EMPLOYMENT TRIBUNALS

Claimant: Mr M Ali

Respondent: Dnata Ltd

Heard at: Manchester Employment Tribunal **On:** 23 May 2022

Before: Employment Judge Dunlop

Representation

Claimant: Mr A Olufunwa (Representative)
Respondent: Ms J Duane (Counsel)

RESERVED JUDGMENT

1. The claimant's complaint of unfair dismissal was presented outside the time limit set out in s.111 Employment Rights 1996. The Tribunal does not have jurisdiction to hear the complaint.

2. The claimant's complaints of discrimination under the Equality Act 2010 (on various protected grounds) were was presented outside the time limit set out in s.123 Equality Act 2010. The Tribunal does not have jurisdiction to hear the complaints.

3. This means that the Tribunal does not have jurisdiction to hear any part of the claim brought by the claimant, and the claim is dismissed in its entirety. The hearing listed for 17-21 July 2023 is cancelled.

REASONS

Introduction

4. This was a public preliminary hearing to determine whether the Tribunal had jurisdiction to hear Mr Ali's claim, which was presented outside the statutory time limit.

The Hearing

5. A preliminary hearing for case management took place in front of Employment Judge Holmes on 19 August 2021. He decided that there should be a public preliminary hearing on the time limit issue and defined the issue as follows:

   (a) Whether the claimant's claim of unfair dismissal, and all his claims of discrimination were presented out of time, and, if so;
   (b) Whether the Tribunal should extend the time for presentation of the claimant's unfair dismissal claim on the grounds that it was not reasonably practicable for the claimant to have presented that claim within time, and it was thereafter presented within a reasonable time; and
   (c) Whether the Tribunal should extend the time for presentation of the claimant's discrimination claims, on the grounds that it would be just and equitable to do so.

6. The hearing was due to take place by CVP on 8 December 2021. Unfortunately, technical difficulties prevented Mr Ali and Mr Olufunwa from joining the hearing. The hearing was conducted by Employment Judge Cronshaw and in a letter sent to the parties afterwards, she notes that the Tribunal could see that Mr Olufunwa was trying to connect, so this was not a case of non-attendance. This is also borne out by some emails from the day. In the circumstances Employment Judge Cronshaw decided that the hearing should be adjourned and reconvened as a hybrid hearing, with the claimant attending in person and the respondent permitted to attend virtually to minimise the additional costs they would be put to.

7. Employment Judge Cronshaw's letter required the claimant to provide an explanation for the failure to connect and to provide any skeleton argument that he wished to rely on by given dates. Unfortunately, there was a delay in sending out the letter and the first of the relevant dates had passed.

8. Mr Olufunwa (who I understand is an immigration law practitioner who has assisted Mr Ali as a friend) did not comply with the directions, nor ask for an extension of time. His comments today suggested that he had 'missed' them and would have expected the respondent's solicitors to tell him if he had failed to comply. In any event, he provided some documents in the last week or so in response to those orders. The respondent objected to this late compliance, and in correspondence indicated that they would seek to have the documents excluded from the hearing.

9. The hybrid hearing proceeded with no technical difficulties and all parties were able to be seen and heard.

10. At the outset of today's hearing I indicated I was concerned about time (we were listed for three hours) and reluctant to spend time on the document issue which might leave us short of time for the substantive issues to be determined in the hearing. Ms Duane pragmatically conceded that the claimant should be allowed to rely on the late-submitted documents, however, she reserved her position as to any costs application emerging out of the late submission, and out of Mr Ali's non-attendance at the last hearing more generally.

Findings of Fact

11. Mr Ali worked as a customer services representative at Manchester Airport. The respondent provides such services to airlines as a contractor. In late 2019/early 2020 Mr Ali experienced issues with a new supervisor. The main issue seems to have arisen around duties which he had been temporarily excused from, as a result of stressful situation in his personal life. He complained that the supervisor did not respect that adjustment, and had required him to work those duties. He raised a grievance. He also considered that he was discriminated against, including by being refused permission to take short breaks for prayers, as required by his Islamic faith. This had not been an issue with previous supervisors.

12. During the grievance process, Mr Ali had a period of sickness absence. The bundle included a MED3 sickness certificate which covered the period from 10 January 2020 to 1 February 2020. The certificate does not specify the nature of the sickness, but I understand it related to the issues Mr Ali was encountering at work. Mr Ali says there was a second certificate which certified his absence for a further period into March. Although that certificate does not appear in the bundle, the respondent did not dispute that Mr Ali's certified sickness period had continued into March 2020.

13. A grievance outcome letter was produced dated 30 March 2020. The grievance was upheld, at least in large part, although from what I can see there was no admission that discrimination had played a part in the treatment Mr Ali had received. There was a further dispute as to the appropriate resolution of the grievance. The respondent proposed moving Mr Ali away from the Emirates contract and onto the Lufthansa contract. He wanted to stay on the Emirates contract.

14. That debate was overtaken by events as onset of the covid-19 crisis meant that the respondent's physical operations were effectively halted. Mr Ali, along with the majority of his colleagues, was placed on furlough. Mr Ali did not, at this point, make any claim about the treatment he received from the supervisor and/or the respondent's response to his grievance.

15. Subsequently, Mr Ali says that some colleagues were asked to return from furlough. I heard no evidence on the details of this, and the question of who returned, when, and how they were selected is (as I understand it) at issue between the parties. In any event, Mr Ali remained on furlough. Again, although this is now a matter he complains about he did not raise a claim at the time, nor did he raise another grievance.

16. In autumn 2020, the respondent began to consider making large-scale redundancies, due to the effect of covid on the business and the broader aviation section. I understand there was some form of consultation process, but I do not make any specific findings about this. By letter dated 1 October 2020, sent by email, Mr Ali was given notice of dismissal and informed that his employment would be ending, by reason of redundancy, on 31 October 2020.

17. Mr Ali emailed by email dated 6 October 2020. This is a lengthy email, extending to just over one A4 page in the bundle. It is set out formally as a letter and contains a careful and articulate explanation of Mr Ali's complaints

about the dismissal. The bottom of the email contains the footer "Sent from my iPhone".

18. Mr Ali subsequently attended an appeal hearing on 26 October 2020, he was accompanied by a colleague. I do not know if this appeal was conducted in person or by video. An outcome letter sent by email on 27 October 2020 confirms the appeal was unsuccessful. Mr Ali's evidence, agreed by the respondent, is that, at the end of the appeal hearing, he had told the respondent that this was not the end of the matter, and that if the dismissal was confirmed he would take the company to court (or words to that effect). Mr Ali complains that the respondent did not inform him that there was a time limit for pursuing a claim to the Employment Tribunal, when he had been open that it was his intent to do so.

19. Mr Ali produced a lengthy witness statement for this hearing. However, most of the statement deals with the substantive matters in the case. Only a few paragraphs at the end (17-19) touch on why the claim was not presented in time. I heard evidence from Mr Ali and he confirmed those paragraphs on oath. Mr Olufunwa did not seek to ask any supplementary questions.

20. The statement said that Mr Ali had been "unable to function properly as a human being since my dismissal" that he had "sleepless nights" that he "could not function properly" and that he "[could not] think straight or clearly". There was no evidence about the impact of this alleged inability to function on any part of Mr Ali's life other than bringing an employment tribunal claim. There is no clear evidence about the chronology of events which led Mr Ali to recover from this inability so as to bring his claim, which of course he eventually did. In response to questions in cross-examination and from the Judge, he gave further evidence that:
    a. He had not applied for any jobs in the period between dismissal and submitting the claim– he did not feel able to.
    b. He had applied for benefits, which he had done via his mobile phone, having also received some advice from a friend as to what benefits he could claim.

21. The statement also recorded that Mr Ali had been under the impression that he had about a year to make a claim, a fact which he confirmed in his oral evidence.

22. Mr Ali sought to represent himself as being technologically disadvantaged, stating in response to questions that he did not have access to a laptop at home, and did not have a wifi connection. In response to cross examination he accepted that using software was a key part of his job, but said he would only be able to use software he had trained on. He avoided technology outside work. I accept his evidence that shares a home with friends and does not have an access to a laptop or wifi at home. However, he does have a smartphone and access to the internet via its data connection. He says that he uses it for emails, calling and messaging friends, and for Facebook. He volunteered that he does not use Snapchat or TikTok. When pressed, he told me that he would use a search facility on the phone, for example if he wanted to find a phone number.

23. The phone is an iPhone 11 Pro. The iPhone 11 Pro launched in September 2019 and I consider I am entitled to take judicial notice of the fact that this is premium smartphone, which was relatively new at the time of these events and would have powerful performance.

24. Overall, I am not prepared to fully accept Mr Ali's evidence as to his own limitations with technology. I take into account the following matters:
    a. He was in his early 40s and his work involved using software applications, there is no suggestion he has any difficulty with this;
    b. He has a high performance smartphone, it would be usual for someone who was incapable/disinterested in technology to have such a phone;
    c. By volunteering evidence that he does *not* use Snapchat or TikTok Mr Ali demonstrates a broad awareness of the eco-system of modern communications technology. Again, that would seem unusual for someone who was technologically inept or avoidant;
    d. He has been able to use his phone to compose and send lengthy emails of some complexity, which are written and formatted in a professional way.

25. In view of all of this, I am satisfied that Mr Ali would be more than capable to use his phone to investigate how to bring an Employment Tribunal claim. Any internet search will result in numerous websites providing guidance on the subject. All reputable sources, such as the gov.uk website, the Citizen's Advice website and ACAS, prominently highlight the existence of a three-month deadline to start the process on bringing a claim.

26. There was some debate between the parties as to whether Mr Ali could have sought advice in person from a solicitor or law centre or similar organisation given the covid-19 restrictions in force at the relevant time. The respondent suggested, for example, that he could have gone to a library to use a computer there. Bearing in mind that there was a second national lockdown from 5 November 2020 to 2 December 2020, followed by 'tier' restrictions covering much of the northwest, followed by a third national lockdown beginning 6 January 2020 I find that it was not practicable for the claimant to physically seek external advice or support throughout this period. However, I am also satisfied that, even absent lockdown, he would not have done so. If he had wanted to know how to bring a claim his first action would have been to look it up on his phone, because that reflects the way in which today's society functions and I am satisfied that Mr Ali is not an outlier in this respect.

27. In February, Mr Ali was discussing the situation with a friend. The friend mentioned that he believed there may be a three-month time limit to bringing a claim. Very shortly afterwards, on 11 February 2021, Mr Ali contacted ACAS and opened Early Conciliation. He was told by ACAS that he was 11 days late, but that in some circumstances, late claims may be allowed to proceed. He should get his claim in as soon as possible. ACAS issued an EC certificate showing that the conciliation period started on 11 February and ended on 12 February.

28. Mr Ali then attempted to submit his claim using an online form on his phone. He started the form on the 13 February. I accept that he experienced

difficulties completing the form on his phone. (I don't consider that the fact he did so undermines my earlier conclusions about his general ability with technology and, in particular, his ability to use the internet to easily find out information about Tribunal time limits). He tried again on 22 February and was again unsuccessful. The claim was eventually submitted by post on 11 March 2021. I understand by this time Mr Ali had obtained assistance from Mr Olufunwa, although this was not explored in detail in the evidence.

Relevant Legal Principles

29. The legal principles in this area are well-trodden. There are different tests to be applied to the unfair dismissal claim and the discrimination claim.

30. The time limit for an unfair dismissal complaint appears in section 111(2) of the Employment Rights Act 1996 :

> **(2) 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.**

31. The provisions of section 207B provide for an extension to that period where the claimant undergoes early conciliation with ACAS (provided early conciliation is commenced within the initial limitation period).

32. Two issues may therefore arise: firstly, whether it was not reasonably practicable for the claimant to present the complaint before the time limit expired, and, if not, secondly whether it was presented within such further period as is reasonable.

33. Something is "reasonably practicable" if it is "reasonably feasible" (see **Palmer v Southend-on-Sea Borough Council [1984] ICR 372,** CA). Ignorance of one's rights can make it not reasonably practicable to present a claim within time, but only if that ignorance is itself reasonable. An employee aware of the right to bring a claim can reasonably be expected to make enquiries about time limits: **Trevelyans (Birmingham) Ltd v Norton [1991] ICR 488** Employment Appeal Tribunal ("EAT").

34. In **Marks & Spencer plc v Williams-Ryan [2005] EWCA Civ 470**, consideration of whether it is reasonably practicable to bring a claim in time, the following factors will be considered:

> a) what, if anything, the employee knew about the right to complain to a tribunal and of the time limit for doing so; and
> b) what knowledge the employee should have had, had they acted reasonably in the circumstances.

35. The time limit for a discrimination complaint appears in s123 Equality Act 2010:

> **(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.**

36. Again, the early conciliation provisions may operate to extend the limitation period, but only where early conciliation is commenced with the primary limitation period.

37. It is well established that where the act to which the complaint relates is a "continuing act" or an "act extending over a period of time" the claim will be brought in time provided it is presented within three months of the act in question coming to an end. Where a claimant relies on a "continuing act" that may be a series of linked complaints or allegations, as well as a situation where (for example) a single discriminatory policy continues to be applied (**Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530, CA** and **Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548, CA**).

38. In considering whether to extend time on a just and equitable basis, tribunals have a much broader discretion than under the test of reasonable practicability. The factors set out in **British Coal Corporation v Keeble [1997] IRLR 336** may be relevant. Those include the length of, and reasons for, the delay; the extent to which cogency of evidence may be affected and the steps taken by the claimant to obtain advice. Ultimately, it is for the Tribunal to weigh up the prejudice that would result to the claimant in not allowing the claim to proceed, against the prejudice to the respondent in allowing it.

39. The fact that there is a broad discretion does not mean that claimants are safe to assume that it will always be exercised in their favour, as noted by the Court of Appeal in **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434**:
"there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule."

40. The respondent referred to other familiar authorities in its skeleton argument. I need not rehearse them here. Mr Olufunwa relied heavily on one authority, which was less familiar to me. It was the Scottish EAT decision in **Norbert Dentressangle Logistic Ltd v Hutton UKEATS/0011/12/BI** and I took time to read it carefully. The case concerned a finding by a Tribunal that it was not reasonably practicable for the claimant to commence proceedings within three months. That conclusion was challenged on appeal. The Tribunal's decision was upheld, despite significant reservations being expressed by the Appeal Tribunal. There was a key finding of fact that the claimant was "not functioning" at critical points, which made it not reasonably practicable for him to take steps in relation to his claim. The Appeal Tribunal felt unable to go behind this

finding of fact. I do not consider that there are any more widely applicable principles to be drawn from this judgment.

Submissions

41. Mr Olufunwa's submisssions drew heavily on **Hutton** and the assertion that Mr Ali was "unable to function" following his dismissal. He made no distinction between the tests applicable to the unfair dismissal element of the case and the discrimination element of the case, and did not offer much by way of response to many of the points taken in Ms Duane's skeleton argument. He contended that the respondent ought to have informed Mr Ali about the time limits when Mr Ali made it clear at the appeal that he wanted to contest the decision. He did respond to various criticisms made of the conduct of the claimant's case, but that is not material for this determination. I do not intend any criticism of Olufunwa; I know that Mr Olufunwa's professional expertise is in another area of law and I appreciate his efforts to assist in the presentation of Mr Ali's case.

42. Ms Duane prepared a comprehensive skeleton argument which she then spoke to. She set out the authorities and emphasised the lack of specific evidence (including medical evidence) in relation to Mr Ali's alleged inability to function during the initial limitation period. She put forward various arguments around Mr Ali's abilities with technology and stressed the stringency of the test in respect of unfair dismissal. She objected to the Mr Ali's apparent belief that he could rely on the respondent and blame them for his failures. In relation to the discrimination claims, she noted that those claims relied on underlying matters which had taken place in December 2019/January 2020. Mr Ali had chosen not pursue them at that point and they were now stale. It would not be just and equitable, in the respondent's submission, for time to be extended.

Discussion and conclusions

Unfair dismissal

43. There is no dispute that this claim is out of time, unless the time limit can properly be extended. Mr Ali was dismissed on 31 October 2020 which meant that the primary time limit expired on 30 January 2021. In contacting ACAS on 11 February, Mr Ali was 11 days late.

44. I find it easy to conclude that it <u>was</u> reasonably practicable for Mr Ali to have brought his claim within the primary time limit. Mr Ali knew there was a mechanism to bring such a claim and had expressed an intention to do so. Despite the covid restrictions he had the ability – literally at his fingertips – to find out about time limits. He simply failed to do so.

45. Whilst I accept that this dismissal will have hit Mr Ali hard, I reject the submission that it left him unable to function, in the sense that he could not have found out about the time limits and started Early Conciliation. My reasons for rejecting this argument are:
    a. There is a complete lack of any medical evidence.
    b. Mr Ali's own evidence lacked the specific detail (which had evidently been part of the **Hutton** case) as to the impact the alleged

loss of function had had on him (aside from the inability to present his claim).

c. Mr Ali was able to engage with the appeal process, including by using his phone to receive and respond to emails related to this.
d. In claiming benefits, Mr Ali has demonstrated that he was able to complete a similar administrative task to secure his own interests.
e. When Mr Ali did learn about the time limit from a friend, he was in fact able to act promptly in contacting ACAS and obtaining an EC Certificate.

46. For those reasons, I find that there is no reasonable excuse for Mr Ali failing to find out about time limits at an earlier point. I therefore find it was reasonably practicable for him to have brought the claim in time. The time limit for presentation of the unfair dismissal claim cannot be extended, and the Tribunal has no jurisdiction to determine that claim, which must be dismissed.

47. For completeness, I did not accept the respondent's criticism of Mr Ali's actions between 11 February and the final presentation of the claim on 11 March 2021. This one-month period matches the period he would have had if Early Conciliation had been commenced within time. Further, it was evident that there were unsuccessful attempts to submit the claim electronically followed by the process of submitting it by post. If I had accepted Mr Ali's case that it was not reasonably practicable for him to present the claim in time, then I would have been content that the further period he took was reasonable.

Discrimination

48. Again, it is accepted by all parties that this claim has been presented out of time, and the question is whether it has been brought within such time as the Tribunal considers "just and equitable".

49. I found this a much harder Judgment to reach than the Judgment relating to unfair dismissal. It is a finely balanced case. In Mr Ali's favour; the delay is short and he didn't have knowledge of the time limits and took reasonable steps to act once he was made aware of them. Despite those factors, however, I have decided it is not just and equitable to extend time in this case.

50. Reminding myself that the exercise of discretion is the exception, and not the rule, I considered that the following factors were significant:

a. Mr Ali asserts that the alleged earlier discrimination 'infected' his redundancy scoring and therefore his dismissal. Although I am happy to accept that time runs from the date of dismissal (at least for the purposes of establishing a prima facie case at this preliminary hearing) it is relevant that the evidence that the Tribunal would have to hear would relate to matters dating back to 2019/early 2020. Those matters would be relatively stale by the time the case came to be heard.
b. Related to that, it is relevant that Mr Ali did not choose to bring a claim about the earlier matters at the time they occurred, or when he

received the grievance outcome (which he was unhappy about), or even when he was not chosen to return from furlough (a fact which he related to the grievance).

c. Although the effective date of termination was 31 October 2020, Mr Ali was notified of his dismissal on 1 October 2020. Unusually, the whole of the appeal process was conducted during his notice period. This meant that Mr Ali in practice had the benefit of four months, rather than three, to find out about how to make a claim. This weakens his argument that the delay was "only 11 days" and should therefore be overlooked.

d. Reflecting the points made above in relation to the unfair dismissal claim, I do not consider that there was any good reason for Mr Ali to delay in finding out how to bring a claim, and therefore finding out about time limits. This was not a case, for example, where there was an on-going appeal process or some other reason to delay. I have rejected Mr Ali's evidence that he was "unable to function".

51. For those reasons I do not consider that the claim was presented within such time as was "just and equitable". The time limit will not be extended for the discrimination claims, the Tribunal therefore has no jurisdiction to hear them and they will be dismissed.

52. At the conclusion of the hearing I reserved my decision and agreed a provisional date with the parties for a final hearing of the case. That hearing will now not go ahead and the dates are vacated.

Employment Judge Dunlop

Date: 27 May 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

31 May 2022

FOR EMPLOYMENT TRIBUNALS