EMPLOYMENT TRIBUNALS

Claimant: **Mr Philton Alfred**

Respondents: **(1) The Commissioners for His Majesty's Revenue and Customs**
(2) Maxtian Interim Limited

Heard at: **East London Hearing Centre**

On: **18 January 2023**

Before: **Employment Judge O'Brien**

Representation:
For the Claimant: **In Person**
For the Respondent: **Mr T Kirk of Counsel**

JUDGMENT

1. The claimant's application to amend his claim is refused.

2. The claimant's claim is struck out as having no reasonable prospects of success.

REASONS

1. The Claimant worked at the premised of the First Respondent for a period between 15 November 2017 and 30 June 2018. He was supplied to do that work by the Second Respondent. The Claimant presented an ET1 on 26 March 2022. He complains of unfair dismissal and race discrimination.

2. A closed preliminary hearing took place before Employment Judge Crossfill on 23 September 2023. In his note of that preliminary hearing, Employment Judge Crossfill summarises the procedural history to that date, and I need not rehearse it here. Suffice to say that the claimant objected to acceptance of both respondent's responses and wished to amend his claim to add a large number of additional complaints. He also recorded that the issue of whether Tribunal had jurisdiction to hear claimant's claims remained unresolved despite an order dated 26 April 2022 that an open preliminary hearing be held to consider the point given the claimant's delay in bringing these claims.

3. Consequently, Employment Judge Crossfill ordered this open preliminary hearing. He did so knowing that the second respondent would not be able to attend or be represented today.

4. The hearing was listed to deal with the following matters:

(i) Whether the claimant has no reasonable prospects of showing that his claims were presented within the statutory time limits such That his claims should be struck out pursuant to rule 37 of schedule one of the Employment Tribunals (constitution of rules and procedures) regulations 2013.

(ii) Whether the claimant should have permission to amend his claim.

(iii) To make any further case management decisions.

5. The claimant was notified that he would be expected to give evidence and might be asked questions on behalf of the other parties. In the light of the fact that the substantive issue of timeliness remained at large and the fact that the claimant would give evidence and be cross-examined today, it was agreed that I also had jurisdiction to consider today if necessary the substantive issue of timeliness rather than being limited merely to whether the claimant had reasonable prospects of succeeding in that issue.

6. Ahead of preliminary hearing and again at the beginning of the hearing, the claimant applied for it to be vacated. The reasons in essence were that:

(i) Employment Judge Crossfill had unlawfully changed the September preliminary hearing from being open to being closed and so any directions given were void.

(ii) The respondents had not challenged jurisdiction and so it was not open to the Tribunal to consider the point.

(iii) The second respondent ought to be taken to have accepted jurisdiction by the fact that it was not present in represented today.

(iv) The respondents' responses had been submitted late, no reasons had been given by the Tribunal for extending time, and so the claimant was entitled to summary judgment.

(v) Further or in the alternative, the respondents had submitted their defence without having previously acknowledged the claim and so had failed to submit a valid defence in accordance with the Civil Procedure Rules.

(vi) The claimant's summary judgment application had to be determined prior to this preliminary hearing.

(vii) I was not a judge qualified to hear this matter, it being a claim brought by a Crown servant.

(viii) The claimant had applied to the Lord Chancellor for his declaration that the claimant had jurisdiction in the Employment Tribunal, and so this hearing should not proceed in advance of any such declaration.

7. Any and all other arguments discernible from the claimant's voluminous correspondence with the Tribunal were entirely without merit and it is not proportionate to deal individually with any save those set out above.

8. The claimant's oral submissions were similarly dense and repetitive. Moreover, he repeatedly resisted my attempts to maintain focus in order to deal with matters within the listed period of two hours. Occasionally, I had to be quite forceful in those attempts but ultimately allowed the claimant to address each of his arguments in opening and closing, completing this preliminary hearing after four hours. It was, however, necessary to reserve my decision in respect of the substantive issues.

9. I dealt with all of the claimant's arguments for vacate in this hearing orally at the time and summarise my reasoning below.

10. Employment Judge Crossfill was perfectly entitled in the circumstances before him to convert the listed open preliminary hearing into a closed preliminary hearing as part of his general case management powers. It would only have been necessary for him to give the claimant advance notice if he had intended to add a preliminary issue to be determined at the hearing. As it was, he decided with good reason that no preliminary issues should be determined at the hearing and so no advance notice was necessary.

11. The CPR do not apply to proceedings in the Employment Tribunal. Therefore, any CPR provisions regarding the acknowledgement of service of the claim, the entering of a defence, the challenging of jurisdiction, or any other matter raised by the claimant are irrelevant to Employment Tribunal proceedings.

12. This hearing had been listed in the knowledge that the second respondent would be unable to attend or be represented. No concession as to jurisdiction could therefore be fairly inferred from its non-attendance.

13. The Tribunal has its own procedure rule concerning the entering of a response to an employment tribunal claim (rule 16). The respondents had each submitted responses in accordance with that rule. The first respondent had submitted its response in the prescribed form on the 28th day after it had been sent a copy of the claim form by the Tribunal. The claimant's argument that the time expired at midnight on the beginning of that 28th day was misconceived; if the claimant's argument were correct then for an act to have been done 'on' the 28th day in accordance with rule 4(1), it would have had to have been done on the 27th day. The second respondent's response had been received within 28 days of the claim form being sent to its correct address. In other words, no 'relief from sanctions', as the claimant had put it, was necessary.

14. It is well established that the Tribunal is obligated to take jurisdictional points on its own motion, even if not raised by the parties, subject only to giving the affected party reasonable and fair notice of its intention to do so. The claimant had been given such notice.

15. The Tribunal's procedure rules do not prescribe a process for applying for summary judgment, let alone provide that any such application must be determined prior to a

preliminary hearing to decide jurisdiction. On the contrary, rule 21 prescribes a process to be initiated by the Tribunal itself should it appear amongst other things that no response has been received within the prescribed time limit. In the instant case, both respondents submitted their responses in time and so no default judgment can or will be entered. To the extent that I'm obligated to consider the claimant's summary judgment application, it fails for that very reason.

16. The claimant's objection to my hearing this preliminary hearing is based on his submission that schedule 2 of the Rules of Procedure Regulations applies (in other words that these are 'National Security proceedings'), because the proceedings relate to Crown employment. However, whether or not the latter is the case, it remains a matter of fact that there has been neither a direction by a Minister of State nor an order by the President of the Employment Tribunals under section 10 of the Employment Tribunals Act 1996. Consequently, this Tribunal is suitably composed to hear this preliminary hearing.

17. The claimant misunderstands the provisions of s3 of the Employment Tribunals Act 1996, which do not include a power to convey on the Tribunal jurisdiction in respect of out of time claims under the Employment Rights Act 1996 or the Equality Act 2010 save as provided in those acts.

18. Therefore, I refused the claimant's application to vacate this hearing and proceeded to deal with the preliminary issues identified by Employment Judge Crossfill.

19. The claimant gave evidence on the basis of a written witness statement which he confirmed to be true and was cross examined. Mr Kirk relied on a skeleton argument developed orally in closing submissions. The claimant gave oral submissions which in the main comprised a repetition of the arguments list above, although he did in part raise arguments as to why the delay in submitting his claim should be excused.

20. I indicated at the end of the hearing that I had to attend to another matter and that I would in the circumstances have to reserve my decision. It is regrettable that I have been unable to dictate these reasons earlier, due to my other judicial commitments; however, they have been prepared on the basis of extensive notes taken at the hearing.

21. I was surprised nevertheless have drawn to my attention today an application from the claimant for reconsideration of my 'decision' on 18 January 2023 to determine proceedings on paper and not at the hearing. The basis of the claimant's application appears to be a misconception that reserving a decision and delivering it in writing equates to determining proceedings without a hearing. Plainly that was not the case, as this decision has been reached after a lengthy and detailed hearing at which the claimant and first respondent attended. Insofar as the claimant is applying for me to reconvene the hearing in order to hand this decision down orally, I refuse that application on the basis that it would be disproportionate to do so.

The Law

Amendments

22. In deciding the amendment applications, I applied the guidelines and approach set out in **Vaughan v Modality Partnership** **UKEAT/0147/20/BA**. HHJ Tayler considers the well-known authorities on amendment (**Cocking, Selkent, Abercrombie** and **Safeway**) but

makes clear, however, that the **Selkent** factors should not be taken as a checklist to be ticked off but rather are facts to be taken into account in conducting the fundamental exercise of balancing the injustice or hardship of allowing or refusing the amendment.

23. The Tribunal must start by considering the real practical consequences of allowing or refusing the amendment. This requires a focus on reality rather than assumptions and needs representatives to take instructions where possible (paragraph 21). The Tribunal must consider the practical importance of the amendment – the real question is not whether refusal prevents the party from getting what they want, rather will they be prevented from getting what they need (paragraph 22). HHJ Tayler suggests that the balancing exercise requires consideration of the injustice to both sides (allowing or refusing) but quantitively and qualitatively, looking at the relative and cumulative significance of the relevant factors (paragraph 26). Maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant considerations but the key factor remains the balance of justice (paragraph 28). A lengthy delay will inevitably result in some fading of memory, although specific details are better than supposition.

24. The following factors are likely to be relevant when exercising my discretion and in assessing the balance of injustice:

(1) whether or not the application proposed is minor or substantial;

(2) the application of time limits and whether there should be any extensions; where the claimant proposes to include a new claim by way of amendment, the tribunal must have regard to the relevant time limits and, if the claim is out of time, to consider whether the time should be extended under the appropriate statutory provision (reasonable practicability or on the just and equitable ground, as the case may be).

(3) the timing and manner of the application, including why an application was not made earlier and why it is being made at this stage. However, delay in itself should not be the sole reason for refusing an application.

Strike Out

25. An Employment Judge has power to strike out a claim on the ground it has no reasonable prospect of success under Employment Tribunal Rules of Procedure 2013 rule 37. The power to strike out a claim on the ground that it has no reasonable prospect of success may be exercised only in rare circumstances.

26. The test for strike out imposes a very high threshold: there must be **no** reasonable prospect of success. This requires the Tribunal to consider whether on a careful consideration of all available material it can properly conclude that the claim has no reasonable prospects of success. It is not a matter of whether the Claimant's claim is likely to fail nor of asking whether it is possible that the claim will fail. It is not a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. A hearing to consider strike out should not be a mini-trial. The Claimant's case should be taken at its highest unless conclusively disproved by (or totally and inexplicably inconsistent with) undisputed contemporaneous documents. Strike out imposes a high test given its draconian nature.

27. As made clear in **Ukegheson v Haringey Borough Council [2015] ICR 1285**, Tribunals should be cautious in exercising the power to strike out, particularly in discrimination claims where there is a public interest in them being heard and because they are likely to be fact sensitive. I took into account that the same considerations apply in whistleblowing claims.

Time Limits

28. The time limit applicable to the claimant's various claims is in each case three months beginning with the effective date of termination or the (end) date of the unlawful act in question (as the case may be). That time limit is extended by the duration of early conciliation, should early conciliation commence within the ordinary time limit, but not if early conciliation begins after expiry of the ordinary time limit.

29. The Tribunal can extend time for the claimant's claims of unfair and/or wrongful dismissal only if it was not reasonably practicable to bring the claim in time and the claim has been brought within a reasonable period after expiry of the ordinary time limit.

30. In respect of the claimant's claims under the Equality Act 2010, the Tribunal may admit a claim or outside the ordinary time limit if brought within 'such other period as the Employment Tribunal thinks just and equitable'. The test requires a broad evaluation of the relevant factors. A useful guide can be found **British Coal Corp v Keeble [1997] IRLR 336**; however, the factors in that case are neither prescriptive nor exhaustive. Ultimately, it is for the Tribunal to identify where the balance of prejudice lies.

The Application to Amend

31. It is appropriate to consider the claimant's application to amend his claim so that when I come to consider the appropriateness of striking any or all of the claimant's complaints out, I do so with the benefit of a holistic view of his claim.

32. The draft amendments are to be found in an 11-page document emailed to the Tribunal on 24 November 2022. The heads of claim are listed on the first two pages and the facts in support of them (such as they are) are set out thereafter.

33. The first two heads of claim are alleged crimes under the Fraud Act 2006 and the Theft Act 1968 respectively. These are not matters in respect of which the Tribunal has jurisdiction.

34. The 5th new head of claim alleges a failure to give notice of pension scheme or any possible contracting out thereof. However, the claimant does not explain how these matters, if true, give rise to a claim in respect of which this Tribunal has jurisdiction nor is it obvious that the Tribunal does.

35. The 6th new head of claim alleges a failure to provide a statement of confirmation upon becoming a permanent employee. However, in order to a make a consequential application to this Tribunal (in respect of which the tribunal's power appears to be limited to a declaration), it would have been for the claimant to be employed by the respondent in question at the time of the application. That was manifestly not the case at the time of the amendment application.

36. The claimant fails to identify how this Tribunal has jurisdiction to consider an alleged failure to calculate and pay national insurance contributions as alleged in the 7th new head of claim or an alleged failure to provide notice of complaints procedure per the 10th new head. Neither is it clear to the Tribunal that it does have any jurisdiction. As observed by the respondent, national insurance contributions do not fall within the definition of wages prescribed by section 27 of the 1996 act and notice of a complaints procedure is not a matter prescribed in part one of the 1996 act (unlike disciplinary procedures).

37. In his 8th new head of claim, the claimant alleges a failure to provide guaranteed pay under section 28 of the 1996 Act from the point of his unfair dismissal to date. However, such payment rises only when the employee would normally be required to work in accordance with his contract but is not provided with work, in other words whilst the employee is still employed.

38. Whilst the claimant complains in his 9th new head of claim of a failure by the respondents to provide a written statement of reasons for dismissal. However, the claimant did not have two years continuous service at effective date of termination in order to be entitled to such a written statement.

39. In the 11th new head of claim, the claimant asserts his entitlement to a payment under the Civil Services Compulsory Redundancy Scheme. However, he does not set out how this founds a claim to the Employment Tribunal, whether as a breach of contract or otherwise.

40. The 12th and 13th new heads of claim are an assertion of entitlement to interest on losses. These are matters which go to remedy and are not in themselves amendments to the existing claim. Similarly, loss of future benefits (per the 15th new head of claim) is a matter which goes to remedy rather than constituting an amendment to the existing claim. I make these observations without any findings on their substantive merits.

41. The 14th new head of claim (employee benefits lost) makes no attempt to identify the benefits in question nor the basis upon which the claimant says he had an entitlement to them, let alone how it is said that the Employment Tribunal has jurisdiction to decide the matter.

42. The 3rd, 4th and 16th new heads of claim assert failures to pay statutory sick pay, statutory holiday pay, and other wages. Each are causes of action over which the Employment Tribunal has jurisdiction; however, there is an entire dearth of detail.

43. The claimant fails to explain how the Tribunal has jurisdiction to consider the alleged failure to provide a 'status determination statement' (as alleged in the 17th of new head of claim) nor is it apparent that the tribunal does indeed have such jurisdiction.

44. The respondent accepts that the 18th head of claim in the amendment application, wrongful dismissal, is mentioned in the original claim and so no amendment is necessary in that regard.

Decision on the Application to Amend

45. Save for the 12th, 13th, 15th and 18th heads of claim (each of which is not in fact an amendment), each of the above is substantial proposed amendment to the original claim introducing a wholly new cause of action.

46. The first two concern criminal matters over which Tribunal has no jurisdiction and so are refused on that basis.

47. The 5th, 7th, 10th, 11th, 14th and 17th new heads of claim each relate to matters which are apparently related to the claimant's employment, but in respect of which the claimant has not identified nor is the Tribunal otherwise aware of any jurisdiction. Even if the tribunal had jurisdiction to consider those matters they are all so inadequately pleaded as to give rise to gross prejudice to the respondent if allowed as amendments.

48. The 3rd, 4th and 16th new heads of claim are all matters over which the Tribunal has jurisdiction; however, they are utterly inadequately pleaded and so would as amendments similarly cause gross prejudice to the respondent.

49. The 6th, 8th and 9th new heads of claim each relate to causes of action the claimant on any analysis is not entitled to bring either because he was not employed at the relevant time or did not have the requisite continuous service. They are, in other words, doomed to fail.

50. In addition to the prejudice caused to the respondents by having to answer inadequately pleaded and or hopeless claims, is added the prejudice of investigating and gathering evidence in respect of matters arising so very long ago. Weighing the totality of the prejudice to the respondents against the prejudice which would be suffered by the claimant should the application be refused (a prejudice considerably tempered by his wholly inadequately explained delay in making the application) I am satisfied that the balance significantly favours the respondents. Consequently, I refuse the amendment application.

Strike out

51. I turn now to the basis of considering whether to strike the claim out: the question of timeliness.

52. The claims are grossly out of time. The acts comprising the claimant's complaint of discrimination all occurred during his brief period supplied by the second respondent to work for the first respondent (15 November 2017 to 30 June 2018). The claimant did not commence early conciliation until 28 February 22, and he did not present his claim to the employment tribunal until 26 March 2022. Consequently, all of his claims are around 3 ½ years out of time.

53. I should add at this point that the claimant appeared at times to argue that his employment had still not terminated. However, that position is contrary to his pleaded case and, if accepted, is fatal to his claims of unfair and wrongful dismissal. In any event, there are no pleaded instances of discrimination subsequent to the pleaded date of termination. His suggestion today that he might have been 'blacklisted' by the respondents is not pleaded, and would require an application to amend.

54. Unusually for consideration of strike out, I had not only a written statement from the claimant but also the benefit of the claimant's evidence tested under cross-examination. Much of his statement focussed on the technical arguments he advanced in respect of whether this hearing should be vacated and/or summary judgment be given in his favour. However, the main elements of his explanation for delay can be summarised thus. The claimant thought 'long and hard' about the effects on his career have bringing the claim

because of HMRC's significant influence. The second respondent's replies to concerns raised by the claimant at the time caused him confusion. Running a small business from July 2018 took a considerable amount of the claimant's time. A new baby and the advent of Covid-19 required the claimant to prioritise his family. A number of accommodation problems between July 2020 and April 2021, and subsequently from October 2022, caused serious disruption and trauma to the claimant. As a result of anxiety and depression, associated with or exacerbated by an employment tribunal claim brought in 2020, the claimant felt unable to bring this claim any earlier.

55. In his oral evidence, the claimant also suggested that he was unaware of Employment Tribunal procedures at any material time, notwithstanding that he brought constructive unfair dismissal claim in early 2020. He complained that he had not been given an opportunity by the respondents for dispute resolution. The claimant confirmed that he had not been told how to raise a grievance.

56. The claimant adduced his medical records. No specific reference was made to anything in them in the claimant's witness statement. In his oral evidence, the claimant did not point to anything in the medical records which would show issues preventing him or impeding him from bringing an employment tribunal claim either during the ordinary time limit or afterwards.

Decision on Strike-out

57. It is appropriate unfair and wrongful dismissal claims separately from the Equality Act claims, as different legal tests apply.

58. In respect of the unfair wrongful dismissal claims, the question is whether the claimant has any reasonable prospect of persuading a Tribunal that it was not reasonably practicable to bring those claims by 29 October 2018 and that he brought the claim within a reasonable period thereafter. Taking everything the claimant said at face value, the fact remains on his own account that he made a conscious decision to delay bringing the claims for a long time whilst he weighed up the pros and cons of doing so. He was capable of running a small business immediately after the effective date of termination and also of supporting a wife and child, notwithstanding a number of unfortunate life events in or around mid-2020. He brought a constructive unfair dismissal claim in the Employment Tribunal in early 2020. There is no real prospect of any reasonable tribunal concluding other than that it was reasonably practicable for the claimant to bring a claim within the ordinary time limit but that he chose not to, and in any event that it was unreasonable for him to have delayed as long has he did.

59. In respect of the Equality Act claims, I have to be satisfied that the claimant has no reasonable prospect of persuading a Tribunal that it is just and equitable to extend time by around 3 ½ years until 26 March 2022. Again, taking the claimant's evidence at face value, any tribunal considering the issue would inevitably have in mind the positive choices taken by the claimant between and mid-2020 not to present the claim, the lack of evidence of any material medical impediment to bringing the case earlier, the lack of any cogent explanation for failing to bring the claimant between April 2021 and March 2022 notwithstanding the unfortunate life events occurring between July 2020 and April 2021. It would also have in mind the inevitable effect of 3 ½ years delay on the cogency of evidence, in particular given the lack of any contemporaneous grievance and therefore any timely investigation into the matters, noting also the paucity of detail given in the claimant's own pleadings of the matters

in question. The Tribunal would have in mind that there is no suggestion that the respondent has failed to cooperate in any request for information by the claimant. Indeed, the Tribunal would have in mind the claimant's own evidence that he did not raise a grievance because he did not know and was not told how to. The Tribunal will have in mind the lack of suggestion that the claimant was unaware at the time of the fact giving rise to the presently pleaded causes of action or that he was thwarted in attempts to obtain legal advice.

60. Any Tribunal considering whether to extend time would waive these and all the other matters raised by the claimant today in the balance and I am unpersuaded that any reasonable tribunal would find that the balance favoured the claimant. In other words, there is no reasonable prospect of the claimant persuading a tribunal that it would be just to extend time sufficiently for it to accept jurisdiction to hear these claims.

61. Consequently, I conclude that it is appropriate to strike out both the claimant's unfair and wrongful dismissal claims and his claims under the Equality Act 2010 on the basis that he has no reasonable prospect of successfully persuading a Tribunal to extend time.

62. I should add that my reasoning would have been the same, and would have applied equally, to the amended claim even if I had allowed any of the claimant's proposed amendments.

63. Even if I were wrong to go so far as to conclude that the claimant had no reasonable prospects of success, I would nevertheless have dismissed his case as out of time, having heard his evidence challenged in cross-examination. It was manifestly reasonably practicable for the claimant to bring his unfair and wrongful dismissal claims within 3 months, and was in any event entirely unreasonable for the claimant to delay beyond early 2020 when he chose to bring a claim against another organisation. As for the Equality Act claims, the balance of injustice weighs considerably in the respondents' favour.

Employment Judge O'Brien
Dated: 13 April 2023