# EMPLOYMENT TRIBUNALS

**Claimant:** Mr R Murray

**Respondent:** London General Transport Services Ltd (t/a Go Ahead London)

**Heard at:** London South Employment Tribunal (by CVP)
**On:** 22 March 2023

**Before:** Employment Judge Abbott

**Representation**
Claimant: Mr Daniel Ibekwe of Brighton & Hove Race Project
Respondent: Ms Jessica Smeaton, counsel (instructed by Harrison Clark Rickerbys Limited)

**JUDGMENT** having been sent to the parties on 31 March 2023 (reasons having been delivered orally on 22 March 2023) and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

Introduction

1. The Claimant, Mr Murray, brought the following complaints against his former employer, London General Transport Services Ltd (t/a Go Ahead London), hereafter referred to as the Respondent:

    a. ordinary unfair dismissal (s.94(1) Employment Rights Act 1996 ('ERA 1996'));
    b. automatic unfair dismissal (s.103A ERA 1996);
    c. protected disclosure detriment (s.47B ERA 1996);
    d. discrimination arising from disability (s.15 Equality Act 2010 ('EqA 2010'));
    e. victimisation (s.27 EqA 2010);
    f. failure to make reasonable adjustments (s.26 EqA 2010);
    g. wrongful dismissal; and
    h. unpaid holiday pay.

2. The claim came before the Tribunal on 22 March 2023 for an open preliminary hearing to consider whether the complaints were made out of time. This was further to a request made by the Respondent's solicitors by a letter dated 4 October 2022. The Notice of Hearing was issued on 19

December 2022.

3. The Claimant did not appear himself at the hearing, and did not provide any written or oral evidence. He was represented at the hearing by Mr Ibekwe. The Respondent was represented at the hearing by Ms Smeaton. I heard submissions from both representatives before making my decision.

Factual background

4. The Claimant was initially employed by the Respondent from 4 September 2017 until 7 December 2021. The Respondent says he was dismissed on 7 December 2021 by reason of ill-health capability but that, in accordance with the Respondent's usual practice, the Claimant was invited to apply for re-employment on the same grade if he became fit enough to work during the six-month period following his dismissal (i.e. up to and including 6 June 2022). The Claimant says that, on a proper view, the dismissal was suspended for a 6-month period pending alleged progress of recovery by the Claimant, following which a re-engagement order became available or a valid option.

5. With the exception of the 'dismissal', which I shall come back to, it was common ground that none of the acts and detriments relied upon by the Claimant occurred after the end of December 2021.

6. The Claimant returned to work for the Respondent between 6 June 2022 and 1 August 2022, when he was dismissed. The Respondent says this was a new period of employment. The Claimant described this in his ET1 as a re-engagement, though Mr Ibekwe in his oral submissions characterised it as a reinstatement.

7. The Claimant commenced ACAS Early Conciliation on 3 August 2022. An ACAS Early Conciliation certificate was issued on 31 August 2022. The Clamant commenced a further period of ACAS Early Conciliation on 2 September 2022. A second ACAS Early Conciliation certificate was issued on 5 September 2022. On 5 September 2022, the Claimant presented his claim to the Tribunal.

Relevant law

8. The primary time limits applicable to the various complaints that form part of this claim are as follows:

    a. for complaints of unfair dismissal and wrongful dismissal - three months from the effective date of termination (s.111(2)(a) ERA 1996; article 3, Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994; s.97 ERA 1996);

    b. for a complaint of protected disclosure detriment - three months from the date of the alleged act or failure to act to which the complaint relates or, where the act or failure to act is part of a series of similar acts, the last such act or failure to act (s.48(3)(a) ERA 1996);

    c. for a complaint of unlawful deductions of wages - three months from

the date of payment of the wages from which the deduction was made or, if a series of deductions, from the date of the last deduction in the series (s.23 ERA 1996); and

d. for complaints of discrimination arising from disability, victimisation and failure to make reasonable adjustments – three months from the date on which the act of discrimination complained of took place (s.123(1)(a) EqA 2010).

9. Periods spent in ACAS Early Conciliation may act so as to extend those periods, so long as Early Conciliation is commenced during the primary time limit.

10. In respect of the non-EqA 2010 complaints, the burden of proving that it was not reasonably practicable to present a claim in time is on the Claimant. The Tribunal has a discretion to extend time where it was not reasonably practicable for the Claimant to bring the claims in time and they were brought within a reasonable period of time thereafter.

11. In respect of the EqA 2010 complaints, the Tribunal has discretion to extend time where it is just and equitable to do so (s.123(1)(b) EqA 2010). A useful guide is to consider the factors listed in s.33(3) of the Limitation Act 1980 (see *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] ICR D5, CA). That section deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: the length of, 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 has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

Submissions

12. The Respondent's submissions can be summarised as follows:

a. It is clear from the ET1 that the Claimant's claims are all based on acts said to have occurred in relation to the first period of employment, which ended on 7 December 2021 (with his final payment being made on 31 December 2021).

b. The Claimant did not commence ACAS Early Conciliation until 3 August 2022. His claim form was lodged on 5 September 2022. Accordingly, any complaint about something that happened before 4 May 2022 is *prima facie* out of time.

c. As a matter of law, it is wrong for the Claimant to characterise the dismissal as a continuing act lasting from 7 December 2021 to 6 June 2022. The effective date of dismissal was 7 December 2021, it was not suspended, and there was no contract between the Claimant and the Respondent governing the period between 7 December 2021

and 6 June 2022. That was made clear to the Claimant in his dismissal letter which, in relevant part, read:

"*I said I would welcome an application from you to return as a Bus Driver with Go-Ahead, and confirmed if you were able to return within 6 months, by 7th June 2022, you could return on your current pay grade but without the terms and conditions that are service related. So keep your grade but everything else reverts to new entrant conditions.*"

d. There is nothing in the ET1, nor in any evidence, to support a conclusion it was not reasonably practicable for the Claimant to bring the non-EqA 2010 claims in time, or within a reasonable period thereafter. The Claimant must have been aware of all of these claims by the end of December 2021. Moreover, he was well enough to return to work in early June 2022 yet didn't start Early Conciliation until August 2022.

e. As regard the EqA 2010 claims, there is nothing in the ET1, nor in any evidence, to indicate why it would be appropriate to extend time. The Respondent would be significantly prejudiced if time were to be extended. It would be required to defend a claim in respect of allegations that are now approximately 15 months old. The passage of time inevitably affects memories and the cogency of the evidence which can be given. It places the Respondent at a significant disadvantage in defending its actions. That is particularly so here where the Claimant did not raise the points he now pursues as part of the internal dismissal process.

f. The Claimant has been represented since at least the bringing of the proceedings, which suggests that he had the opportunity to access legal advice earlier. He was also represented by his union during the second dismissal process, which again suggests that he had the opportunity to access advice and support earlier.

13. Mr Ibekwe for the Claimant responded, in summary, as follows:

a. This is a case full of conflicts of evidence and therefore it is not suitable to be struck out. Disclosure should be given first. To determine this application now is premature and a 1 day preliminary hearing should instead be listed, after disclosure.

b. The Claimant has always made clear in the proceedings that he never received the dismissal letter quoted from above.

c. The process of dismissal continued beyond 7 December 2021, so the whole period up to 6 June 2022 should be considered to be relevant. For the EqA 2010 claims, time should run from that later date because it is only then that the detriments can be measured.

d. The Respondent is seeking to evade liability by its arrangement of allowing employees to 'reapply' for their old job within 6 months after being 'dismissed' on sickness grounds, and is essentially seeking to

circumvent the contracting out provisions in s.144 EqA 2010. It is only at the point of reinstatement / re-employment that the full extent of damage caused by discrimination becomes clear.

Discussion

14. I indicated during Mr Ibekwe's submissions that I would not accede to his request not to determine the time point at this hearing. I considered the correspondence that he had sent regarding documentary requests of the Respondent, which was in the hearing bundle, but consider, in my judgement, that these requests related to the underlying merits of the complaints, and not to time limits. In circumstances where the Claimant was on sufficient notice that this hearing was going to determine the time point, I considered it fair and in the interests of justice to proceed.

15. The parties prepared a Working List of Issues which, whilst not fully agreed, was helpful in understanding the allegations being made. As already mentioned, it is common ground that, subject to one point around the dismissal itself, none of the acts and detriments relied upon occurred after the end of December 2021. As ACAS Early Conciliation was not commenced until August 2022, all of those acts and detriments are, on their face, outside the primary time limit.

16. As regards the dismissal, it is the Claimant's case that this was a continuing act which lasted from on or around 7 December 2021 when the Claimant was purportedly dismissed through to his re-engagement / reinstatement on 6 June 2022. The Respondent says this is flawed as a matter of law – a dismissal has to have an effective date, that date was 7 December 2021. What happened after that is irrelevant to the dismissal.

17. I carefully considered the way the case is pleaded in the ET1 and kept in mind the Claimant's submission that the "dismissal letter" of 7 December 2021 was never in fact received by the Claimant. The fundamental problem with the Claimant's submissions is that, in the ET1, it is expressly relied upon that the Claimant's contract of employment was terminated on 7 December 2021 (see point 4.4 in the Particulars of Claim) and that he was re-engaged on a new contract without continuity of employment, as opposed to reinstated, on around 6 June 2022 (see point 1.1 in the Particulars of Claim). I accept the Respondent's submission that there cannot in law be a 'continuing dismissal', but in any event the facts as pleaded are against the Claimant's case. Whether or not the "dismissal letter" was received is not relevant to this determination, since it must have been clear (not least from the fact that the Claimant was not being paid anything after end of December 2021) that the Claimant had been dismissed on or around 7 December 2021, and this understanding is made clear in the ET1 in any event.

18. Accordingly, all acts and detriments, including the dismissal, are outside of the primary time limit.

19. As I have already said, in respect of the non-EqA 2010 complaints, the burden of proving that it was not reasonably practicable to present a claim in time is on the Claimant. The Claimant provided no explanation in the ET1 for why the complaints were brought out of time, and no evidence has been

offered, either in writing or orally (as the Claimant did not attend the hearing). In those circumstances, the Claimant has not discharged the burden of proving that it was not reasonably practicable to present a claim in time. Moreover, even if the Claimant was impaired by ill health from bringing his claim earlier, he was well enough to return to work by early June 2022 but did not commence Early Conciliation for a further two months after that and, accordingly, I find (again in the absence of any justification from the Claimant) that the claim was not brought within a reasonable period of time after the primary time limit.

20. In respect of the EqA 2010 complaints, I have already mentioned the potentially relevant factors when determining whether to exercise the 'just and equitable' discretion to extend time. The length of the delay here is significant – several months – and no reasons have been offered in the ET1 or in evidence. The Respondent has explained why having to deal with these late claims will cause prejudice to it. I accept those submissions, and I also bear in mind that a final hearing will not happen until March 2024, another year on from this hearing. I do not accept the Claimant acted promptly – even on his case that he could not have known of the full facts giving rise to a cause of action until his re-engagement in early June 2022, he did not commence ACAS conciliation until late August 2022. Taking the Claimant's case at its highest, I understand from Mr Ibekwe's submissions that there was correspondence around the alleged non-provision of the "dismissal letter" after December 2021, but I have not been shown that correspondence, nor can I see why it would necessarily prevent a claim being brought earlier. Balancing all of the factors, I do not consider it is just and equitable to extend time.

21. The result, then, is that all complaints are out of time. My judgment therefore was that the claim be dismissed on the basis that the Tribunal does not have jurisdiction to hear any of the complaints brought by the Claimant. I also ordered that the hearings scheduled for August 2023 (a case management preliminary hearing) and March 2024 (the final hearing) be vacated.

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Employment Judge Abbott
Date: 17 April 2023

Sent to the parties on
Date: 10 May 2023