EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Temba	**v**	1. Shorterm Limited 2. Liquid Friday Limited

Heard at: Watford **On**: 19 October 2022

Before: Employment Judge

Appearances

For the Claimant: In person
For the First Respondent: Mr Stanley (Counsel)
For the Second Respondent: Ms Splska (Legal Consultant)

JUDGMENT having been sent to the parties on 11 November 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant, Mr Silvery Temba, is a black man of Tanzanian nationality. He is a qualified aircraft fitter. In March 2018, he accepted an assignment to work on aircraft at Heathrow for either the first or second respondent. That assignment came to an end in April 2018 for reasons, the respondents say, connected with their belief about Mr Temba's lack of a right to work in the United Kingdom.

2. The first respondent, Shorterm Limited, says that it is an employment agency which places skilled crew or ground staff within the aviation industry. The second respondent, Liquid Friday Limited is described as an "umbrella" company which is not associated with Shorterm Limited, but which acts as an employer for the purposes of such arrangements.

3. The claimant presented a claim to the Employment Tribunal on 12 March 2020 alleging unfair dismissal, race discrimination, age discrimination, breach of contract as to notice, unlawful deduction from wages and non-payment of holiday pay. The claim was rejected by the Tribunal as it was not accompanied by an ACAS early conciliation certificate number. An application was made on

behalf of the claimant for reconsideration under Rule 13 of the Tribunal's Rules of Procedure. Such an application does not require to be copied to any other party. The application for reconsideration was accompanied by an ACAS early conciliation certificate which had been obtained in April 2020. Early conciliation was conducted between 23 and 24 April 2020. There is no requirement for the respondents to have been contacted for that process to be completed so they may well have been unaware that the process was gone through.

4. In any event, the claim form was accepted by the Tribunal with effect from 1 May 2020 on the basis that it had effectively been amended to include details of the early conciliation certificate. A subsequent authority in 2021, **Pryce v Baxterstorey [2022] EAT 61**, demonstrates that this was, in fact, the wrong approach. However, it remains the case that the Tribunal accepted the claim there has been no appeal against that decision, and in those circumstances, the case has proceeded.

5. I have taken the view that it is important to provide some resolution today rather than exploring the jurisdictional point which arises from the **Pryce** case; had I done so it is likely to have led to the presentation of a further claim involving the same issues.

6. The complaint of unfair dismissal was not accepted by the Tribunal because the claimant did not have the necessary qualifying service (2 years).

7. Unfortunately, the history of this claim has been protracted. The matter came before Employment Judge Reindorf on 3 November 2021. This was a telephone hearing but one which the claimant or his then representative did not attend. Mr Stanley, who appears again today, was present for the first respondent and the second respondent was represented by Ms Ali (a litigation executive).

8. Judge Reindorf listed a one-day public preliminary hearing to decide whether these claims had been presented within the relevant statutory time limits and to consider any other applications that were outstanding. The Judge made orders for the claimant to provide particulars of his age discrimination claim, his claims for unpaid wages, holiday pay and notice pay, and an explanation of any delay in presenting those claims to the Tribunal. The claimant subsequently withdrew his age discrimination claim by letter dated 28 November 2021.

9. The claimant's representative complied with Judge Reindorf's order in a series of documents dated 28 November 2021.

10. The public preliminary hearing was listed to take place on 30 May 2022 by video. It was suggested that this was a change from what had been ordered by Judge Reindorf but, in fact, I cannot see that she had directed that the case be heard in one way or the other so nothing turns on this.

11. The hearing of 30 May 2022 came before Judge Martin Warren but was ineffective. Judge Warren's reasons for postponing the hearing are set out clearly in his case management summary and I shall not repeat them here. I note however that at paragraph 10 of his orders he expressed concern about

the lack of evidence relating to issues that the Tribunal would have to decide, and he also mentioned that there might be some costs risk in this case. These are matters that I may have to return to.

12. Because of the Judge's decision to postpone, the matter was unfortunately delayed further and eventually came before me today for hearing. In deciding the preliminary issues, I started the hearing by focusing on the issues identified by Judge Reindorf. I suggested that paragraph 3a of her case management orders required me to make a factual determination about whether the claimant's claims had been presented in time. The parties agreed. There are further issues that may fall to be decided, for example, if I accept that the claim has been presented in time or that time should be extended for it, there is an application by the respondents to strike it out as standing no reasonable prospect of success. I have not considered this application at this stage.

13. I heard evidence from the claimant, and from Mr Duncan Smart of the first respondent. The second respondent did not call evidence.

14. I also considered the documents to which I was taken in two bundles. The principal bundle is that prepared by the first respondent but the claimant produced a supplemental bundle of about fifty pages. References to page numbers in these reasons preceded by the letter C relate to the claimant's bundle. The claimant's witness statement dated 23 October 2021, which I read. is at page C32. Mr Smart's witness statement dated 27 May 2022, which I also read, is at page 280 of the main bundle.

15. I say at the outset that I accept that both the claimant and Mr Smart have done their best to give me honest evidence as they perceive the facts to be. This is one of those happy cases therefore where I have not concluded that someone has been less than truthful in their evidence to me.

16. One further step that I took at the commencement of the hearing was to clarify with the claimant what his complaints of race discrimination are. His former representative had provided particulars of this claim in a document dated 28 November (page 52). I gave the claimant the opportunity of a short break to reconsider this document. The claimant told me that his claim of race discrimination is that he was dismissed by the respondents in April 2018 because their belief that he lacked the right to work in the United Kingdom was something intimately bound up with his ethnicity and/ or nationality.

17. The claimant characterised his complaint as one of discriminatory dismissal but Mr Stanley, on behalf of the first respondent and supported by Ms Splska for the second respondent, characterised it slightly differently. Mr Stanley said that the allegation was a discriminatory refusal by the respondents to accept that the claimant had demonstrated a right to work in the United Kingdom.

18. It has not been necessary for me to decide which formulation is more accurate because, whichever way one describes it, the act or omission occurred in April 2018, approximately 6 April 2018 although the exact date does not matter in the context of the preliminary issue.

19. Despite the time I gave the claimant, he was unable to identify any other allegations of race discrimination. I have, however, looked at the case correspondence to see whether that assists him.

20. I explained to the parties that for the purposes of deciding the preliminary issue, I have accepted that there is a contingent liability (subject to the Tribunal's jurisdiction and proof) for the allegation of race discrimination which might attach to either respondent. It is arguable that one of the respondents is a principal under section 41 of the Equality Act 2010, and it is the second respondent's positive case that it was the claimant's employer.

21. There is a further issue about the correct identity of the claimant's employer. The claimant contends that he was employed by the first respondent, which it disputes. This is not an issue that I have needed to resolve in deciding the preliminary issue.

22. I turn then to the facts. I make these findings on the balance of probabilities having regard to the evidence but to a large extent the facts were uncontroversial.

23. The allegation of discrimination and the allegations of underpayment of notice pay, wages and holiday pay all relate to treatment which occurred in April 2018. That is when the claimant's engagement ended and his alleged discriminatory dismissal occurred. This is the point therefore when his claims for race discrimination, notice pay and accrued holiday pay crystallised.

24. The claimant delayed in presenting his claim until, at the earliest, 12 March 2020, when he attempted to present a claim. That is a period of approximately one year and eleven months. Under section 123 of the Equality Act the relevant time limit for the presentation of claims is three months from the act complained of; this time limit can be adjusted to enable compliance with the early conciliation procedure but for this to apply early conciliation needs to be started during the primary limitation period (which the claimant did not do). It is immediately apparent therefore that the complaint of race discrimination was presented to the Tribunal more than a year and a half after the expiry of the basic time limit.

25. I can only extend time for a late discrimination claim if it is just and equitable to do so and the burden of proving this lies on the claimant. Furthermore, the concepts of justice and equity work both ways, the Tribunal must consider not just what is fair to the claimant but must balance this with the hardship that respondents face in meeting a late claim. The underlying context is that Parliament, which invests the Tribunal with its powers, has specifically directed that time limits for discrimination claims should be short: in other words, claimants are expected to get on with it.

26. As far as claims for unpaid sums are concerned, the test is whether it was "reasonably practicable" (that is, feasible) for the claimant to present a claim in time. If it was not reasonably practicable to present the claim in time, a second

question arises, namely was it presented in such further period as is reasonable? The test here is not one of justice and equity but what was practical for the claimant to achieve within the basic time limit and, if not, whether they acted reasonably promptly when it became practicable for them to present a claim.

27. Against that broad legal background, I turn to the claimant's explanation for his delay in presenting his claims, starting with the money claims (wages, notice pay and holiday pay). I do not find that the claimant has addressed the tests summarised above in the evidence he gave me. He did not identify any impediment to him presenting his claims for unpaid sums within the relevant time limit (3 months from when the payment should have been made). Indeed, I note that on the 27 April 2018 he wrote to the first respondent and referred specifically to section 13 of the Employment Rights Act 1996 (page 105). This was a clear assertion of the right not to suffer unlawful deduction from wages and indicates to me that he was aware of the claims that he could bring in the Employment Tribunal. I asked the claimant during evidence whether this letter was written on his behalf or whether he wrote it himself; he recalled writing it himself and he confirmed that he knew about section 13. If he was capable of writing a letter asserting the relevant statutory provision and if he was clearly aware that he believed he had been underpaid, it is difficult to see how it was not practical for him to present his claim in respect of wages, holiday pay or notice pay to the Tribunal within the three-month period. Moreover, I find it impossible to conclude that he was unaware of the relevant time-limits. If I am wrong in that, I would not find that it was reasonable for him to be ignorant of them when he had informed himself about other aspects of the relevant law. For these reasons the claimant has not persuaded me on the evidence that it was not reasonably practicable for him to present his money claims in time.

28. If I were wrong in that, the claimant has not convinced me either that the period of delay between it becoming practicable to do so and actually presenting his claim was a reasonable one. As mentioned, he presented his claim in March 2020 when time for this claim ran out in July 2018. That is a gap of well over a year and a half. In that time, he had the benefit of advice from a friend who could produce particulars of claim and seems to have had some understanding employment law processes. As I have mentioned, the Claimant himself was aware of relevant provisions in the Employment Rights Act.

29. I find that the claimant's money claims have been presented outside the relevant time limits in the Employment Rights Act and Extension of Jurisdiction Order and that the Tribunal does not have jurisdiction to hear them. They are, therefore, dismissed.

30. That leaves the complaint of race discrimination. This, too, was presented outside the relevant time limit. The claimant has given two explanations for why this delay occurred. The first is that he was awaiting information from the Home Office to confirm the status of his right to work in the United Kingdom. I can understand why that might lead him to hesitate in commencing Employment Tribunal proceedings. He raised the status issue through his MP and received a response from the MP on 18 June 2018 (page 120). The claimant's dealings

with his MP and the Home Office provides an explanation for some delay in the early part of the total period but does not explain the long delay that occurred after June 2018.

31. A second explanation the claimant gave was the impact of the Covid-19 pandemic. The problem with this is that the first national lockdown did not occur until the end of March 2020 whereas the Claimant presented his claim on 12 March 2020, albeit unsuccessfully. While the nation may have been growing alarmed at the news concerning Covid-19, it was not an impediment to presenting claims at that time. In fact, claimants were able to present claims throughout the period of lockdown using the online service. Referring to Covid is simply not an explanation for the long period of delay.

32. The claimant was asked to consider various pieces of correspondence as part of his evidence. There was a flurry of correspondence between him and the first respondent between April and August 2018. In a letter dated 9 August 2018 (page 149) the first respondent responded to the claimant's allegations and gave a detailed explanation of what they had done to check his right to work in the UK. The next letter in the correspondence chain is the claimant's response dated 6 November 2019 (page 152) though marked as received in December 2019. Whichever is correct, that is more than twelve months after the last piece of correspondence. When the claimant was pressed on the reason for that, his only explanation was that he was giving the respondents time, as he put it, to "see sense" and to resolve this matter without the need for litigation: it is difficult to see how if there was no correspondence between parties. In my judgment there was a long period of delay for which there is simply no good explanation.

33. There was a further exchange of correspondence in December 2019. The claimant wrote on 9 December 2019 and again on 10 December 2019 and received a response dated 19 December 2019 (page 161). I have looked at this letter very carefully because it was received within three months of the date when the claimant attempted to present a claim to the Tribunal. I have considered whether there is material which might provide some fresh support to his allegation of race discrimination which somehow "restarts the limitation clock". I do not find that it does.

34. This is a case, therefore, where the claimant has not provided any compelling explanation for his substantial delay in presenting his claim but that is not my only consideration: I heard evidence from Mr Smart about potential prejudice to the respondent which I accept. The aviation industry suffered a substantial downturn during the pandemic and the individuals who were dealing with the claimant, Mr Malt and Ms Brown, have left the first respondent. Mr Smart said that Mr Malt has since died and the first respondent is no longer in contact with Ms Brown. While some documents have been extracted from their former email accounts, this was a difficult and time-consuming exercise. I find that this is clear evidence of prejudice to the respondents because of the claimant's delay.

35. I find, therefore, that the claim of race discrimination has been presented out of time and that is neither just nor equitable to extend time to allow it to proceed. It is therefore dismissed.

36. That disposes of all the remaining claims before the Tribunal but for the sake of completeness, I confirm that the claim of age discrimination is dismissed on its earlier withdrawal.

____
Regional Employment Judge Foxwell

Date: …22 December 2022 ………..

Sent to the parties on: 23 December 22

For the Tribunal Office