EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms D M West	v	**Ward Security Limited**

OPEN PRELIMINARY HEARING

Heard at: London South by CVP **On: 4 April 2023**

Before: Employment Judge Truscott KC

Appearances:

For the Claimant: **In person**
For the Respondent: **Mr T Goodwin Counsel**

JUDGMENT

1. The claim for unpaid wages were presented outside the primary time limit contained in section 23(2) of the Employment Rights Act 1996 and it was reasonably practicable for the claim to be presented within the primary time limit, the claim for unpaid wages is struck out.

2. Further, the claim for unpaid wages is a claim for breach of contract in respect of which the Tribunal has no jurisdiction, accordingly the claim is struck out.

3. The claim of age discrimination was presented outside the primary time limit contained in section 123(1)(a) of the Equality Act 2010 and it is not just and equitable to extend the period within which the claims fall to be lodged. The claim of age discrimination is struck out.

4. Further, the claim of age discrimination has no reasonable prospects of success and is struck out.

5. The hearing listed for 21 – 25 August 2023 is discharged.

REASONS

Preliminary

1. This preliminary hearing was fixed to address the issue of time limits for the claims which had been lodged and whether the claims had a reasonable prospect of success. The claimant's claim was unclear. The ET1 included a number of complaints. It is not known if those are supposed to be further claims or merely background, although none of them disclose facts upon which any allegation of discrimination could be founded or, for that matter, any other claim that the Tribunal has jurisdiction to hear.

2. At a Case Management Preliminary Hearing on 2 November 2022, the claimant was ordered to [34]:

2.1 Clarify what her claims of age discrimination were (Orders, 1.1).
2.2 Clarify her unlawful deductions claim (Orders, 1.2).
2.3 Not expand her claim (Orders, 1.3).

3. After the Case Management Hearing in November 2022, EJ Khalil issued a written order (emphasis original):

> *On or before **23 November 2022**, the claimant is to provide further clarity to the respondent in writing in relation to her discrimination claims, setting out a brief description of the alleged acts of discrimination, the dates, who she says was responsible and who are her comparators (whether actual or hypothetical).*

4. The claimant provided further particulars on 21 November 2022 [37]. Although not clear, the claimant appears to advance the following claims:

1) Between October 2017 and July 2018, the claimant was told that she "*should enjoy* [a] *boring job as* [she is] *a nan*", which (presumably) is an allegation of age discrimination (set out in the ET1 [9]).
2) She was told it looked like she was sleeping with a dog because of hair on her clothes [8]. This would appear to be a comment made by a client in February 2020 para 19 of GoR [42].
3) The claimant was removed from a site, 1 Holborn Place "*in 2020*" because of her "*age and character*" (further particulars [37]).
4) The claimant's unlawful deductions claim is, effectively, that she was employed initially on a fixed hours contract providing 60 hours work a week and had now been subjected to a zero hours contract without her consent (further particulars [37]).

5. There was a bundle of documents available to the Tribunal. The claimant made submissions on her own behalf. She did not provide any additional documents to the Tribunal. The respondent provided a skeleton argument.

Findings

6. The claimant is employed by the respondent as a security officer. Her employment commenced on 16 October 2017 and she remains in employment.

7. The respondent is a security business which operates by deploying security staff to various sites operated by the respondent's clients across London. The respondent's terms with its clients include a provision wherein it will remove a security officer it has deployed to the site on the client's request.

8. The claimant's terms and conditions have been updated on a number of times during her employment either due to standard changes across the workforce, but also on occasion due to the need to redeploy the claimant from a site due to her own conduct. The claimant's contractual history with the respondent is as follows (insofar as it is relevant):

8.1. The claimant was initially engaged under a contract issued at the commencement of her employment [48-71] (the "First Contract"). That provided for 50 hours a week, but gave the respondent a discretion to alter those hours [52].

8.2. The claimant's hours were altered on 16 October 2018, such that the engagement of 50 hours a week was reduced to 45 hours per week [72]. The claimant raised no objection.

8.3. A new contract was issued on 8 August 2019 [78-96] (the "Second Contract") (backdated to 14 February 2019, when the changes had been implemented), which provided for flexibility in hours, specifically [81]:

> "Your hours of work and pay will vary according to the operational requirements of the business and as notified to you in your Assignment Instructions.
>
> The Company will endeavour to provide the Employee with average working hours up to 48 hours per week based on 7 calendar days, based on operational needs and notify the Employee in advance by means of a roster schedule.
>
> […]
>
> It is a condition of your employment that you work flexibly. Accordingly, you acknowledge that there may be periods when no work is available and the Company has no obligation to provide you with any work, or to provide you with any minimum number of hours work or to provide any minimum number of hours in any given week. However, the Company will endeavour to allocate suitable work to you when it is available. […]"

9. The claimant raised no objections, either on implementation of the new terms in February 2019 or when the new contract was issued in August. Nor did she raise any objection when the contract was re-sent to her on 3 September 2019 [97].

10. In each iteration of the contract and in each update / amendment, remuneration has been by way of an hourly rate. The claimant has never been entitled to a fixed annual salary, her income varies according to what hours she works.

11. The claimant presented a claim to the Tribunal on 13 May 2021 [3]. This followed ACAS conciliation conducted between 23 February 2021 and 6 April 2021. Accordingly, any act / omission that took place on or before 2 January 2021 is (at least *prima facie*) out of time.

Law

The Wages Claim

12. The right not to suffer unlawful deductions is set out at section 13 of the Employment Rights Act 1996 ("ERA 1996"):

> (1) An employer shall not make a deduction from wages of a worker employed by him unless—
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
>
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
>
> […]
>
> (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.
>
> […]

13. In order for there to be any unlawful deduction, the wages due to the claimant must have been "*properly payable*" (s13(3)). To assess whether wages are properly payable, the Tribunal must consider what is due under the contract according to **Delaney v. Staples (t/a De Montfort Recruitment***)* [1992] AC 687 HL at 692 A-C:

> … the essential characteristic of wages is that they are consideration for work done or to be done under a contract of employment. If a payment is not referable to an obligation on the employee under a subsisting contract of employment to render his services it does not in my judgment fall within the ordinary meaning of the word "wages".

Time limit

14. Section 23(2) of the Employment Rights Act 1996 provides:

> "an Employment Tribunal shall not consider a complaint…unless it is presented to the Tribunal before the end of the period of three months beginning with the effective date of termination."

15. A Tribunal may only extend time for presenting a claim where it is satisfied of the following:

> "It was "not reasonably practicable" for the complaint to be presented in time. The claim was nevertheless presented "within such further period as the Tribunal considers reasonable" (Section 23(4) ERA 1996.)

Time limit discrimination

16. Section 123(1)(b) of the 2010 Equality Act permits the Tribunal to grant an extension of time for such other period as the employment tribunal thinks just and equitable. Section 140B of the Equality Act 2010 serves to extend the time limit under section 123 to facilitate conciliation before institution of proceedings.

17. The Tribunal has reminded itself of the developed case-law in relation to what is now section 123 of the Equality Act 2010. That has included a group of well-known judgments setting out the underlying principles to be applied in this area, together with recent occasions on which those principles have been applied and approved by later courts and tribunals. Particular attention has been paid to the historical line of cases emerging in the wake of the case of **Hutchinson v. Westwood Television** [1977] ICR 279, the comments in **Robinson v. The Post Office** [2000] IRLR 804, the detailed consideration of the Employment Appeal Tribunal in **Virdi v. Commissioner of Police of the Metropolis et al** [2007] IRLR 24, and, in particular, the observations of Elias J. in that case, as well as the decision of the same body in **Chikwe v. Mouchel Group plc** [2012] All ER (D) 1.

18. The Tribunal also notes the guidance offered by the Court of Appeal in the case of **Apelogun-Gabriels v. London Borough of Lambeth & Anr** [2002] ICR 713 at 719 D that the pursuit by a claimant of an internal grievance or appeal procedure will not normally constitute sufficient ground for delaying the presentation of a claim: and observations made by Mummery LJ in the case of **Ma v. Merck Sharp and Dohme** [2008] All ER (D) 158.

19. The Tribunal noted in particular that it has been held that 'the time limits are exercised strictly in employment … cases', and that there is no presumption that a tribunal should exercise its discretion to extend time on the 'just and equitable' ground unless it can justify failure to exercise the discretion; as the onus is always on the claimant to convince the tribunal that it is just and equitable to extend time, 'the exercise of discretion is the exception rather than the rule' (**Robertson v. Bexley Community Centre** [2003] IRLR 434, at para 25, per Auld LJ); **Department of Constitutional Affairs v. Jones** [2008] IRLR 128, at paras 14–15, per Pill LJ) but LJ Sedley in **Chief Constable of Lincolnshire Police v. Caston** said in relation to what LJ Auld said "there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised."

20. The Tribunal's discretion is as wide as that of the civil courts under section 33 of the Limitation Act 1980; **British Coal Corporation v. Keeble** [1997] IRLR 336; **DPP v. Marshall** [1998] IRLR 494. Section 33 of the Limitation Act 1980 requires courts to consider factors relevant to the prejudice that each party would suffer if an extension was refused, including:

- the length and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;
- the extent to which the party sued had co-operated with any requests for information;
- the promptness with which the claimant acted once he knew of the possibility of taking action; and
- the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

21. Although these are relevant factors to be considered, there is no legal obligation on the Tribunal to go through the list, providing that no significant factor is left out; **London Borough of Southwark v. Afolabi** [2003] IRLR 220.

22. Incorrect legal advice may be a valid reason for delay in bringing a claim but will depend on the facts of the case: **Hawkins v Ball & Barclays** [1996] IRLR 258 and **Chohan v Derby Law Centre** [2004] IRLR 685. In answering the question as to whether to extend time, the Tribunal needs to decide why the time limit was not met and why, after the expiry of the primary time limit, the claim was not brought sooner than it was; see **Abertawe Bro Morgannwg University Local Health Board v Morgan [**2014] UKEAT/0305/13 unreported per Langstaff J. However, in determining whether or not to grant an extension of time, all the factors in the case should be considered; see **Rathakrishnan v Pizza Express (Restaurants) Ltd** (2016) IRLR 278.

23. The Tribunal has additionally taken note of the fact that what is now the modern section 123 provision contains some linguistic differences from its predecessors – which were to be found in various earlier statutes and regulations – concerning the presentation of claims alleging discrimination in the employment field. However, the case law which has developed in relation to what is now described as "the just and equitable power" has been consistent and remains valid. The Tribunal has therefore taken those authorities directly into account in its consideration.

24. It is also a generally received starting proposition that it is for the claimant who has presented his or her claims out of time to establish to the satisfaction of the Tribunal that the "just and equitable" discretion should be exercised in the particular case.

25. When considering claims added by way of amendment, the Tribunal must judge time limits by reference to the date on which the application to amend was made (being 7 January 2022). In **Newsquest (Herald and Times) Ltd v. Keeping** EATS 0051/09 (unrept, 12 March 2010) Lady Smith said at para. 23:

> It is trite that the question of whether a new cause of action contained in an application to amend would, if it were an independent claim, be time barred, falls to be determined by reference to the date when the application to amend is made not by reference to the date of presentation of the ET1 in the complaint which the claimant seeks to amend.

26. Whist the Tribunal must consider whether it is just and equitable to extend time to allow the amendment, it is not required to make a definitive decision on time: **Galilee v. Commissioner of Police of the Metropolis** [2018] ICR 634. This will be particularly acute in cases where a claimant alleges a course of ongoing conduct.

Strike Out

27. The Tribunal's discretion to strike out a claim is set out at rule 37(1) of the ET Rules:

> At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
> (a) that it is scandalous or vexatious or has no reasonable prospect of success;

28. A claim is said to have reasonable prospects if its prospects are "*more than fanciful*" (**A v. B and anor** [2011] ICR D9, CA). Strike out should not be considered until the Tribunal has tried to identify what the claims are **Cox v. Adecco** [2021] ICR 1307 EAT.

29. The power to strike out a claim (a) the power to strike out a claim ought to only be used sparingly in discrimination claims; and (b) the claimant's case should be taken at its highest when assessing prospects of success (**Ukegheson v. Haringey London Borough Council** [2015] ICR 1285).

DISCUSSION and DECISION

30. The respondent's application, in summary, is that the claim should be struck out for the following reasons:

30.1. Neither the age discrimination nor the unlawful deductions claim has any prospects of success (r37(1)(a)) because:
(a) The discrimination claims are out of time.
(b) None of the claims could be made out on the facts.

30.2. The claimant's failure to properly plead her claim, contrary to EJ Khalil's directions at the previous PHCM, is unreasonable (r37(1)(b)) and/or amounts to non-compliance with an order (r37(1)(c)).

31. In relation to the point at 30.2, the Tribunal decided that the claimant had tried her best to comply with the order.

32. The claimant has not particularised the first or second claims, those she was ordered to clarify, set out in para 4 hereof. The third complaint relates to being replaced by a younger person and was put forward in response to the order by EJ Khalil. In respect of the new claim (alleging that the claimant was removed from 1 Holborn Place), she clarified that she meant 1 Smarts Place, Holborn.

33. The claims (taken at their highest) are very significantly out of time:

33.1. The first complaint (October 2017 to July 2018) occurred somewhere between 39 and 30 months before the limitation date.

33.2. The second complaint is probably dated February 2020.

33.3. The third allegation fell (the claimant says) at some point in 2020 – so somewhere between 13 months and one month before the limitation date. However, as this claim can only be advanced by way of amendment, the relevant date is not the date of the ET1 but the date of any application. Assuming the date of the further particulars (21 November 2022) as the date of the application (although, in fact, no such application has been made), that renders this claim over 22 months out of time.

34. The claimant did not provide any explanation why she is raising these allegations months, if not years, after the deadline.

35. On the basis of the guidance set out earlier and weighing all the relevant factors, the Tribunal considers that it is not proportionate to resolve the discrimination issues when they are out of time, accordingly it is not just and equitable to extend the time for lodging the claims and the claims of discrimination are struck out.

36. In any event, the claimant was only relying on age discrimination as a basis for making some claim against her employer not because there was such a claim. The claim has no prospect of success.

37. The claim for wages is actually a claim that the respondent has failed to provide work and/or imposed new terms without consent, rather than any claim that the respondent failed to pay the claimant for work done, or paid the claimant at a reduced rate. Specifically:

37.1. Question 9.2 of the ET1 [11] (spelling, grammar and formatting original):

> *I want compensation to make up my loss of earnings since they took away my original contract without getting my consent or without a valid reason.*
> *I was working 60 hours per week up until Oct 20* […]
> *I also want my original 60 hour contact reinstated.*

The claimant then goes on to claim "*Unfair dismissal from original contract and loss of earnings*". She has not been dismissed and cannot bring such a claim, but it shows that C's claim is about the 'loss' of her former contractual terms.

37.2. The claimant's email of further particulars [37] (the wages claim having not been pleaded in the ET1) (spelling, grammar and formatting original):

> *Sam harding spoke to me regarding a zero hours relief officer position which I told him straight that I wasn't interested.*
> *Due to the fact I was taken on on a 60 hour contract with permanent site, and this was what I needed due to financial Commitments , however he changed it anyway without my consent or my knowledge.*
> *I only questioned it when they didn't give me work for the full month lonth and my pay was low.*
> *This was when I was made aware of it , I have never signed for zero hours contract , and it was taken from me without my permission and through pure mliciousness...*

38. The wages claim is destined to fail for the following reasons:

38.1. There has been no deduction. What has happened is that the claimant has not been provided with work – for various, legitimate reasons (see AGoR, paras 15-21 [44-45]).

38.2. A claim for failure to provide work, as opposed to making deductions from pay for work undertaken, is properly brought as a breach of contract claim and cannot be advanced as a section 13 deductions claim in accordance with the EAT in **Besong v Connex Bus (UK) Ltd** UKEAT/0436/04 (unrept 21 June 2005):

> *36.* […] *The Applicant had never complained that he was not properly paid for the shifts that he actually worked. His complaint was always that the Respondents did not make shifts available for him to work as frequently as they should have done and on the days and at times that suited him. His complaint therefore was that, in breach of contract, he was not given a proper opportunity to work and earn wages. The failure to allow an employee to work and thereby to earn wages does not mean, in our judgment, that there is for that employee a claim for*

unlawful deductions from wages. Just like [the Claimant in *Delaney*]*, who was unable due to her employer's breach of contract to work during her notice period, this Applicant was also unable to work because of the Respondents' breach of contract, as the Tribunal found. His claim was not therefore a claim for a debt outstanding, that is that he had not been properly paid for services rendered. Properly analysed his complaint was therefore not a complaint of unlawful deductions from his wages.*

37. In [*Whitmore v Commissioner of Inland Revenue* (EAT/0727/02)] *the EAT held at paragraph 26, on the particular facts of the case, that:*

> *"…in cases in which the employee asserts that he or she should have been paid monies to which he or she was contractually entitled, the claim can be put both in debt as a claim for monies due, ie because those monies due had not been paid that has been a wrongful deduction, or series of deductions and in damages as monies lost by reason of the employer's breach of contract in failing to pay, ie a claim there has been a breach or series of breaches of contract falling within the 1994 Order."*

It is clear from this Applicant's Originating Application however that his complaint is not that a specific sum was owed to him, as was the case in Whitmore; but rather that he was not paid because shifts were not offered to him. That his claim was a claim for damages seems to us to be clear from paragraph 6 of his Originating Application, which stated:

> *"The aforesaid breach of his contract of employment has resulted in a loss to the Applicant of 41 days' pay. The Applicant pay varied slightly, but on average the Applicant is paid £60/day. The Applicant has therefore lost £2,460 and now claims this sum from the Respondent."*

The pay hours varied each week because the nature of the shifts would vary so the claim of £60 per day was no more than an approximation. Such a claim could not legitimately be recast as a debt action for a sum of wages contractually due. […]

38. We answer this first question therefore in favour of the Respondents. The Tribunal in our judgment correctly concluded that a claim for unlawful deductions from wages would not have succeeded and that the Applicant's claim was, as he had pleaded it, a claim for damages for breach of contract.

38.3. The claim appears (effectively) to be that she was denied hours (and thus the ability to earn). That is not an unlawful deductions claim.

38.4. The Tribunal does not have jurisdiction to hear breach of contract claims brought before the termination of employment (Art. 3(c) Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623; *Capek v Lincolnshire County Council* [2000] IRLR 590).

38.5. In any event, the claimant had no entitlement to work a set number of hours:

(a) The Second Contract is clear that the respondent has great flexibility to change the claimant's hours. The claimant is entitled to no more than her agreed hourly rate for the hours she has worked.

(b) By the performance of her obligations under the Second Contract, without protest at any time, the claimant has accepted and affirmed the terms of the Second Contract.

(c) Nevertheless, even under the First Contract, the respondent retained discretion to alter the claimant's hours. On any analysis, the respondent has been entitled to reduce the hours – with the concomitant effect that income is also reduced.

39. For the reasons set out above, the wages claim should be struck out. In any event, the claims are time barred and it was reasonably practicable to make the claim in time.

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Employment Judge Truscott KC
Date: 4 April 2023

Sent to the parties on
Date: 14 April 2023