EMPLOYMENT TRIBUNALS

BETWEEN

BERNARD KING

Claimant

AND

THALES DIS UK LIMITED

Respondent

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD at Southampton by CVP **ON** 3 October 2023

EMPLOYMENT JUDGE H Lumby

Representation

For the Claimant: In person/with Paul Bolzara (colleague)
For the Respondent: Mr R Hickford of Ashdowns Legal LLP

PRELIMINARY HEARING IN PUBLIC JUDGMENT

The judgment of the Tribunal is as follows:

1. The complaints of breach of contract were not presented within the applicable time limit. It was not reasonably practicable to do so but the claims were not presented within a further reasonable period. The claims are therefore dismissed.

2. The complaints of discrimination were not presented within the applicable time limit. It is not just and equitable to extend the time limit. The claims are therefore dismissed.

3. All claims in this case are therefore dismissed.

REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not the claimant's claims were presented in time and, if so, whether they should be struck out as an abuse of process.

2. The hearing was held online using the CVP system, by agreement between the parties.

3. The claimant is a person with autism, dyslexia and ADHD. Prior to the hearing, I reviewed the relevant sections of the Equality Treatment Bench Book on these conditions. Adjustments were discussed with him and adopted for the hearing. In particular, breaks were taken whenever requested, including when the claimant became anxious. It was explained that he could seek clarification of questions whenever wanted and he could take his time in answering questions. He could check details when required. Mr Bolzara was sitting with the claimant and was able to provide support and assistance, speaking for him or explaining issues.

4. The papers I was referred to included two bundles provided by the claimant and one provided by the claimant. The claimant was concerned that he did not have the final bundle but was assured that all documents he had produced had been provided to the tribunal. In addition, I received skeleton arguments from each party, as well as five authorities from the claimant and five case authorities from the respondent. The claimant said he had not seen the cases produced but accepted that they were summarised in the respondent's skeleton argument and were provided for reference only. All the authorities provided were considered by the tribunal.

5. At the start of the hearing, the claimant expressed concern that all the papers were not all in a single bundle which he could print out. He agreed to proceed without this and was asked at the end whether the lack of a single bundle had caused him any concerns. He confirmed that it had not.

6. I have heard from the claimant, and I have heard from his colleague Paul Bolzara on behalf of the claimant. I have heard from Mr Hickford on behalf of the respondent. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to any factual and legal submissions made by and on behalf of the respective parties.

Facts

7. The claimant was employed by the respondent as a bureau operator, commencing work with a predecessor to the respondent in December 1999. He alleges that he was subjected to bullying, victimisation and discrimination by Mr Luke Mercer of the respondent on 31 May 2018, following which Mr Mercer made a complaint in relation to the claimant to HR. The claimant had previously raised a grievance in relation to harassment and sexual discrimination; the grievance was scheduled to be heard on 20 June 2018 but was cancelled due to Mr Mercer's complaint.

8. The claimant was suspended as a result of Mr Mercer's complaint and subsequently dismissed on 8 August 2018. An appeal was made against the dismissal which was refused on 3 December 2018.

9. In the meantime, the claimant lodged a further grievance, this time against Mr Mercer on 29 July 2018. He contends that the respondent refused to investigate the incident with Mr Mercer. The claimant's union representative sought on 30 October 2018 to obtain a grievance meeting and the grievance was refused on 6 November 2018. It was made clear to the claimant on 3 December 2018 that there would be no further investigation of the grievances. This meant that there would be no grievance hearing or meeting.

10. The claimant lodged a claim for unfair dismissal on 13 November 2018. This was dismissed on 17 June 2019 on the basis that the claim was out of time. The claimant appealed this decision to the Employment Appeals Tribunal and the Court of Appeal but was unsuccessful in both appeals. The claimant had legal advice in relation to this claim and was represented by counsel on appeal.

11. The claimant then brought a second claim, which was lodged on 2 August 2021. This claim was for disability discrimination. This claim was dismissed on 2 August 2021 for being an abuse of process, on the basis that the broad factual allegations giving rise to that claim were raised in the first claim. An appeal against this decision is ongoing.

12. The claimant accepts that the second claim covers discrimination and that the discrimination complaints in this case would be covered by the second claim if he succeeds in his appeal.

13. The claimant contends that the failure to hold a grievance hearing was a breach of the respondent's handbook policy on grievance procedure and of their dignity at work policy. In addition, failing to investigate his grievances fully and failing to stop bullying, harassment and victimisation or make

reasonable adjustments for his mental health were a breach of the Equality Act 2010 and his human rights.

14. This claim was received by the tribunal on 19 March 2023 and brings claims for breach of contract, victimisation, breach of duty of care, sexual discrimination pursuant to the Equality Act 2010 and an unspecified claim relating to the Human Rights Act 1998. Early conciliation occurred at ACAS between 16 and 23 February 2023.

Law

15. Having established the above facts, I now apply the law.

16. One of the relevant statutes is the Employment Rights Act 1996 ("the Act"). Section 111(2) of the Act provides that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

17. There are similar time limit provisions relating to the claimant's claim for breach of contract, which are contained in article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order").

18. This is also a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination, indirect discrimination, harassment; and victimisation. The protected characteristic relied upon is sex, as set out in section 4 of the EqA.

19. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

20. With effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.

21. I have been referred to and have considered the following cases, namely: Palmer and Saunders v Southend-on-Sea BC [1984] ICR 372; Porter v Bandridge Ltd [1978] IRLR 271 CA; Wall's Meat Co v Khan [1978] IRLR 499; London Underground Ltd v Noel [1999] IRLR 621; Dedman v British Building and Engineering Appliances [1974] 1 All ER 520; Cullinane v Balfour Beattie Engineering Services Ltd UKEAT/0537/10; Wolverhampton University v Elbeltagi [2007] All E R (D) 303 EAT; Riley v Tesco Stores [1980] ICR 323; Croydon HA v Jaufurally [1986] ICR 4 EAT; British Coal v Keeble [1997] IRLR 336 EAT; Robertson v Bexley Community Service [2003] IRLR 434 CA; Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640; Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT; Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA; London Borough of Southwark v Afolabi [2003] IRLR 220 CA; Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23; Henderson v Henderson [1843-1860] All ER Rep 378; Johnson v Gore Wood [2000] UKHL 65; Barrow v Bankside Members Agency Limited [1996] 1 All ER 981; Arnold v National Westminster Bank plc [1991] 2 AC 93; Taylor Goodchild Ltd v Taylor & Anor [2020] EWHC 2000 (Ch)

22. In this case the claimant's effective date of termination of employment was 8 August 2018. The three month time limit therefore expired at midnight on 8 November 2018.

Breach of contract claim law

23. The question of whether or not it was reasonably practicable for the claimant to have presented his claim in time is to be considered having regard to the following authorities. In Wall's Meat Co v Khan Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the claimant, see Porter v Bandridge Ltd. In addition, the Tribunal must have regard to the entire period of the time limit (Elbeltagi).

24. In Palmer and Saunders v Southend-on-Sea BC the headnote suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the Industrial Tribunal taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, in determining whether or not it was reasonably practicable to present the complaint in time, an Industrial Tribunal may wish to consider the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something

similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit. The Industrial Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used. Contrary to the argument advanced on behalf of the appellants in the present case and the obiter dictum of Kilner Brown J in Crown Agents for Overseas Governments and Administrations v Lawal [1978] IRLR542, however, the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time. The views expressed by the EAT in Bodha v Hampshire Area Health Authority on this point were preferred to those expressed in Lawal.

25. To this end the Tribunal should consider: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.

26. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) concluded that "reasonably practicable" does not mean reasonable (which would be too favourable to employees), and does not mean physically possible (which would be too favourable to employers) but means something like "reasonably feasible".

27. Subsequently in London Underground Ltd v Noel, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing so. As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of

practicability … the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204).

28. Underhill P as he then was considered the period after the expiry of the primary time limit in Cullinane v Balfour Beattie Engineering Services Ltd (in the context of the time limit under section 139 of the Trade Union & Labour Relations (Consolidation) Act 1992, which is the same test as in section 111 of the Act) at paragraph 16: "The question at "stage 2" is what period - that is, between the expiry of the primary time limit and the eventual presentation of the claim - is reasonable. That is not the same as asking whether the claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted - having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months."

Discrimination claim law

29. I have considered the factors in section 33 of the Limitation Act 1980 which is referred to in the Keeble decision. For the record, these are 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 parties cooperated with any request for information; the promptness with which the claimant acted once the facts giving rise to the cause of action were known; and the steps taken by the claimant to obtain appropriate professional advice.

30. However, it is clear from the comments of Underhill LJ in Adedeji, that a rigid adherence to such a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion. He observed in paragraph 37: "The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time including in particular … "The length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."

31. This follows the dicta of Leggatt LJ in Abertawe Bro Morgannwg University Local Health Board v Morgan at paragraphs 18 and 19: "[18] … It is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the equality act does not specify any

list of factors to which the tribunal is instructed to have regard, and it would be wrong in the circumstances to put a gloss on the words of the provision or to interpret it as if it contained such a list … [19] that said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

32. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.

33. Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan (at the EAT) before the Employment Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was.

34. However, As Sedley LJ stated in Chief Constable of Lincolnshire Police v Caston at paragraphs 31 and 32: "In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it."

Conclusion

35. The claimant clarified that there were essentially two categories of claims being brought by this case, claims for breach of contract and claims for discrimination.

36. Both categories of claims should have been brought by 8 November 2018. Early conciliation began in February 2023 and the claim was brought in March 2023. They are therefore all brought over four years and three months after the relevant time limits.

Breach of contract claims

37. I have first considered the claims for breach of contract. There are two issues to be considered, first whether it was reasonably practicable for the claim to be brought within the three month time period and secondly whether it has been brough within such period as is reasonable.

38. The grounds relied upon by the claimant for suggesting that it was not reasonably practicable to have issued proceedings within the relevant time limit are that he was awaiting the grievance hearing. He firmly believed that he was entitled to a hearing as part of his grievance process and that he could not bring a claim for breach of contract until the hearing had taken place. He accepted that he was told on 3 December 2018 that the complaints would not be investigated.

39. He was asked why he did not include this claim in his first claim. He said that was put in quickly without understanding what he was doing, given the time limits (the claim was already late). He felt that the tribunal should have identified the breach of contract claim when investigating what his first claim was. He emphasised that his mental condition made understanding the position more difficult.

40. I consider that the claimant's mental condition was the substantial cause in him not bringing the breach of contract claims within the three months' time limit. He did have advice at the time from his union and legal advice once he brought his claim which should have ensured that a timely claim was issued. However, his state of mind and confusion meant it was not reasonably practicable for the claims to be brought within the time limit.

41. I therefore turn to the question of whether the claims were brought within such period as was reasonable.

42. The claimant used the same arguments as to why the claim had not been brought until 2023. In addition, he was awaiting the outcome of the appeal

on the second claim, he was bringing the claim now because he had lost patience with the process.

43. He was asked why he had not brought these claims as part of the second claim. He argued that he believed he had, even though it was brought as a discrimination claim. However, the judge in the second claim had dismissed this as a side issue. He argued therefore that it was not included in the second claim; he accepts, however, that the appeal on that claim might determine that it was included, so dispensing with the need for these claims.

44. The claimant argues that the reason that the breach of contract claims were not brought earlier because he was "deadlocked" from doing so by the tribunal. By this, I have understood him to mean that the tribunal refused to hear the first claim because it was out of time (a decision confirmed by two higher levels on appeal) and its refusal to hear the second claim on the grounds it was an abuse of process. The claimant felt compelled to bring this claim due to the time being taken by the EAT to deal with his appeal in that claim.

45. The respondent accepts that the claimant had health issues but argues that he had legal advice and union representation for much of the first claim and so should have been made aware of the time limits. Even if not, he was able to bring the second claim and nothing prevented the claim being included within that. In any event, a delay of this period cannot be reasonable.

46. If the breach of contract claims were included within the second claim, this would appear to be a repeat claim which I consider below. If, on the other hand, it is a fresh claim, the time issue remains. I accept that the claimant's mental condition and illness caused delay in bringing this case. However, it is also clear that there has to be a finite limit within which the case must be brought. This will depend on the facts of the case including the nature of his condition.

47. It is clear that he believed he had a claim and was able to bring forward claims – two have been brought before. It is also clear that he had advice as to the process. The fact of the second claim is critical to this. He was able to bring the second claim in 2021 and argued at the hearing that he believed the breach of contract claim was part of that second claim. If the tribunal wrongly assessed that at the time, he has the appeal process to determine whether he is correct. I understand that he was waiting for the determination of that appeal before bringing this claim but the fact that he was able to bring a claim (and thought he had within the second claim) weighs against a further delay until 2023 before bringing this claim. He also argues that he was waiting for the grievance hearing to be organised but it was clear by the end of 2018 that this was not going to occur. Even if not

clear to the claimant then, it must have been clear by the time of the second claim, if he thought that was part of the claim.

48. He was aware of these claims, had the capacity to bring a claim and yet waited over four years to bring them. I therefore conclude that they were not brought within a reasonable time period and so the tribunal does not have the jurisdiction to consider the breach of contract claims. They should therefore be dismissed.

49. The respondent argued in addition that the breach of contract claims should be struck out on the grounds that the claims have either been brought before or was an abuse of process because the claims could have been brought before, in earlier claims. As I have concluded that the breach of contracts claim are out of time and so the tribunal does not have jurisdiction to hear them, I have not considered this further, save in one respect. The upper courts may find that the breach of contract claims were already included within the second claim, as the claimant himself argues. If they do conclude that the breach of contracts claims are within the second claim, then in any event they cannot be brought to the tribunal again.

50. Accordingly the claims for breach of contract are dismissed as they were not brought within the required time limits.

Discrimination claims

51. As referred to above, the discrimination claims were brought outside the three month time limit required by the EqA. It therefore needs to be considered whether they were brought within such period as is just and equitable.

52. The tests and the case law for the just and equitable test are different to those for the breach of contracts claims.

53. The grounds relied upon by the claimant for suggesting that it would be just and equitable to extend the time limit are the same as for the breach of contract claim, in particular that his mental conditions and the decisions of the tribunal prevented him from bringing his claim earlier. He has brought this claim because he is frustrated by the delays in dealing with his appeal to the second claim.

54. The claimant made it clear at the hearing that the second claim was about discrimination and this is focused on breach of contract. Even if the claimant's condition prevented him from bringing the claim within the three month time limit set by the EqA, he was clearly aware of his ability to bring discrimination claims by bringing the second claim. Whether that claim was brought within such period as is just and equitable is not for this tribunal to

decide. However, waiting another two years before bringing another discrimination claim is clearly outside such period. If this is a separate claim for discrimination, it should have been brought at the same time as the second claim and there is no acceptable explanation given for the delay in relation to the discrimination claims.

55. I must therefore conclude that the discrimination claims are brought outside such period as is just and equitable and so the tribunal does not have jurisdiction to hear the claims. They have therefore dismissed.

56. As with the breach of contract claims, the respondent also argued that the discrimination claims should be struck out on the grounds that they have already the subject of a claim or should have been brought forward before. As I have dismissed the claims as out of time, I do not need to consider these arguments.

57. However, I note that the claimant has argued that this claim is distinct from the first two claims as the first related to unfair dismissal and the second related to discrimination. In both his skeleton argument and at the hearing he reiterated that this is a claim for breach of contract and therefore a distinct and separate claim. I make no findings on whether the first claim did or did not include discrimination, that has been claimed in the second claim and is now with the EAT. In any event, it is irrelevant which claim included discrimination, the point is that it is covered by one or other of those claims. If it was in the first claim, it has been dismissed. If it was not in the first claim, then that is a matter for the second claim and its progression. If it is included in the second claim, it cannot be considered by the tribunal on the grounds of cause of action estoppel. Alternatively, if it is a new claim for discrimination, it should have been brought forward with the second claim, in accordance with the principle established in Henderson v Henderson and so should be struck out as an abuse of process. In either case if I had had to consider the position, I would have struck out the discrimination grounds on one or other of these grounds.

58. Accordingly, I find that all the claims have been brought outside the relevant time limits and so the tribunal does not have jurisdiction to hear them. They are accordingly all dismissed.

59. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 7 to 14; a concise identification of the relevant law is at paragraphs 15 to 34; how that law has been applied to those findings in order to decide the issues is at paragraphs 35 to 58.

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Employment Judge H Lumby
Dated: 1 November 2023

Judgment sent to Parties on 17 November 2023

For the Tribunal Office