EMPLOYMENT TRIBUNALS

Claimant: Mr M U Okoli

Respondent: Abellio London Ltd

Heard at: London South Croydon in public by CVP

On: 27 April 2022

Before: Employment Judge Tsamados (sitting alone)

Representation

Claimant: Mr J Barbarindi, Solicitor
Respondent: Ms T Patala, Solicitor

JUDGMENT

The Judgment of the Employment Tribunal is as follows:

1) The Employment Tribunal has no jurisdiction to hear the complaints of unfair dismissal, race and age discrimination, unauthorised deductions from wages and damages for breach of contract, those complaints having been presented outside the requisite time limits.

2) The claim is therefore dismissed.

REASONS

These reasons are provided at the request of the Claimant.

Background

1. By a claim form presented to the Tribunal on 16 June 2020 following a period of early conciliation, starting on 3 June and ending on 9 June 2020, the claimant brought complaints of unfair dismissal, age and race discrimination and monetary claims in respect of his entitlement to notice pay, holiday pay and other payments. His employment ended on 21 February 2020 and so the referral to ACAS under the Early Conciliation scheme was not made

within the primary time limit of 3 months applying to each complaint, which expired on 20 May 2020 in respect of his dismissal. As a result, he does not gain the advantage of the extension of the time limit for the period he was within Early Conciliation. But in any event, even allowing for that, the claim was presented out of time. The claimant sets out his explanation for the delay in presenting his claim to the Employment Tribunal at paragraph 15 of his claim form and to an extent repeats this within a covering letter dated 15 June 2020.

2. In its response received on 1 September 2020, the respondent has denied the claim in its entirety and has further contended that the claim had been presented out of time, with no explanation as to why it was not reasonably practicable to have presented it within the requisite time limit.

3. The case was listed at the ET1 pre-acceptance stage for a one hour open preliminary hearing to take place on 21 December 2020 in which the Tribunal was required to consider whether to extend time for presentation of the claim.

4. That open preliminary hearing was conducted by Employment Judge Hargrove by way of the Cloud Video Platform (CVP). His Orders and Explanatory Note of that hearing was sent to the parties on 5 January 2021. This sets out various orders made and the fact findings reached. It would appear that EJ Hargrove reserved his decision at the end of taking evidence most likely because of insufficient time. He ordered the parties to exchange closing written submissions of fact and law. In addition he ordered the claimant to provide the respondent with details of any actual or hypothetical comparator that he relied upon in respect of his discrimination complaint. Employment Judge Hargrove further directed the matter to be brought back to him on paper and listing and further case management to be undertaken as appropriate.

5. The closing submissions and comparator information were subsequently provided by the parties.

6. Sadly, Employment Judge Hargrove was unable to consider the matter any further due to his ill-health and he subsequently passed away.

7. On 18 June 2021, Regional Employment Judge Freer wrote to the parties informing them of the position and directed that the matter be re-heard by a new Tribunal and that it would be listed for 2 days to be fully completed.

8. On 12 November 2021, EJ Keogh requested the parties to provide dates to avoid for the further hearing and for the claimant to provide a witness statement to the respondent, and to the Tribunal, dealing with the time limit issue. The claimant subsequently provided his witness statement.

9. The case was re-listed for this hearing by CVP in a notice dated 17 February 2022. It was erroneously listed for hearing by a full Tribunal panel whereas in fact it was an open preliminary hearing before a Judge sitting alone.

Documents and Evidence

10. I had before me the following documents: the claimant's bundle for the previous preliminary hearing consisting of 11 pages (which I will refer to as "C" followed by the page number where appropriate); the respondent's bundle for this hearing consisting of 89 pages (which I will refer to "R" followed by the page number where appropriate); the claimant's witness statement dated 9 December 2020 (although this should be dated 2021); and closing written submissions from both parties.

11. I heard evidence from the claimant by way of his written statement and in answer to oral questions.

12. At the close of evidence, both representatives spoke to their written submissions.

Findings

13. I have been careful in my findings not to be drawn into any matters which go behind the findings made by Employment Judge Hargrove unless I came to a contrary view on the evidence or unless otherwise accepted by the parties.

14. The claimant was employed as a Bus Driver by the respondent bus company from 2007 until his dismissal on 21 February 2020. This followed a driving incident which took place on 14 February 2020.

15. The claimant was previously a Unite the Union representative for 12 months and in 2018 had undertaken some training which he said did not include anything to do with Tribunal time limits. He stated that his role was restricted to representing members at disciplinary hearings. Further, he explained that if a dismissal resulted from a disciplinary hearing, any further union involvement would be conducted by the local Convenor, then referred to the Full Time Official and/or Unite's Legal Department.

16. The respondent carried out an investigation into the incident of 14 February 2020, part of which included a fact-finding interview which the Claimant attended on 17 February 2020. The outcome of the investigation was that the claimant was found to have a disciplinary case to answer in respect of the following allegations of gross misconduct:

    • *Dangerous driving (failing to stop accordingly for a pedestrian illegally crossing)*
    • *Action likely to threaten the Health and Safety of yourself, or members of the public*
    • *Serious breach of Company Health and Safety rules and/or procedures (failing to call code red and request emergency services).*

17. This was communicated to the claimant in a letter from the respondent dated 17 February 2020 (at R47-48). It is fair to record that the claimant denies these allegations.

18. In a separate letter of even date the claimant was sent confirmation of his suspension from work (at R71-72).

19. A disciplinary hearing took place on 20 February 2020 at which the claimant was accompanied by a representative from Unite the Union. He

subsequently received a letter dated 26 February 2020 informing of the decision to summarily dismiss him with effect from 21 February 2020 without notice. The letter also notified him of his right of appeal within 7 calendar days of the date of receiving the letter. This letter is at R80-81.

20. On 21 February 2020, the claimant appealed against his dismissal on the basis of the severity of the sanction applied (at R83).

21. The appeal hearing was originally scheduled to take place on 30 March 2020. Unfortunately, as a result of the measures taken to control the spread of Covid 19, the hearing was postponed. It was only by letter dated 15 May 2020 that the respondent indicated that it was now in a position to hear the claimant's appeal and that arrangements would be made to conduct the hearing by telephone conference call or video conferencing depending on his preference (at C8).

22. The hearing took place on 22 May 2020 by way of telephone conference call. The claimant was again represented by Unite, this time by the Union Convenor.

23. The claimant was subsequently notified of the outcome of the appeal by letter dated 27 May 2020. This letter is at R87-89. The decision was essentially that whilst the charge of dangerous driving was overturned, his appeal against dismissal on the other 2 charges was rejected and so the dismissal was upheld.

24. The claimant's position in evidence as to the events leading to submission of his claim to the Employment Tribunal is as follows (at times it was difficult to follow and on key matters vague):

    a. Whilst he was a union representative for 12 months from August 2017 onwards, he received limited training in 2018 which did not extend to cover employment law, Employment Tribunal claims or time limits;

    b. Whilst he was represented by a union representative during the disciplinary hearing, he was not given any advice about bringing Employment Tribunal claims or time limits;

    c. The claimant contacted the Unite Convenor on 21 February 2020, told him he had been dismissed and was asked if he had lodged an appeal, to which he replied that he had. The Convenor only told him not to worry you will get your job back on appeal;

    d. The Convenor subsequently represented the claimant at the appeal hearing. However, the Convenor did not give him any advice about bringing Employment Tribunal claims or as to the time limits involved;

    e. He contacted ACAS by telephone on 24 February 2020 having found their number by using the Google search engine on his mobile phone. He does not recall who he spoke to or whether he was speaking to someone on the ACAS advice line or early conciliation or another department. He explained to the ACAS adviser that he had an issue with his employer and had been laid off and in response the ACAS

adviser told him that he should contact them again when his appeal had been determined. The claimant was initially unable to explain why he contacted ACAS at this point, beyond the need to inform them of the issue. He subsequently said when pressed that he contacted ACAS based on the training he had received as a union representative in case he did not get his job back on appeal. However, stressed on several occasions during his evidence that he was confident that he would get his job back because the charges against him were unfounded;

f. The appeal took place on 22 May and the claimant received the outcome letter on 29 May 2020. This was the first time that he knew he had lost his job. He contacted the Convenor and told him the outcome. The Convenor said he would pass the file to the Unite Full Time Officer and to the Legal Department. Whilst the claimant told the Convenor that he wanted to take legal action, again he states that the Convenor did not provide any advice and simply said he would pass the file on;

g. At the previous hearing, the claimant said that he was aware of 3 month time limit in which to present a Tribunal claim but he also stated that he was unaware that it ran from the date of the original dismissal as opposed to the outcome of any appeal, following his telephone call to ACAS on 24 February 2020. At today's hearing that he accepted that he had actually said that he knew of a 90 day less 1 day time limit running from the date of the outcome of any appeal (although this is not recorded within the record of that hearing);

h. Notwithstanding the Convenor's proposed action, the claimant contacted Unite's Legal Department the following Monday, 1 June 2020. He gave no explanation for this. He telephoned the Legal Department and told them what had happened and that he had lodged an appeal against dismissal. The person he spoke to assured him that a lawyer would call him back. The claimant was aware of the existence of the Legal Department from a leaflet he had from his time as a union representative;

i. Having received no response from the Legal Department by 3 June 2020, he telephoned ACAS and took steps to engage a solicitor because he wanted to make a claim. ACAS advised him that he needed to go through the Early Conciliation process. He filled in an online Early Conciliation notification form. ACAS also advised him that because his claim was possibly out of time it would issue the Early Conciliation certificate straightaway. The certificate was issued on 9 June 2020. This appears odd because in situations such as this ACAS would usually issue the certificate on the same day as the notification. The claimant could not provide any explanation for this and said he was not ACAS;

j. He never heard anything further from Unite the Union;

k. He contacted his solicitor (Mr Babarinde) on 10 June 2020. The claimant was aware that his claim was potentially out of time from 3 June 2020. His explanation for the apparent delay was that you cannot rush into appointing a solicitor and you need to consider your financial

position as well as find one to handle your case. I would note that this is the day after receipt of the Early Conciliation certificate;

l. He initially spoke to his solicitor by telephone that day and was advised to fill in the online ET1 claim form and to submit it to the Employment Tribunal. He attempted to do so but was unable to understand how to complete the form and so telephoned his solicitor again. As a result they arranged to meet up 3 or 4 days later and completed the form together and his solicitor drafted the covering letter referred to above. Given that the covering letter is dated 15 June 2020 it is most likely that this was the day that they met. The claim form was received by the Tribunal on the following day, 16 June 2020;

m. The claimant did not raise any issue of discrimination (or for that matter victimisation for trade union activities) with the respondent prior to the presentation of his claim. He explained that he had every belief that he would get his job back but after the dismissal was upheld, he concluded that had he been of a different race he would not have been treated in this way on the basis of unfounded charges;

n. Whilst he had access to the Internet via his mobile phone and he used the Google search engine to obtain the telephone number of ACAS, he did not make any search enquiries as to early conciliation, Employment Tribunal claims or time limits. He explained that this was the first time he had been in this position and that he relied on the initial advice from ACAS as well as expecting his trade union to advise him;

o. His overall position is that when the internal appeal was concluded it was only then that he could bring a Tribunal claim;

p. He believes that the respondent deliberately delayed the holding of the appeal so as to disadvantage him in respect of the time limits. He made the point that of course they could have conducted a telephone hearing at any time.

Essential Relevant Law

25. Section 111(2) of the Employment Rights Act 1996 states that:

> *"… [Subject to the following provisions of this section] an [employment tribunal] shall not consider a complaint under this section 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.*
> *[(2A)Section 207A(3) (extension because of mediation in certain European cross-border disputes) [and section 207B (extension of time-limits to facilitate conciliation before institution of proceedings) apply] for the purposes of subsection (2)(a).]"*

26. There are two limbs to this formula. First, the employee must show that it was not reasonably practicable to present his claim in time. The burden of proving this rests firmly on the Employee (Porter v Bandridge Ltd [1978] IRLR 271, CA). Second, if he succeeds in doing so, the Tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.

27. Whether it was reasonably practicable for the Employee to submit her claim in time is a question of fact for the Tribunal to decide having looked at all the surrounding circumstances and considered and evaluated the Employee's reasons.

28. The Court of Appeal in Palmer & Anor v Southend on Sea Council [1984] IRLR 119 considered the meaning of the words 'reasonably practicable' and concluded that this does not mean 'reasonable', which would be too favourable to employers and does not mean 'physically possible', which would be too favourable to employees, but means something like 'reasonably feasible', ie 'was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?'

29. May LJ in Palmer stated that the factors affecting an Employee's ability to present a claim within the relevant time limit are many and various and cannot be exhaustively described, for they will depend on the circumstances of each case. However, he set out a number of considerations from the past authorities which might be investigated ([1984] IRLR at 125). These included the manner of, and reason for, the dismissal; whether the employer's conciliation machinery had been used; the substantial cause of the Employee's failure to comply with the time limit; whether there was any physical impediment preventing compliance, such as illness, or a postal strike; whether, and if so when, the Employee knew of his rights; whether the employer had misrepresented any relevant matter to the employee; whether the employee had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the Employee or his adviser which led to the failure to present the complaint in time.

30. When considering whether or not a particular step is reasonably practicable or feasible, it is necessary for the Tribunal to answer this question 'against the background of the surrounding circumstances and the aim to be achieved'. This is what the 'injection of the qualification of reasonableness requires' (Schultz v Esso Petroleum Ltd [1999] IRLR 488, CA)

31. Section 123 governs time limits under The Equality Act 2010. It states as follows:

> *"(1) [Subject to sections 140A and 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."*

32. A Tribunal may allow a claim outside the time limit if it is just and equitable to do so. This is a wider discretion than for unfair dismissal claims. This is a process of weighing up the reasons for and against extending time and setting out the rationale. Case law has suggested that a Tribunal ought to

consider the checklist under section 33 of The Limitation Act 1980, suitably modified for tribunal cases.

33. The factors to take into account (as modified) are these:

    a. the length of, and reasons for, the worker's delay;
    b. the extent to which the strength of the evidence of either party might be affected by the delay;
    c. the employer's conduct after the cause of action arose, including his/her response to requests by the worker for information or documents to ascertain the relevant facts;
    d. the extent to which the worker acted promptly and reasonably once s/he knew whether or not s/he had a legal case;
    e. the steps taken by the worker to get expert advice and the nature of the advice s/he received. A mistake by the worker's legal adviser should not be held against the worker and appears to be a valid excuse.

34. The Tribunal should consider whether the employer is prejudiced by the lateness, ie whether the employer was already aware of the allegation and so not caught by surprise, and whether any harm is done to the employer or to the chances of a fair hearing by the element of lateness.

Conclusions

35. I was grateful to both representatives for their written submissions which they amplified orally. Whilst I have not set them out within my judgment I have nevertheless taken them fully into account in reaching my conclusions.

Reasonable practicability

36. I found the claimant's evidence difficult in that he simply took the view that it was not his fault that he was unaware of the time limits in which to institute claims in the employment tribunal.

37. His evidence was very much assertion with no supporting evidence and was at key points vague. What was clear was that he had been a trade union representative, he had represented members at disciplinary hearings, he had himself been represented at his own disciplinary proceedings by both a representative and by the Union Convener. He had also attended training as a union representative. I found it improbable that the training did not extend to knowledge of basic matters of significant importance such as time limits and that neither his representative nor the convener advised him of such as he claimed.

38. In addition, the claimant admitted that he had a mobile phone which allowed him access to the Internet. Using this he was able to search Google to find the telephone number of ACAS but failed to make any other enquiries as to his position having been dismissed even if he was supremely confident that he would be reinstated on appeal. He knew of his dismissal as early as 21 February 2020. Had he done so he would readily have found out about Employment Tribunal time limits within the requisite time limits even if he was previously unaware of them.

39. I also find his evidence regarding the conversation with ACAS difficult and indeed unsatisfactory. Notwithstanding his assertion that he was not told of time limits, this does seem unlikely given that his approach to ACAS at this stage could only have been for advice. It did not make sense that he was telephoning ACAS purely to notify them of the position. He also stated that he telephoned ACAS following his Union training just in case his appeal was unsuccessful. He also gave evidence before me that he was unaware of any time limits but at the previous preliminary hearing and by his further admission today he stated that he was aware of the time limit (at this stage) but believed it ran from the outcome of any appeal.

40. On balance of probability I do not accept his evidence as to the advice from ACAS. It does seem convenient that the claimant is in effect blaming an anonymous and absent ACAS adviser for not only failing to advise him of the time limits but also of the need to commence the Early Conciliation process. He as provided very sparse and confusing details about that conversation. He has not met the burden of proof that is upon him.

41. In any event, I formed the view that the claimant, coming from a background of a union representative, with training and with the union's resources available to him, and with access to the Internet could have readily discovered the position regarding time limits and the required process to institute timely Employment Tribunal proceedings.

42. I do not find anything untoward in the delay in convening the appeal hearing given the exceptional circumstances of the Covid 19 pandemic. In any event this is a pure assertion by the claimant. I deal with this further below.

43. As a result, I find that it was reasonably practicable for the claimant to have brought his claim by commencing Early Conciliation within the original time limit.

44. In any event, I do not believe the claimant acted within a further reasonable time to lodge his claim. By his own reckoning he was aware that his dismissal had been upheld on appeal by 29 May 2020 but did not contact ACAS until 3 June 2020. His explanation for this does not make sense given what he states that his Convenor and the Legal Department told him. Moreover, there is no explanation as to why ACAS waited until 9 June 2020 to issue the Early Conciliation certificate if they identified to him that his claim was possibly out of time.

45. He approached a solicitor on 10 June when he had been told on 3 June 2020 that his clam was possibly out of time. I note that the certificate was issued on 9 June 2020. Whilst I accept that it obviously take some time to locate, consult and instruct a solicitor, he was on notice that there was a potential time issue by his own reckoning. But in any event there is a further delay between 10 June, on which date he did consult Mr Babarinde, and 16 June 2020, when the claim form was presented. Again at a point when the claimant was aware of the potential time issue and his evidence is that Mr Barbarinde had told him to complete and issue the claim form online on 10 June. Moreover, the claim form contains very little detail of anything more than the unfair dismissal claim and has more detail explaining away the delay.

The complaints of discrimination in particular are simply not set out in any detail. Frankly, it could have been completed relatively quickly.

46. I therefore find that the Tribunal has no jurisdiction to hear the complaints of unfair dismissal, damages for breach of contract in respect of entitlement to notice pay, unauthorised deduction from wages in respect of entitlement to holiday pay or in respect of other payments (which I note are unspecified).

Just and Equitable

47. Turning then to the discrimination complaints and the discretion under section 123 of the Equality Act 2010. The complaints are not set out in any real detail but appears also to relate to the claimant's dismissal. I have taken into account the reasons for and against extending the time limit by reference among other things to section 33 of the Limitation Act 1980. But this is not the only thing I have looked at.

48. I have already dealt with the length of and the reasons for the claimant's delay. However, it appears to me that what the claimant said today is that he was only aware of the possibility of a discrimination complaint on confirmation of his dismissal after the appeal. His claim form does not provide any real details of this and beyond what he said at this hearing in relation to the race discrimination complaint he does not offer any rationale for this or any particulars in support.

49. He accepts that he did not raise discrimination during the course of his employment and so it follows that the respondent was not aware of the possibility of the complaint until it received the claim form and still does not have sufficient particulars on which to defend that claim. Whilst any delay in dealing with this has unfortunately been added to by the sad passing of EJ Hargrove, it is nevertheless the case that the extent to which the strength of the evidence of the respondent has been affected by the original delay.

50. As I have already stated, the claimant points to the respondent's alleged deliberate delay in holding the appeal hearing. However, as I have also said, I do not find anything untoward from this. It is simply a consequence of the exceptional circumstances relating to the Covid 19 outbreak. Whilst the claimant believes it was a simple matter of just setting up a telephone conference, there is no evidence in support of this. The respondent has submitted that the reason for the delay was simply down to the impact of Covid 19 and the National lockdown. All disciplinary matters were put on hold until such time as it could deal with matters safely. When it did resume disciplinary hearings there was a backlog and so it took time to arrange hearings. This seems a quite reasonable and innocuous explanation.

51. In terms of the extent to which the claimant acted promptly and reasonably once he knew whether or not he had a legal case, I am not convinced that the claimant's explanation that this crystallised when he received the appeal outcome. It does appear that the discrimination claim is merely an afterthought given the wording of the claim form which is not much more than boxes and his non-acceptance of the validity of the reasons for his dismissal. It is not borne of any evidence in support and has not even been set out in any particulars within his claim form.

52. In terms of the steps he took to get expert advice and the nature of the advice he received, I cannot comment on that because I do not know what advice the claimant was given by his solicitor. He has relied on the asserted erroneous advice from ACAS and the lack of advice from Unite. However, it does appear to me as a general proposition that he was in a position, I might say better than most, given his membership of a trade union, to seek advice. And as I have said above I do not find on balance of probability that ACAS gave the advice that he asserts he was given or that his union membership did not give him access to that advice.

53. I considered the degree of prejudice caused to the respondent by the lateness of the claim and took the view that the respondent was not aware of these allegations and so was caught completely by surprise when the claim form was received alleging discrimination. The extent to which the claim was delayed does cause harm to the respondent and the chances of a fair hearing, although as I have recognised the circumstances in which this matter has had to be reheard has added to that. However, I am focusing on the initial delay.

54. I also considered whether this was a case where claim is made outside the time limit because a material fact emerges and whether I should consider it was reasonable of the claimant not to have realised he had a prima facie case until this happened (Clarke v Hampshire Electro-Plating Co Ltd [1991] IRLR 490, EAT).

55. The difficulty is that the claimant's whole case is based on his alleged ignorance of the time limits, the advice given by ACAS and the lack of advice from his trade union. Setting that aside, if I were to take the view that he did not realise he had a prima facie case of discrimination until the outcome of the appeal confirming his dismissal, I have to find that it was not reasonable of him to reach this conclusion because he had been dismissed in February 2020 and all that had happened was that the dismissal was upheld on appeal. Moreover, he has provided nothing tangible beyond his assertion of a difference in protected characteristics and his treatment at the time. He has subsequently provided evidence as to comparators on 7 January 2021 but this was not set out within his claim form.

56. I therefore conclude that it is not just and equitable to extend the time limit and so the Tribunal has no jurisdiction to deal with the complaints of race and age discrimination.

57. I would add that it was of assistance to be provided with a number of case authorities by each party in their submissions. These were cases both at first instance and on appeal and I was guided by them. However, the essential case law is as I have cited above and the matter essentially comes down to my own factual assessment of the evidence.

58. By way of a footnote, I decided after giving my oral Judgment and Reasons that I should comment on one aspect of Mr Babarindi's written submissions. At paragraph 3 of his submissions, he refers to the difficulties faced by "a number of claimants" in that to issue a Tribunal claim, an ACAS Early Conciliation Certificate is required. He equates this to the claimant's position

of being told to wait until the internal appeal process concluded "(probably) not bearing in mind that such a process might last longer than 3 months as it did in the claimant's case". He then includes what appears to be an extract which has been cut and paste from the ACAS website which he states gives unclear advice as to what to do if an appeal is delayed. I do not know the wider context in which that advice is given. I would emphasise that these general matters are purely his submissions or assertions. They do not stem from evidence which was put before me. The claimant's case turned on his own evidence as to the advice he said he was given by ACAS as well as the surrounding circumstances, which, as I have indicated above did not persuade me to exercise my discretion favourably under either statue.

Employment Judge Tsamados
27 April 2022