EMPLOYMENT TRIBUNALS

Claimant: Mr Mohammad G Roble

Respondent: G4S Aviation Security (UK) Ltd

RECORD OF A PRELIMINARY HEARING

Heard at: by CVP **On:** 4 May 2022

Before: Employment Judge Tuck QC (sitting alone)

Appearances
For the claimant: In Person
For the respondent: Mr A Clark, solicitor.

JUDGMENT

1. The claimant's claims for discrimination because of race, religion and belief and age are out of time. It is not just and equitable to extend the time limit.
2. The claimant's claims of unlawful deductions from wages and holiday pay were presented out of time; it was reasonably practicable to have presented those complaints in time.
3. All claims are accordingly dismissed.

The claim

(1) The claimant was employed by the respondent as a security officer from 2002 until April 2020. By a claim form presented on 27 November 2020, following a period of early conciliation from 24 August 2020 until 22 September 2020, the claimant brought complaints of unlawful deductions from wages and holiday pay, and ticked the boxes indicating claims of discrimination because of race, religion or belief and age.

(2) The Respondent denies the claims and has set out that essentially the claimant was required to undergo Annual Recurrent Training (ATR) to secure the required "CTC Clearance" and have a valid airport ID. They say (and have produced today

emails) showing the claimant was invited to a number of training sessions in March – June 2020 but did not attend and was asking for furlough.

(3) The claimant did not give any particulars of discrimination in his claim form and was asked to do so by 18th October. He sought to comply with that order by emails of 17 and 18 October and also 10 November 2021. I have considered all three emails.

Issues for Preliminary Hearing

(4) By letter of 2 January 2022 the ET directed today's Preliminary Hearing to consider whether the claim should be struck out or a deposit order made on the grounds the claim is out of time and /o r has no reasonable (or little reasonable) prospect of success.

Today's hearing

(5) The Claimant represented himself – he had received the email with the bundle attached from the Respondent, but only had one screen, via which he connected to the video hearing. Mr Clark represented the Respondent.

What are the claims?

(6) The claims in this case have not yet been clarified. Today's hearing proceeded on the following basis:

(i) The claimant makes complaints of deductions from his wages for a period in December 2016.

(ii) The claimant's complaints of discrimination arise from his relationship with his manager and a number of adverse comments made over the years.

(iii) The claimant said he was forced to take holiday in March/April 2020 when his airside ID had expired. He was paid for these holidays.

Facts.

(7) The claimant worked for the respondent for over 18 years. To carry out airside security duties he needed to have the appropriate accreditation, for which one requirement was to undergo an annual recurrent training (which is mysteriously shortened to "ATR").

(8) The claimant said that in February / March 2020 he was aware of the expiry of his airport ID coming up and essentially had a 60 day count down. He told his manager. When his pass expired in March 2020, the country was entering into the first Covid lockdown.

(9) The claimant told me today (and this is set out in emails he sent at the time) that he said "I have a right to furlough", but his manager said he didn't. The Respondent states that its security officers were key workers and work was still available. They sought to have the Claimant undertake his ATR, but he

did not attend. I understood the Claimant to be telling he was not convinced that it was an appropriate BAA course.

(10) I asked the claimant to tell me about his discrimination complaints, and he said that 90% of the workforce was Asian – and there were lots of Sikh employees, whereas he is Muslim. He said that his manager made comments such as "you people" and asked "when are you going back" which were racist. He referred specifically to an occasion in 2014 when he broke his thumb at work and did not feel supported.

(11) In mid 2020 the claimant spoke to his union as he was not being paid, and had been denied furlough. The union representative said he spoke to "the company", but that the claimant would now need to go to ACAS. ACAS in turn gave him a reference number and certificate and told him to go to the ET. The claimant confirmed he received the ACAS EC certificate by email on 22 September 2020.

(12) Thereafter he sought to obtain legal advice or assistance but could not afford it, and his efforts were hampered by lockdowns. In the end he completed the ET1 himself, which he said (and I accept) took him some days as he needed to frequently use a dictionary to manage the task.

Submissions

(13) The Respondent points out that the ACAS EC period was from 24 August 2020 until 22 September 2020, and the ET1 was not presented until 27 November 2020, some two months and five days later. Allowing for the 'limitation clock' to have been paused during the EC period, this meant that any acts or omissions after 29 July 2020 were out of time.

(14) The Respondent made several appointments for the claimant to undergo ATR training, the last of which was scheduled to take place on 1 July 2020, but the claimant did not attend. I note that there is also an email from the Respondent to the claimant dated 7 September 2020 which says:

> "we are extremely concerned about your health and well being and you did not attend work since March 2020. … we have sent letters dated 2.9.20 and 5 .9.20 via recorded delivery. Please see attached the copies of those correspondences. Grateful if you could please make a contact with us at your earlies convenience".

The claimant was given two email addresses and mobile numbers -t eh manager about whom he complained and another individual. The claimant appears not to have responded.

(15) The claimant eloquently explained the hardship he has been facing and his desire to work. He said that he has been unable to obtain alternative employment for want of a reference. In response to my question Mr Clark very graciously said that he did not see any impediment to the Respondent providing a "to whom it may concern" reference to the claimant who provided some 18 years of service.

Law

(16) A claim of unlawful deductions from wages must be presented within 3 months of the final deduction, unless that is not reasonably practicable, in which case it may be considered if it has been presented within such further period as is reasonable. This is provided for in section 23 of the Employment Rights Act 1996 ("ERA"). The three month period will be extended in accordance with section 207B ERA when compulsory early conciliation has been entered into; section 207B(4) provides that if a time limit would expire during the conciliation period, it will instead expire one month after the end of the conciliation period.

(17) What it is "reasonably practicable" for a claimant to do is a question of fact (*Wall's Mean v Khan* [1979] ICR 52), and there is a duty on the claimant to show why she could not present her claim within time (*Porter v Bandridge* (1978) ICR 943). Even if there is medical evidence of an impediment, it remains for the claimant to show why they could not bring the claim within time (*Chouafi v London United Busways* [2006] EWCA Civ 689).

(18) In *Schultz v Esso Petroleum* [1999] IRLR 488, the Court of Appeal confirmed that "reasonably practicable" means more than reasonably capable physically of being done, and the best approach is to ask whether it was reasonably feasible to present the complaint within the relevant three months. The injection of the qualification of "reasonableness" also requires a tribunal to consider the surrounding circumstances of a case.

(19) For claims of discrimination the relevant time limit is set out in section 123 of the Equality Act 2010 ("EqA"). Complaints must be presented to an employment tribunal within three months from the date of the act to which the complaint relates, or within such other period as the employment tribunal thinks just and equitable. Conduct extending over a period is to be treated as being done at the end of that period, and a failure to do something should be considered done when something inconsistent occurs or on the expiry of the period in which a person might reasonably have been expected to do something. Section 140B EqA, like section 207B ERA, provides for an extension of time when compulsory early conciliation has been entered into. Section 140B(4) provides that if a time limit would expire during the conciliation period, it will instead expire one month after the end of the conciliation period.

(20) As to the approach to asking whether it is just and equitable to extend the limitation period, as the Court of Appeal set out in *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 at paragraph 26, the burden is on the complainant who is seeking the exercise of the discretion in her favour. Lord Justice Sedley summarised it thus:

> "There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal in the EAT is a well known example) policy has led to

a consistently sparing use of the power. This has not happened and ought not to happen in relation to the power to enlarge the time for bringing ET proceedings."

(21) The tribunal takes into account anything which it judges to be relevant; this is the exercise of a wide general discretion and may include the date from which the claimant first became aware of the right to present a complaint. Consideration here is likely to include whether it is possible to have a fair trial of the issues.

(22) In *British Coal Corpn v Keeble* [1997] IRLR 336 it was suggested that a comparison with the factors listed in s33 of the Limitation Act 1980 might assist tribunals in considering their discretion to extend time. This lists the following matters to be taken into account:

- The length of and reasons for the delay
- The extent which the evidence is likely to be less cogent
- Whether the respondent's conduct contributed to the delay
- The duration of any relevant disability, that is something which deprived the claimant of the mental capacity required in law
- The extent to which the claimant acted promptly once she knew that act or omission might be capable of giving rise to a claim; and
- Steps taken to receive relevant expert advice.

(23) The Court of Appeal in *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] ICR D5 held that *Keeble* "did not more than suggest that a comparison with the requirements of section 33 of the limitation act might help illuminate the task of the tribunal by setting out potentially relevant matters. It is not to be understood as a checklist or framework for the decision. The ET has a very broad general discretion. The approach to be taken is "to assess all the factors in the particular case which it considered relevant to whether it was just and equitable to extend time, including in particular the length of, and the reasons for, the delay."

(24) The ET Rules of Procedure provide at Rule 37 that a claim may be struck out if it has "no reasonable prospect of success".

(25) In *Mbuisa v Cygnet Healthcare Ltd* EAT 0119/18 the EAT noted that strike-out is a draconian step that should be taken only in exceptional cases. Particular caution should be exercised if a case is badly pleaded – for example, by a litigant in person. In *Cox v Adecco and Ors* EAT 0339/19 the EAT stated that, if the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike-out will be appropriate. The claimant's case must ordinarily be taken at

its highest and the tribunal must consider, in reasonable detail, what the claim(s) and issues are. Thus, there has to be a reasonable attempt at identifying the claim and the issues before considering strike-out or making a deposit order. In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case.

(26) In *Ahir v British Airways plc* 2017 EWCA Civ 1392, CA, the Court of Appeal asserted that tribunals should not be deterred from striking out even discrimination claims that involve disputes of fact if they are entirely satisfied that there is no reasonable prospect of the facts necessary to find liability being established, provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been explored. Finally, in *Kaur v Leeds Teaching Hospitals NHS Trust* 2019 ICR 1, CA, Lord Justice Underhill observed that 'Whether [striking out] is appropriate in a particular case involves a consideration of the nature of the issues and the facts that can realistically be disputed…".

Conclusions on issues.

(27) The unlawful deductions from wages of which the claimant complains took place in December 2016. It is over three and a half years out of time. I have no doubt it was reasonably practicable to have entered a claim during that period.

(28) The dates on which the unparticularised complaints of discrimination are alleged to have occurred are more difficult to establish. It is clear that the claimant did not attend work after March 2020 such that any instances of face to face verbal exchanges with his manager must have been before this date. I note that the claimant does complain of some telephone exchanges thereafter – though related, as I understand it, to the refusal to place him on furlough. At this preliminary stage of proceedings I consider it appropriate to take the claimant's case "at its highest". However, he does not assert any contact with his manager after June 2020. His claim is therefore undoubtedly out of time.

(29) There is a broad discretion to extend time if it is just and equitable; and I fully accept the difficulties the claimant faced in seeking to find legal assistance during lock down and with extremely limited funds such that he could not pay for legal advice. He did however contact ACAS by August – just two months after the last of his email exchanges about the ATR course, and confirmed that he received his EC certificate by email on 22 September. I find that the efforts he took to submit his own ET1 are to his credit – but am satisfied he could have done this earlier.

(30) I do consider that the Respondent would suffer prejudice in having to defend this late claim – particularly as the allegations of discriminatory comments seem to have taken place by, at the latest, March 2020. The complaints the Claimant has about the expiry of his airside ID / requirements to take the ATR

course and compulsion to take holiday in April 2020 while the issue was outstanding, were not explained by him to be further complaints of discrimination.

(31) In all the circumstances I do not consider it to be just and equitable to extend the limitation period. In these circumstances I have not determined whether the complaints had no reasonable prospects of success.

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Employment Judge Tuck QC

Date: 4 May 2022

Sent to the parties on:

8 November 2022

For the Tribunal: