employment history with the Respondent now spans over 13.5 years. On the limited information currently available to me, any compensation awarded, even if the claims succeed and the Claimant establishes that his feelings have been injured, seems most likely to fall significantly below the top limit of the lowest of the Vento bands (a maximum of £8,800 given the date of issue of the claim), although I make no findings of fact or quantum.
70. The length of the delay between the Claimant's knowledge that he had been treated differently and therefore that he had potentially been discriminated against and the primary limitation cut-off is significant (10 or 12 months as above). Although the Claimant queried both matters promptly with the Respondent, and sought advice from his union with reasonable alacrity (which was not provided for 3 months between September 2018 and December 2018 through no fault of the Claimant), he did not act promptly in bringing the proceedings. The only reasons advanced for the delay are that he tried to resolve the matter informally with the Respondent, that there were substantial delays in that process and that he was unaware of his ability to bring a claim to the Tribunal until December 2019.
71. I cannot accept that these were good reasons for the delay. By 12th December 2018 it is clear that the Claimant was associating these 2 acts with racism and discrimination [89]. Nevertheless, he did not commence the tribunal proceedings for over a further year.
72. By 7th March 2019 (over 9 months prior to commencing the claim) the Claimant had raised the issues with the Respondent and received a response from the Respondent [93-94]. Although there are multiple documents passing between the parties subsequent to 7th March 2019 in relation to other issues raised by the Claimant, he did not pursue the alleged discrimination matters with the Respondent during meetings or in his formal grievance after 7th March 2019. He took no further action relating to these claims until making his ACAS referral on 29th November 2019 and commencing this claim on 30th December 2019.
73. Additionally, the Claimant had the benefit of assistance from his union from December 2018 and is clearly an intelligent man capable of seeking out

advice and assistance and researching his rights independently. He ultimately found out about the tribunal procedures using a google search. There is no reason why he could not have made appropriate enquiries and commenced a claim sooner. He was not misled by the Respondent prior to commencing his claim in respect of either of these matters and the Respondent has not failed to co-operate with requests for information in respect of these claims.

74. This type of claim (ie race discrimination) will require a significant amount of both the party's and the tribunal's resources to pursue and is unlikely to be capable of being heard by the tribunal for many months.
75. Taking all of the above into consideration, I do not consider that it would be just and equitable to extend time for these claims to be brought and I do not do so.
76. The claims must therefore be dismissed as the Tribunal lacks jurisdiction to deal with them in the absence of an extension of time.

Unlawful Deduction from Wages – Back Pay

77. The back pay claim relates solely to the period 2013-2014 and was paid in 2014. Self-evidently it is not part of a series of deductions and the primary time limit would therefore run from the date on which the back payment was made, sometime in 2014. This claim is, on its face, at least 5 years out of time if time is calculated from the date of the deduction.
78. I must therefore consider whether it was reasonably practicable for the Claimant to bring the claim in time and, if not, when it would have been reasonably practicable for him to bring it.
79. The Claimant's evidence was that he had concerns in 2014 about the amount of back-pay he received which were allayed when he was provided with the Respondent's calculations in 2014. Although, on his own account, he is a qualified accountant in India with a masters degree, I am nevertheless satisfied that he reasonably did not have sufficient crucial facts at that time so as to make it reasonably practicable for him to bring a claim. It was not until his suspicions were raised again (and crystallised) on receipt of a different calculation basis from the Respondent that he reasonably believed that he may have a viable claim so as to justify instigation of proceedings.
80. However, taking the Claimant's case at its highest, the Claimant was aware by about August 2018 at the latest (on his own admission) that his back pay for the year 2013-2014 had been incorrectly calculated. He raised this with the Respondent by e-mail on 12th December 2018 [88-89] and at a meeting on 8th January 2019 [90-91].
81. The Claimant asserts that the reasons he did not bring a claim shortly thereafter are that he tried to resolve the matter informally with the Respondent, that there were substantial delays in that process and that he

was unaware of his ability to bring a claim to the Tribunal until December 2019.

82. The mere fact that he was engaged in informal enquiries, discussions and subsequently a formal grievance procedure with the Respondent did not make it not reasonably practicable to bring the claim in time. This is demonstrated by the fact that he commenced the proceedings before the appeal against his grievance outcome was heard and determined.
83. There was no evidence presented to me of additional factors or unusual circumstances as to the Claimant's state of health, knowledge or reliance on misleading information provided by the Respondent after August 2018.
84. The Claimant sought the assistance of his union in September 2018 and had the benefit of assistance from Ms Johnson from December 2018 but still delayed in bringing the proceedings for a further year. He did not obtain advice from his union regarding bringing tribunal proceedings but in any event, any deficiency or inaccuracy in the advice provided by the union would not render it not reasonably practicable to bring the claim.
85. Having considered the authorities set out above and for the reasons set out at paragraph 73 above I find that he could reasonably practicably have presented his claims by 30th September 2018 at the latest. As he did not present his claim until 30th December 2019 he did not present it either within the primary time limit or within a reasonable time of it becoming reasonably practicable for him to do so and the claim is therefore out of time. As the Tribunal has no jurisdiction to hear it, it must be dismissed.

Unlawful Deduction from Wages – pay rate differential claim

86. The Claimant's case in this regards relies solely on there being a difference between the pay that he received and that which is colleague SM, who he asserts was in the same pay banding, received. The Respondent makes 2 points in relation to this claim: Firstly, that it is out of time and secondly, that it has no reasonable prospects of success in any event.
87. For any period during which there is an unfavourably differential pay rate between the Claimant and an equivalent colleague, there is in effect a separate deduction made on each pay date that the Claimant is under remunerated. Nevertheless, each deduction is part of a continuous series whilst there remains a pay differential. The primary limitation period therefore falls to be calculated from the last deduction in the series.
88. On the basis of the unchallenged pay comparison chart at [105] I find that the pay rate difference between the Claimant and SM applied only between March 2016 (when SM was first paid at a higher rate than the Claimant) until 1st May 2019 (when their pay rates were once again the same).

89. The primary limitation date in respect of this claim will therefore run from the payday after 1st May 2019, namely Friday 3rd May 2019. The claim, having been presented on 30th December 2019, is therefore substantially out of time.
90. I must therefore consider whether it was reasonably practicable for the Claimant to bring the claim in time and, if not, when it would have been reasonably practicable for him to bring it.
91. It would not have been reasonably practicable for the Claimant to bring a claim until he was aware that a differential existed. Taking the Claimant's case at its highest, the Claimant was aware by about August 2018 at the latest (on his own admission) that he was paid differently from SM. He raised this with the Respondent at the meeting on 8th January 2019 [90-91]. As both of these matters pre-date the end of the series, his awareness of crucial information necessary to bring the claim will not assist to extend the relevant period.
92. There was no evidence before me as to whether or not the Claimant was aware that the differential ceased to exist on 1st May 2019. Nevertheless, this was not knowledge that he required in order to bring the claim and will not therefore assist him to extend time.
93. For the reasons set out at paragraphs 73, 81-85 and 91 above, I find that it was reasonably practicable for the Claimant to bring the claim before the primary limitation period expired.
94. If I am wrong about this, I would have struck out the claim under the provisions of Tribunal Rule 37 as having no reasonable prospects of success for the following reasons:
95. The Claimant asserts a contractual entitlement to be paid at same rate as other people and in support of this refers to the letter dated 28th May 2014 setting out the changes to his terms and conditions on implementation of the AFC [68]. Nothing in this letter refers to the pay of others or to any right to be paid the same as others doing the same job. Nor does his original contract of employment contain such a right [87].
96. In his oral evidence the Claimant asserted that during information given to staff about the AFC it was "mentioned" by the Respondent that all people in same band would get the same pay. This is far short of what would be required to give rise to a contractual right to the same pay.
97. Further, and in any event, the Claimant's case is premised upon SM being in the same band as him, and that all people in the same band should receive the same pay. He denied, indeed was unable to accept, that there were different pay levels within the bands or that there could be legitimate reasons for pay differences within bands.
98. I do not accept that premise. The letter of 28th May 2014 clearly states that the Claimant will be in "Band 2, pay point 2". For the words "pay point 2" to have any meaning, there must be different pay points within band 2.

99. I also note that whilst it was accepted by the Respondent that the pay rates of SM and the Claimant differed at times as per [105], and it appeared to be accepted that SM was in the same Band as the Claimant, there was no evidence before me as to what paypoint SM was placed at any point in time, and I did not understand it to be conceded that she was also placed at paypoint 2 within Band 2.
100. Even if the Claimant was able to overcome both of the above hurdles, there was in any event additional evidence which affords a further explanation as to why/how the hourly rates of people who initially were on the same hourly rate of pay in 2014 might subsequently have diverged without moving between bands or paypoints.
101. A redacted letter (said to be to SM) dated March 2016 [104] indicates that in 2016 there was a consolidation of the receiving individual's non-contractual allowance into their pay resulting in a small increase to their hourly pay rate. The redacted letter is consistent with the change in SM's pay in March 2016 [105], which is when SM's hourly rate and that of the Claimant first differ.
102. Taking all of this together, and taking the Claimant's case at its highest, and therefore assuming that SM was placed at the same paypoint (ie paypoint 2) as the Claimant within Band 2, I find that the Claimant's case that there has been an unlawful deduction from his wages on the basis that he was paid less than a colleague, SM for the same job, has no reasonable prospects of success.
103. I need not therefore consider whether I should make a deposit order. However, in light of the Claimant's evidence as to his income, savings and expenditure, had I considered there were sufficient prospects of success not to strike out the rate pay claim, I would have required a £250.00 deposit from the Claimant in order for them to be pursued. This is because, for the reasons set out above, the claim stands little prospects of success. The Claimant's own evidence indicated that he had a disposable income of £19.43 pcm (or £73.93 pcm if his Sky TV subscription were discounted) plus savings in the region of £5,000.00 for contingencies.

Unlawful Deduction from Wages – Holiday pay claim

104. This is a matter which is ongoing and the Respondent does not assert that this claim has not brought in time. However, this claim is said to date back to the AFC implementation in 2014 and therefore spans a period of over 6 years prior to the commencement of the claim.
105. Section 23(4A) ERA 1996 creates an absolute bar on the Tribunal's jurisdiction which has no provision for extension. Therefore, to the extent that the Claimant claims for incorrectly calculated holiday pay for any period prior to 30th December 2017 his claim is therefore bound to fail as a result of 23(4A) ERA 1996.

106. The grounds for strike out in Tribunal Rule 37(a) are therefore made out. It would be neither proportionate, fair nor just to put the parties to the time or expense of adducing evidence or to burden the Tribunal with such a claim.
107. For these reasons, to the extent that the claim seeks compensation for holiday pay for any period prior to 30th December 2017 will therefore be struck out.

Conclusion

108. The Claimant's only remaining live claim relates to his holiday pay entitlement/calculation. The issues relating to this are set out in paragraph 4(iii) of the case management order of 13th May 2021 [46]. A further case management order sets out the steps that the parties are required to take to prepare this matter for a final hearing.

Employment Judge Clarke
Date: 21st March 2022

Public access to employment tribunal decisions

Note that both judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the parties.