EMPLOYMENT TRIBUNALS

Claimant: **Mr. M Ali**

Respondents: **(1) Cordant Cleaning Limited**
(2) Bidvest Noonan (UK) Limited

Heard at: **East London Hearing Centre (by CVP)**

On: **6th and 15th June 2023**

Before: **Employment Judge J Bromige**

Representation
Claimant: In Person (assisted by Ms Tabbaya, McKenzie Friend on 6th June and Mr Khan, Friend, on 15th June)

The Respondents: Ms. Rezaie (Counsel)

JUDGMENT having been sent to the parties on 20 June 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Preliminary matters and issues

1. The above case was heard via CVP on 6th and 15th June 2023. The original judgment was sent to the parties on 20th June 2023, and a request for written reasons was received on 4th July 2023 (communicated to the Judge on 14th July 2023). There was some initial confusion as the Tribunal marked the correspondence (received in the post) as having been received on 6th July 2023, however on further examination a request was received by email on 4th July (along with an application for reconsideration which is dealt with separately).

2. The Claimant worked for the First Respondent, and then the Second Respondent, as a cleaner. The Respondents were at the material times cleaning company's, and the Claimant worked on a contract that the respective Respondents held with Stagecoach, based in Bow, East London.

3. The original ET1 form was issued on 25th March 2022 (under Case Number 3201317/2022)**.** At §8.1 of that ET1, he claimed race discrimination, notice pay and holiday pay. He set out a narrative to his claim at §8.2. The claim was issued against the Second Respondent only; however it was rejected by Employment Judge Clark under rule 12 of the Employment Tribunal Rules of Procedure 2013 because the name of the Respondent on the ET1 did not match the name of the Respondent on the ACAS Early Conciliation certificate. The notification of the rejection was sent on 7th April 2022.

4. The Claimant applied for reconsideration of the rejection on 15th June 2022, which was considered by EJ Clark who dismissed the reconsideration application under rule 13(3) on 28th June 2022. The Claimant was told that he could present a new claim with the correct ACAS EC Certificate, which he did, under Claim Number 3204185/2022 on 13th July 2022. This claim was against both the First and Second Respondents, and included a claim for unfair dismissal, with the dismissal said to be on or around 10th February 2022. §8.2 was replaced with a full particular of claim drafted by Ms Tabbaya (the Claimant's McKenzie Friend). Specifically the allegation of unfair dismissal was at §15 of the Particulars of Claim:

   On or around 10th February 2022, R2 and/or R1 informed C that there are no more shifts, and he should not return to the premises. C asked for reasons for dismissal but did not receive this. C contends that he did not receive any alternative shifts or work sites.

5. ET3s on behalf of both Respondents, as well as a joint ground of resistance were submitted on 22nd December 2022. In respect of the First Respondent, they stated that there had been a TUPE transfer between the First and Second Respondent on 1st December 2021, and that all liabilities lay with the Second Respondent only. It is not clear to the Tribunal why there was a need to issue a claim against the First Respondent when there was no claim for any breaches of TUPE.

6. The principle parts of the Second Respondent's defence was that there had been no dismissal, and instead the Claimant had been issued with a final written warning on or around 7th December 2021, which he had appealed. The Respondents stated that there was an appeal meeting on 3rd February 2022 and the decision to impose a final warning had been upheld. There had never been any dismissal. The Respondents also raised time limit issues in their Grounds of Resistance

7. The hearing was initially listed for just 6th June 2023 by Employment Judge Park, and was to be a preliminary hearing to consider the following issues:

   a. Has the Claimant's employment with the Second Respondent terminated?

   b. If so, on what date did this happen?

   c. If so, what was the effective cause of termination?

   d. Did the Respondent expressly dismiss the Claimant?

e. If there was no express dismissal, how did the Claimant's employment terminate?

f. If there was a dismissal, was the unfair dismissal claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination?

g. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

h. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

8. On 6th June, I clarified a number of matters with the Claimant, who at the time was assisted by Ms Tabbaya. The Claimant clarified that all of his claims were against the Second Respondent, and therefore the First Respondent could be dismissed from proceedings. He also confirmed that he brought his race discrimination claim as a series of acts from 5th September 2020 until 10th February 2022. Both parties agreed that I should also therefore consider whether the discrimination claims under EqA 2010 were also brought in time, as per s.123 EqA 2010. I note that the test for extension of time is whether it would be just and equitable, as opposed to the stricter test referred in the list of issues above for the unfair dismissal claim.

9. I had an agreed bundle of documents running to 104 pages, with a further addendum bundle of 49 pages, as well as statements from the Claimant and Miss Richards, the Second Respondent's HR Director.

10. The hearing was adjourned at the end of 6th June due to an issue arising about the Claimant's witness statement and an application to strike out the Claimant's claims by the Respondent, which is set out in further detail below. The case was able to be re-listed as a part heard hearing promptly on 15th June 2023, where the Claimant was assisted by a friend (rather than a McKenzie friend), Mr Khan.

11. Given that the claims against the First Respondent were dismissed prior to evidence, from hereafter in this judgment the Second Respondent will simply be referred to as 'the Respondent'.

Conduct of the hearing and strike out.

12. The Claimant gave evidence, via an interpreter, on 6th June 2023. The witness statement had been written with the assistance of Ms Tabbaya. It was signed by the Claimant with an accompanying statement of truth in English. After taking the affirmation, I asked him whether he had read the statement recently. He confirmed that he had. He also confirmed there were no additions or amendments to the statement.

13. Ms Rezaie cross-examined the Claimant through the interpreter. During cross-examination, the Claimant appeared to be giving evidence that was inconsistent with his witness statement. For example, orally he said that he didn't receive the appeal outcome letter at pg. 103 in the bundle, however

at §10 of his statement he refers to receipt of the appeal outcome.

14. The Claimant was also challenged about potential inconsistencies between his pleaded case and his witness evidence. For example it was put to him that in his Particulars of Claim he accepted he made no reference to there being an explicit dismissal. However in a letter to the Tribunal dated 17th Feb 2023 in answer to questions posed by EJ Park, he says he was dismissed by Mr Thomas on 10th February 2022.

15. When these potential inconsistencies were highlighted, the Claimant said that he would receive emails or letters from his employer, but he could not read them, as he needed help with English. He said that he speaks English on a limited basis, and he has no formal education and struggles with reading, in any language. He said that any correspondence he had with the Tribunal, as well as his witness statement, were prepared by him speaking in Urdu to his McKenzie friend, who then translated into English. However the final document, in English, was never read back to him, and he was not aware of its contents, although he believed it to be accurate.

16. This caused some concern to the Tribunal, given the importance of the Claimant's evidence, and that he had confirmed the contents of his statement to me earlier during the hearing. I adjourned the case over lunch for both parties to consider their position. When we returned, the Respondent made an application to strike out the Claimant's claims, or in the alternative to make a deposit order, under rule 37 and/or rule 39 of the Employment Tribunal Rules of Procedure 2013.

17. Ms Rezaie addressed me on three parts of Rule 37, namely:

    a. Rule 37(1)(a). She argued that there were no prospects of success even on the evidence before the Tribunal at this stage. There was no evidence from the Claimant as to exactly how he had been dismissed, his evidence was not supported by contemporary documents, and given the issues now around his witness statement, it should be ruled inadmissible. In the alternative, the Claimant lacked credibility and so lacked prospects of success. Further, as to the time issues, the Claimant has adduced no evidence about these matters in his witness statement, such as it was capable of being relied upon.

    b. Rule 37(1)(b). Ms Rezaie pointed to parts of the correspondence where the Claimant had liaised directly with the Tribunal, such as over the Rule 13 reconsideration for the original claim, and that at various points, the Claimant, or someone acting on his behalf, had corresponded with the Tribunal but had not raised the issue of the Claimant's lack of English as an issue. In particular, Ms Rezaie took me to pg. 19 in the supplementary bundle, which was the reconsideration application, and reference was made to the Claimant seeking legal advice. His lack of English, or literacy, was not relied upon as part of the reconsideration application. His failure to do so was vexatious in light of what had happened since, and the Claimant's conduct effectively meant that the hearing in its present

format could not go ahead.

c. Rule 37(1)(c). The Respondent submitted that whilst there had been no express breach of the rules of procedure, the Claimant had breached the CMO of EJ Park in failing to properly produce a witness statement. The CMO made specific directions for the preparation of witness statements which the Claimant's representative would have appreciated in the context of the Claimant being unable to understand written English.

d. Rule 37(1)(d). Ms Rezaie submitted that the Claimant's reliance on others, to the extent that he was not aware of documents and letters being prepared on his behalf, meant that he was not actively pursuing his claim.

18. In response, and being careful not to waive privilege, Ms Tabbaya outlined the position for the Claimant. She told me that she was a non-practicing barrister, having completed the Bar Practice Course in 2019, where she had studied employment law. She was a family friend of the Claimant, and was not charging for her services. She particularly focused her submissions on Rule 37(1)(a) and (1)(b). She said that there were reasonable prospects since the Claimant could show that he was offered no work for the Respondent after 10th February 2022. She had drafted all documents in accordance with his instructions, and accurately represented what she had been told. Whilst the Claimant was now querying the statement, this was because of his lack of English, and not because he was acting vexatiously or disruptively. Despite the issue with the witness statement, his principle claim was the same – that he had been dismissed.

The Law

19. In submissions, Ms Rezaie referred me to the High Court decision in *Correia v Williams* [2022] EWHC 2824. In *Williams*, an issue arose as to the Claimant's witness statement. The Claimant was a Portuguese national who spoke Portuguese. His statement had been drafted in English, with the assistance of a bi-lingual Solicitor. The statement had been given to the Solicitor in Portuguese, and the Solicitor had translated it. A Portuguese version of the statement had never been prepared.

20. Much of *Williams* deals with potential breaches of the Civil Procedure Rules r.32.8, alongside Practice Directions 22 and 32. As the EAT and Court of Appeal have frequently confirmed, the Civil Procedure Rules, with some limited exceptions, do not apply to the ET, which has its own rules of procedure. Indeed, the Presidential Guidance - General Case Management indicates that there is no strict requirement for statements in ET proceedings to have a statement of truth. Rule 43 of the ET Rules of Procedure states that:

Where a witness is called to give oral evidence, any witness statement of that person ordered by the Tribunal shall stand as that witness's evidence in chief unless the Tribunal orders otherwise. Witnesses shall be required to give their oral evidence on oath or affirmation. The Tribunal may exclude from the hearing any person who is to appear as a witness in the

proceedings until such time as that person gives evidence if it considers it in the interests of justice to do so.

21. Therefore whilst the guidance in *Williams* as to the danger and pitfalls of evidence being adduced in that manner might be a useful warning to the ET, breaches of the CPR are not relevant here, and it cannot be said that there has been any particular breach of a practice direction or rule of procedure by the Claimant.

Strike Out – Ruling

22. The Respondent's application to strike out the claim was refused. Dealing with each of the points in turn:

23. *Rule 37(1)(a).* As per rule 43, the witness statement shall stand as evidence in chief unless I order otherwise. The witness statement does (albeit briefly) address the extension of time point at §14 on the basis that the first ET1, which was rejected, was in time, and there is some evidence about dismissal at §10. Given that the purpose of the preliminary hearing is to determine those issues, and the Claimant has started his evidence about those issues, it would not be an appropriate use of r.37(1)(a) to strike the Claimant's claim out on the basis of the evidence that he has adduced about those particular issues at this preliminary stage.

24. *Rule 37(1)(b).* In my judgment there has been unreasonable conduct by the Claimant in the manner in which this case has been litigated. In particular, that the Claimant did not raise the issue of reading and writing at the last preliminary hearing, which impacts not only upon his witness statement but also the preparation of the bundle of documents. If he had mentioned this before today, it is possible that case management directions could have been made to provide a solution to the satisfaction of all parties.

25. This is not a criticism of Ms Tayyaba, who I accept has done the best that she can to assist the Claimant, a family friend, in this litigation. Her task has been exacerbated precisely because the Tribunal rules do not have the same provisions as the CPR around the preparation of witness statements in a foreign language. However, by not raising this with EJ Park, when it would have been appropriate to do so (the Claimant also requested an interpreter at that stage) is unreasonable conduct. The consequence of that conduct is that the Claimant has confirmed to me that he read through his statement recently (he had not) and confirmed the statement is true to the best of his knowledge and belief, when he could not actually do so. The statement of truth and affirmation are not simply window dressing to a witness statement, but rather it underpins how evidence is given and challenged in this Tribunal.

26. However, I have considered the proportionality of striking out the Claimant's claims, and whether a fair trial is still possible or not, or whether there is some other, lesser order that can be made to put things right. I was satisfied that a fair hearing was still possible for two reasons. Firstly, that we could re-list this hearing, part heard before the same judge, in very quick time – on the 15th June 2023. And that secondly, applying rules 29 and 43, I could case manage the rest of the hearing as follows:

a. When the hearing resumes on 15th June 2023, the Claimant shall have translated to him, in Pashto, the contents of his English witness statement. He can then confirm to me whether he agrees with the contents of that statement, and if not, what areas he disagrees with;

b. This process will allow me to assess whether to his witness statement should in fact stand as his evidence in chief, in accordance with Rule 43. If it does not, then the Claimant will have the opportunity to give evidence, via the Translator, as to what he says occurred between 7th December – 10th February 2022 (the Claimant has already given effectively agreed evidence up until his return to work on or around 3rd December, and such evidence will not assist me further). Such oral evidence in chief is, on my reading of r.43, permitted.

c. If materially new matters come out in this process, the Respondent can of course ask for an adjournment to consider any new lines of cross-examination, or any further disclosure required. The prejudice to them through this is therefore minimised. In any event, the burden is on the Claimant to prove these matters, and as has been observed today, there is a bundle of contemporaneous documents which the Respondent relies upon.

27. I follow a similar line of analysis and conclusion for my reasons for rejecting the application under Rule 37(1)(c). Any such breach of the CMO of EJ Park could be cured by a short adjournment and having the Claimant's witness statement read out to him in Pashto. I was also not satisfied that the Claimant could be criticised for not actively pursuing the litigation when he had attended the preliminary hearing and given evidence.

28. I further determined that I would not make a deposit order at this stage, given that it would not be proportionate (even if there were little reasonable prospects of success) given that the substantive issues were to be determined within the week following on from 6th June 2023.

The hearing on 15th June 2023

29. When the hearing resumed on 15th June 2023, the Claimant had his statement read to him, and he confirmed again its contents. As well as hearing evidence from the Claimant, the Respondent called Miss Richards (HR Director) and Mr Khan, who was now representing the Claimant, asked her questions.

Findings of Fact - Dismissal

30. Where there is a dispute in the evidence, overall, I have preferred the contemporaneous documentation. I did not find the Claimant to be a credible witness. Whilst making adjustment for the language barrier, and that he was giving his evidence through an interpreter, his oral evidence was at odds with both his written statement, and the contemporaneous documents.

31. In particular, the Claimant's oral evidence about receipt (or no receipt) of both the disciplinary outcome letter in December 2021, and the appeal outcome on 10th February 2022 was contradicted by his own pleaded case, which referred to him receiving both documents, and gave dates. His suggestion now that he did not know about these documents until the bundle was prepared last month was disingenuous. The Tribunal is satisfied that he received both the 7th December and 10th February letters at the time, because he referred to them in his June 2022 ET1, and also that he acted upon the 7th December sanction letter by appealing it.

32. Further, the Claimant issued his initial ET1 in March 2022. In that ET1, he stated that he had not been dismissed, that his employment was continuing and that the sanction he had received had been a final written warning as well as being moved to a different site. As for the appeal, he confirmed *"I attended an appeal hearing meeting but the decision was kept the same"*. The Claimant was not able to adequately explain why there was such a material difference in his first ET1. He was asked on four occasions by Ms Rezaie, as well as questions of clarification from myself, and he opted to change the subject and complain that the Respondent had not given him any notice of dismissal in writing. He also changed his evidence on several occasions, for example about how many times he had met Mr Thomas, and around the various letters.

33. The Tribunal's conclusion as to whether the Claimant was dismissed by Mr Thomas on or around 10th February 2022 is that no such dismissal occurred, either on 10th February or at any point thereafter.

34. The Tribunal finds that the Claimant appealed his disciplinary sanction (which was a final written warning and a change of work location), which was upheld by Mr Thomas. Mr Thomas did not give the Claimant the appeal outcome orally at the 3rd February 2022 meeting, but rather he did so in writing on 10th February 2022.

35. The Tribunal is satisfied that the Claimant understood the contents of the outcome letter, which is why he contacted ACAS on 4th March 2022 and issued an ET1 on 25th March 2022. He did this because he wished to pursue his rights at the Employment Tribunal – something he had said to Mr Thomas at the appeal meeting.

Conclusions - Dismissal

36. The truth of the matter was contained in the Claimant's original ET1, that the decision to uphold the written warning was communicated to him, and that there was no dismissal. Therefore, in answer to the preliminary issue regarding the dismissal, the Tribunal's judgment is that there was no dismissal. Accordingly the Claimant's claim for unfair dismissal is not well-founded and is dismissed.

37. Since there was no dismissal, the Claimant is unable to bring a claim for breach of contract and that claim is also dismissed.

Conclusions - Time Limits

38. It is not disputed that the last act complained of by the Claimant in his ET1 the purported dismissal on 10th February 2022, This meant that the Claimant should have brought his claim (before calculating for time spent in ACAS Early Conciliation) by 11th May 2022. The ET1 was in fact received on 13th July 2022, with the Claimant commencing early conciliation with the Respondent on 14th June 2022, and therefore no extension of time is permissible under either s.207B ERA 1996 and/or s.140B EqA 2010. This means that the claims were presented 65 days out of time.

39. I first considered whether, even if I was wrong about the Claimant's dismissal, was it reasonably practicable for the Claimant to have presented his claim within time, applying s.108(2)(b) ERA 1996. I was satisfied that it was reasonably practicable for the Claimant to present his claim in time, since he had in fact done so initially, only for it to be rejected because of his non-compliance with the ACAS Early Conciliation provisions.

40. Whilst the Claimant had told the Tribunal in his letter of 15th June 2022 that he was unaware of the requirements of the Early Conciliation provisions, that cannot be correct since he was able to complete Early Conciliation against the First Respondent by 18th March 2022. Therefore the Tribunal declined to extend time for the unfair dismissal claim under s.108(2)(b) ERA 1996.

41. The Tribunal reminded itself that the tests for extension of time under ERA 1996 and EqA 2010 are different, however, it reached the same conclusion with respect of whether it was just and equitable to extend time. The Claimant had not adduced any evidence to show why it would be just and equitable but in any event, the Tribunal's judgment was that it would not be just and equitable to extend time because. The position was that the Claimant had been able to complete ACAS Early Conciliation against the First Respondent, and issue an ET1 against the Second Respondent, in March 2022. Even making allowances for his difficulties with English, the Claimant was (either as an individual or with the support of others) able to fully, but incorrectly engage with the litigation process, and he did not reference his language difficulties as an issue when he applied for reconsideration on 15th June 2022.

42. Therefore the Claimant's claims of race discrimination under EqA 2010 are dismissed because they were presented 65 days out of time.

Costs

43. The Respondent made an application for costs under Rule 76(1)(a), arising from the Tribunal's finding that the Claimant had acted unreasonably in presenting and relying upon a witness statement that he had not read or understood. The Respondent provided a cost schedule of costs incurred for the preliminary hearing of £4,180.00 + VAT. A further joint bundle was also produced, running to 49 pages and principally containing the Claimant's financial information.

44. Given my finding as to the Claimant's conduct already, I did not have to further consider Rule 76(1)(a), but I directed myself as to both *Gee v Shell (UK) Limited* [2002] EWCA Civ 1479 and also *Barnsley Metropolitan Borough Council v Yerrakalva* [2012] IRLR 42, in particular Mummery LJ at paragraph [42].

45. The Tribunal further reminded itself that even if the cost threshold had been triggered (as it had been in this case), whether to exercise its discretion in favour of the party claiming costs having regard to all of the circumstances of the case. If discretion is in favour of awarding costs, the Tribunal must have regard to the paying party's ability to pay under rule 84.

46. The Claimant's principle submission, and indeed his evidence, was that he did not have the means to pay. He currently works as an Uber driver, and as per his draft tax calculations, he earned £15,117.00 in the tax year 2021/22 from a turnover of £25,798.00 and earned a similar amount for 2022/23. The Claimant had rent to pay (which he paid in cash), and would also send money to his family who lived abroad.

47. Ms Rezaie questioned the Claimant about his means, and challenged him as to the monies received from Uber. For example, in April 2023, the Claimant had received £4714.87 from Uber, and in March 2023 had received £4108.24 from Uber and Bolt (another online taxi company). She suggested that the Claimant was deliberately downplaying his means.

48. In my judgment, the Claimant was earning more presently then he had as per his tax return for 2021/2022. Even making allowances for the Claimant operating in a cash based economy, such as paying his rent in cash, and having operating costs and needing to see aside money for tax (although there did not appear to be any such efforts) there were significant cash withdrawals on a monthly basis. I was satisfied that the Claimant had the means to pay at least something towards the Respondent's costs.

49. The Tribunal was further satisfied that in all the circumstances of the case, it was right to order the Claimant to pay the Respondent costs. This was because the Claimant's unreasonable conduct had the very clear consequence of requiring a second day for the preliminary hearing. Whilst not a strict test of causation, but for the issue with the witness statement, the Tribunal was confident it would have concluded the preliminary hearing within the allocated time on 6th June 2023.

50. However, turning to the assessment of costs, and doing the best it could as a summary assessment, the Tribunal allowed the Respondent the total of £2515.00 ex VAT for costs incurred. Principally this was linked to Ms Rezaie's brief fee, which had been incurred for a second time, and some costs associated with the adjournment and preparation for the hearing on 15th June 2023. However, there were elements of costs which appeared to cover the period prior to 6th June, and further the witness expenses of £300 were disallowed since there was no evidence that they had been incurred.

51. Doing the best it could, and applying Rule 84, the Tribunal ordered the Claimant to pay the sum of £500 inc VAT, taking into account the Claimant's means and ability to pay.

Employment Judge J Bromige
Dated: 11th October 2023