EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondent**
Mr S Olorunfemi		**Abellio London Limited**

ON: **14 February 2022**

BEFORE: **Employment Judge K Bryant QC**

Appearances:

For the Claimant: **Mr J Neckles (union representative)**
For the Respondent: **Miss L Smith (solicitor)**

JUDGMENT

1. The claims for direct race discrimination and harassment related to race under the Equality Act 2010 and for breach of the right to be accompanied under the Employment Relations Act 1999 are dismissed on withdrawal.

2. It was reasonably practicable to present the claims for unfair and wrongful dismissal within the applicable time limit; the tribunal therefore has no jurisdiction to hear those claims and they are dismissed.

REASONS

Introduction

3. The following are the written reasons for the tribunal's judgment in this case, as requested by the Claimant's representative at the hearing.

4. This hearing had been listed to consider whether the Claimant's claims had been presented within the applicable time limit and, if not, whether time should be extended to allow them to be heard.

5. At the start of the hearing, which took place by CVP, the Claimant's representative said that the Claimant wished to withdraw his claims under

the Equality Act 2010 and the Employment Relations Act 1999, and that he was content for them to be dismissed on withdrawal. The Claimant subsequently confirmed that this was his position and so those claims were dismissed on withdrawal.

6. That left live claims for unfair dismissal and wrongful dismissal.

7. It was agreed by both parties that the effective date of termination of the Claimant's employment was 16 August 2019, that he started the early conciliation process by contacting ACAS on 20 August 2020, that his EC certificate was issued the next day on 21 August 2020 and that his ET1 was presented to the tribunal on 20 September 2020.

8. It was also agreed by the Claimant that his claims were therefore presented some months outside the primary time limit (which would have expired on 15 November 2019) and that if those claims were to be allowed to proceed he would have to persuade the tribunal that it had not been reasonably practicable for him to present them in time and that they had then been presented within a further reasonable period: see section 111(2) of the Employment Rights Act 1996 and article 7(a) and (c) of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

Evidence and findings of fact

9. The tribunal heard evidence from the Claimant which he gave by reference to a written witness statement dated 29 July 2021. The tribunal was also referred to a bundle of documents prepared by the Respondent but which included documents relied on by the Claimant.

10. The tribunal has made the following findings of fact:

    10.1 The Claimant was employed by the Respondent as a bus operator / PCV driver based at its Battersea Bus Garage from around April 2008 until his resignation with immediate effect on 16 August 2019.
    10.2 The Claimant was suspended with pay in early July 2019 when a number of allegations were made against him.
    10.3 The Claimant was invited to a fact-finding meeting and subsequently to a disciplinary hearing. On both occasions he said that he wanted to be accompanied by Mr John Neckles (his trade union representative at this hearing) or Mr Francis Neckles (also a trade union representative and, as the tribunal understands it, Mr John Neckles's brother). He says that the Respondent refused to allow either Mr Neckles to represent him as they had been banned from attending the Respondent's premises. The Claimant then resigned.
    10.4 The tribunal has seen a copy of a number of letters or emails sent by the Claimant to the Respondent during the course of the investigation / disciplinary process.
    10.5 In the context of the fact-finding investigation the Claimant wrote on 24 July 2019 saying, amongst other things, that:

        'I hereby serve notice of the assertion of my contractual rights to be accompanied and represented at my Investigation/Fact-Find

Hearing by my Trade Union (PTSC Union) of which I am a member.'

10.6 On 13 August 2019 the Claimant wrote:

*'**Re: Resignation pursuant to S.95(1) (C) ERA 1996***

…

1. I hereby reaffirm my statutory and contractual rights of accompaniment to be accompanied and represented at my Disciplinary Hearing scheduled this morning by my Trade Union through Mr John Neckles.'

10.7 On 15 August 2019 the Claimant wrote in materially identical terms.

10.8 On 16 August 2019 the Claimant tendered his resignation in writing, which was accepted by the Respondent the same day. In his resignation letter the Claimant including the following:

'I hereby in accordance with the ratio held in **Western Excavating (EEC) Ltd v Sharp [1978] IRLR 27** *tender my resignation to take effect forthwith for the following reasons, which is not an exhaustive list:*

1. That through I have been invited to attend two Investigation/Fact-Find Hearings and in so doing; I asserted my contractual rights to be accompanied and represented at those hearings by my Trade Union through Mr John/Francis Neckles. My employer have denied me those contractual rights in breach of contract.

2. That having been instructed to attend a Disciplinary Hearing on the 13th & 16th August 2019. I asserted my contractual and statutory rights of accompaniment to be accompanied and represented at those hearings by my Trade Union through Mr John/Francis Neckles. However, my employer have refused to grant me such rights in breach of contract and law to my detriment.

…

I therefore consider that the actions of my employer as described above which is not an exhaustive list to amount to a fundamental breach of my contract as well as the implied terms of trust and confidence contained therein, of which its repudiation of same has now been accepted by me and has resulted in the tender of my resignation to take effect forthwith.'

10.9 The Claimant confirms in his witness statement that having been denied his 'contractual and statutory rights of accompaniment' and realising that the Respondent had not intention of complying with those rights, he tendered his resignation because he had lost trust and confidence in the Respondent and because to continue with the disciplinary process without his choice of representative would be to his detriment.

10.10 This is reflected in the content of the Claimant's ET1, which again refers to the denial of his 'contractual and statutory rights of accompaniment' which he says led to him accepting the Respondent's repudiation of a fundamental term of his contract by resigning.

10.11 Following the Claimant's resignation nothing of relevance appears to have happened until some time in June 2020 when the Claimant

bumped into a representative from a different union on his way home from a job interview. The Claimant says that the representative told him that others in different bus garages had also been refused representation by one or other Mr Neckles, but they had not resigned and the allegations against them had subsequently not been pursued.

10.12 This prompted the Claimant to contact his former union (he had resigned from the PTSC following his resignation) and either he or Mr Francis Neckles on his behalf wrote to the Respondent on or around 16 June 2020 to ask whether the information provided to the Claimant was true.

10.13 It seems that the Claimant did not receive a reply to this enquiry and so contacted ACAS and then presented his claim to the tribunal on the dates indicated above.

Discussion and conclusions

11. In their closing submissions the parties referred to three authorities, namely (in date order) *Dedman v British Building and Engineering Appliances Ltd* ([1973] IRLR 379, CA), *Machine Tool Industry Research Association v Simpson* ([1988] IRLR 212, CA) and *Marley (UK) Ltd v Anderson* ([1996] IRLR 163, CA). The tribunal has taken into account the guidance from those cases, and the submissions made by both parties.

12. As noted above, the remaining live claims in this case are for unfair dismissal and wrongful dismissal. Those claims were presented many months out of time and the next question is whether the Claimant has established, the burden being on him, that it was not reasonably practicable to have presented his claims in time.

13. The Claimant relies on the acquisition of further information in June 2020 and says that this meant that it was not reasonably practicable to have presented his claims any earlier than that.

14. In this context the tribunal has reminded itself of the guidance in the *Machine Tool* case to the effect that reasonable practicability, including specifically in the context of a case where a claimant is said to have been unaware of relevant facts, involves three stages, at each of which the burden rests on the Claimant (per Purchas LJ at ¶13):

> *'… the expression 'reasonably practicable' imports three stages, the proof of which rests on the* [claimant]*. The first proposition relevant to this case is that it was reasonable for the* [claimant] *not to be aware of the factual basis upon which she could bring* [a claim] *to the Tribunal during the currency of the three-month limitation period. … Secondly, the* [claimant] *must establish that the knowledge which she gains has, in the circumstances, been reasonably gained by her, and that that knowledge is either crucial, fundamental or important – it matters not which particular epithet, if any, is applied – to her change of belief from one in which she does not believe that she has grounds for* [a claim]*, to a belief which she reasonably and genuinely holds, that she has a ground for making* [a claim]*.*

… it is an objective qualification of reasonableness, in the circumstances, to a subjective test of the applicant's state of mind.'

15. The Claimant's representative confirmed in closing submissions that the contractual rights relied on by the Claimant, and which it is said form the basis for the constructive unfair and wrongful dismissal claims, are a right to be accompanied and the duty to maintain trust and confidence. That reflects the Claimant's position as set out in his ET1 and in his witness statement as outlined above, but more importantly it also reflects the position set out in the contemporaneous correspondence up to and including his resignation letter. The Claimant said in terms at that time that he was asserting a contractual right to be accompanied, and that the denial of that right amounted to a fundamental breach of his contract of employment. He said at the time that this was the reason for his resignation. That he was referring to the constituent elements of constructive dismissal can be in no doubt not only from the above matters, but also from his specific reference in correspondence to section 95(1)(c) of the ERA and to the *Western Excavating* case.

16. That being so, the Claimant's argument on reasonable practicability falls at the first hurdle: he was, the tribunal finds, aware of the factual basis on which he could, and subsequently did, bring his claims for constructive unfair and wrongful dismissal by the date of his resignation if not before.

17. In any event, the new facts of which the Claimant says he became aware in June 2020 were not, in the tribunal's judgment, crucial or even important to any change from a reasonable belief that he did not have a claim to one that he did. The further information may have led the Claimant to believe that, if he had not resigned, the disciplinary allegations against him may not have been pursued, but that information could not of itself add anything material to the facts needed to bring a claim for constructive unfair or wrongful dismissal; the Claimant had already been in possession of those facts since his resignation.

18. In the circumstances, the tribunal finds that it was reasonably practicable to present the claims within the primary limitation period, and the tribunal does not have jurisdiction to hear them.

19. Further, even if the tribunal is wrong in that conclusion, the tribunal would have found that the claims were not presented within a further reasonable period. Once the Claimant became aware of the further information in early to mid June 2020 (it must have been before 16 June 2020 as the information is referred to in an email on that date), it took over two months for him to contact ACAS, and then a further month from the date of receipt of the EC certificate to present his claim. Even allowing a week or two for the Respondent to reply to his email query, that would still amount to a further delay of over 2½ months which was not, in the tribunal's judgment, reasonable.

20. For those reasons, the tribunal has concluded that it has no jurisdiction to hear the remaining claims, and they must therefore be dismissed.

Employment Judge K Bryant QC

14 February 2022

JUDGMENT SENT TO THE PARTIES ON

20 April 2022

FOR EMPLOYMENT TRIBUNALS