EMPLOYMENT TRIBUNALS

Claimant: Mr W Matthaus (C)

Respondent: Paymaster (1836) Ltd (trading as Hazell Carr) (R1)
Bank of America Merrill Lynch (R2)
Steven Brown (R3)
John Twomey (R4)

HELD AT/BY: Wrexham by CVP **on:** 21st February 2024

BEFORE: Employment Judge T. Vincent Ryan

REPRESENTATION:

Claimant: Mr I Ahmed, Counsel
Respondent: Mr M Slater, Counsel (for R1 &4), Mr S Way, Counsel (R3), Mr Brown (R3) represented himself (a Litigant in Person)

RESERVED DECISION

The Decision of the Tribunal is:

1. In relation to extension of time for C's presentation of Race, Religion & Belief, Sex, and Age Discrimination claims, (collectively referred to as "the Discrimination Claims"), on the basis of justice and equity: C presented his claims out of time in circumstances where it would not be just and equitable to extend time to the date of eventual presentation; the Discrimination Claims are dismissed.

2. In relation to time issues in respect of claims of Public Interest Disclosure Detriment, Breach of Contract, Unauthorised Deduction from Wages (including Holiday Pay) (for convenience collectively referred to as "the ERA Claims", albeit inclusive of holiday pay claims which could be brought under applicable Regulations or as wages claims under the Employment Rights Act 1996 (ERA): C presented the ERA Claims out of time in circumstances where it was reasonably practicable for him to have presented them within three months of the termination of his relevant engagement and the date payments were due; C has no reasonable prospect of establishing otherwise; the ERA claims are stuck out.

3. In relation to alleged Breach of COT3 Contract by C: In presenting this claim C has not breached his contract with R1 and others, a COT3 settlement dated by the parties 24th and 27th February 2023 ("the COT3"); that contract related to a different Employment Tribunal claim, case number 1601710/2018, involving some different parties, and did not extend to the matters subject of these proceedings (which predate the subject matter of that 2018 litigation but were not in the contemplation of the parties to the COT3 when it was entered into).

4. In relation to alleged Abuse of Process by C in issuing these proceedings: C has not acted in abuse of process in presenting this claim on the basis of his having pursued Employment Tribunal case number 1601710/2018, a matter concerning a different engagement and timeframe, mostly different parties, and in all respects a claim (bar C's and R1's involvement and the jurisdictions under which the claims are brought), wholly distinct and discrete from these proceedings.

5. Reconsideration of the dismissal judgment of Regional Employment Judge Davies dated 8 November 2023 (by delegation to me, consented to by all parties):

   5.1. there is no reasonable prospect of the dismissal judgment being varied or revoked in so far as it relates to the claim of entitlement to redundancy pay and to Unfair Dismissal under s.94 Employment Rights Act 1996 (ERA); C's engagement was from 11 April 2011 until termination on 2 October 2011, a period of less than the two continuous years employment required for entitlement (regardless of establishing C's status at the material time, which is disputed);

   5.2. the said judgment is varied to reflect that s.108 ERA does not apply to C's claim of automatic Unfair Dismissal contrary to s.103A ERA.

      5.2.1. C's claim of Unfair Dismissal contrary to s.103A ERA is not dismissed for lack of continuous employment (aside any questions of employment status);

      5.2.2. C's claim under s.103A was presented to the Tribunal out of time in circumstances where it was reasonably practicable for C to have presented it in time; he has no reasonable prospect of establishing otherwise. C's said claim is struck out.

REASONS

1. Introduction**:**

   1.1. C was engaged by R1 to work at R2 between 11 April 2011 and 2 October 2011 when his engagement was brought to an end, ostensibly because the project in hand was overstaffed by one full time equivalent person. C says that he accepted that rationale at the time. R2 and R3 were involved in relevant management during that engagement. C says that in 2023 he was told, and that he has relatively recently seen evidence to the effect, that overstaffing was not the real reason that his said engagement was terminated in 2011. C commenced ACAS early conciliation in relation to circumstances in 2011, on

21 August 2023 and a certificate was issued on 24 August 2023. C Presented a claim to the Employment Tribunal in relation to his 2011 engagement on 20 September 2023. All parties accept, the obvious, that the claim form in relation to the 2011 engagement was presented out of time, subject in respect of some claims to the reasonable practicability test and in respect of the Discrimination Claims, any just and equitable extension of time.

1.2. On 8 November 2023 C's claims of unfair dismissal (by implication both "ordinary" Unfair Dismissal and automatically Unfair Dismissal by reason that he had made a protected disclosure) and entitlement to redundancy pay, which related to the 2011 engagement, were dismissed for want of qualifying employment. C has applied for reconsideration of that judgment made by the Regional Employment Judge. The Regional Employment Judge has delegated the reconsideration to me with a view to it being dealt with at this hearing.

1.3. C also claims in relation to his 2011 engagement, public interest disclosure detriment, breach of contract in respect of notice, unauthorised deduction from wages, and a failure to pay holiday pay. All of these claims, the ERA Claims, are subject to a primary limitation period of three months, subject to reasonable practicability and presentation within a reasonable time.

1.4. Collectively all Rs contend that the claims in relation to 2011 are out of time and should be dismissed.

1.5. R1 was a respondent to a claim made by C that was presented on 22nd November 2018. I sat with members at the final hearing in relation to those claims and the reserved judgment on liability was signed on 14 October 2021 and sent to the parties the next day. There was a reconsideration of that judgment, with a further judgment signed on 31 January 2022 and sent to the parties on 2nd February 2022. There were appeals and cross appeals. The appeals and cross appeals were withdrawn, as was the application for remedy in respect of the Employment Tribunal judgment, upon settlement reflected in a COT3 agreement signed by C on 24 February 2023, and by Rs to that claim on 27 February 2023 ("the COT3"). That settlement led to C withdrawing from the proceedings and the proceedings generally being dismissed. Taken together this litigation is referred to below as "the 2018 litigation". R1 contends that C's 2023 claim in relation to events in 2011 are an abuse of process and amount to a breach of contract (a breach of the COT3) and should be dismissed in any event.

1.6. The Notice of Hearing for today, issued on 6 February 2024, gave notice that the issue to be decided was "Would it be just and equitable to extend the time limit for presenting the claim? By reference to s.123 Equality Act 2010 and consideration of whether it would be just and equitable to extend time". This is a reference to the Discrimination Claims only.

1.7. The matters listed in the Decision above and numbered 1 - 5 are collectively referred to below as "All Matters", namely just and equitable extension,

reasonable practicability, abuse of process by C, breach of contract by C, and reconsideration of the dismissal judgment of 8 November 2023.

1.8. The parties expected that today's hearing would deal not only with extension of time in respect of the Discrimination Claims but All Matters.

1.9. I raised the potential procedural deficiency of the Notice in the light of Rule 54 Employment Tribunal (Constitution & Rules of Procedure) Regs 2013 (and any reference to a Rule is a reference to these Rules and Regulations), requiring all preliminary issues to be specified in writing in a Notice given no less than 14 days prior to the preliminary hearing in question.

1.10. The parties discussed matters between themselves and presented to me a joint proposal as they were all ready, able and wanted to proceed on All Matters, which they contended was compliant with the Tribunal's overriding objective (according to Rule 2).

1.11. The parties consented to my exercise of discretion under Rule 5, to foreshorten the minimum 14 days written notice requirement. They all consider that I could address All Matters under Rule 37, being able to consider striking out all or part of a claim (which may be done at any stage of proceedings on application or my own motion) on the basis of any of the grounds at Rule 37 (1) (a) – (e). Each party acknowledged and confirmed that they had had a reasonable opportunity to make representations either orally or in writing, or indeed both, as today was their chosen opportunity to make representations on All Matters.

1.12. Taking account of all relevant circumstances and the factors listed in Rule 2, including the parties' emphatically stated wish to proceed today on All Matters (as they expected, and for which they had prepared, and had been offered time today to further prepare if they wished), I consider that it was in the interests of justice to proceed today on All Matters.

2. Witnesses**:** I heard oral evidence from C and in support of him from Ms R Mango, and from Mr D J Denyer for R1. C presented five anonymised and redacted written statements asking that they be taken into account and that weight be attached to them. The Rs objected to me either reading or, if read, attaching any weight to the anonymised statements. It transpired that one of the statements was, in any event the evidence of Ms Mango. I read the anonymised statements; I take into account that they are not only anonymised but also redacted and therefore of limited value in themselves; their authors did not participate at the hearing such that the evidence was not attested or tested; I had no opportunity to consider witness credibility. All that said, I took some notice of them, and my views on those statements are included in my findings (in so far as I was able to take any relevant view) below.

3. Documents**:** I was provided with a hearing bundle of 345 pages, including index, R1 & R4s' "Note" dated 18 February, R2's Skeleton Argument dated 16 February, C's Draft List of Issues (undated, 10 pages paras 1 – 10.5). I refer below to Counsels' respective Note and Skeleton as their written submissions. I was taken

to relevant documents during the hearing, having confirmed to the parties at the outset what I had pre-read, including the reserved judgment in case Numbered 1601710/2018 and related documents of the Tribunal and Employment Appeals Tribunal, as well as the COT3 (that is I had read the relevant papers in relation to the 2018 litigation).

4. The Hearing: The hearing commenced at 10:00 and ended at 16:25. There were breaks, including a lunch break of one hour's duration. In view of the time and amount of further reading I was asked to undertake, I reserved this decision in the interest of justice. There were no significant IT issues during the hearing. I thanked all participants for their efficiency, clarity, and courtesy throughout.

5. Consideration of extension of time for C's presentation of the Discrimination Claims on the basis of justice and equity:

2.1. The Issues: given that C's 2011 engagement ended on 2nd October 2011 he was required to present any claims by no later than 1 January 2012. He presented his claim 11 years and nine months later than that, and the time issue therefore in relation to the discrimination claims is whether I ought to exercise my discretion to allow him to bring the Discrimination Claims within such time as I consider just and equitable.

2.2 The Facts/matters considered:

2.2.1 Throughout the 2011 engagement C was aware of managerial conduct and treatment of those engaged by it which he considered to amount to unlawful race discrimination. He and several of his colleagues discussed between themselves and raised with management issues about differential treatment and concerns where they believed that the reason for such was wholly or in part on the basis of religion or race. C considered that he himself had been mistreated because of his religion, (Muslim), and because of his South Asian origin, his race.

2.2.2 Ms Mango raised issues on behalf of C in 2011, and in particular in relation to a failed application for a promotion; this was a matter raised by C himself with management. In the opinion of Ms Mango and others, the atmosphere and environment at work was at times "toxic" with an undertone of unlawful discrimination. The anonymised statements to a greater or lesser extent merely confirm misgivings shared by C about management at the time of his engagement in 2011.

2.2.3 C alleges that during the course of the 2011 engagement he made two protected acts when he alleged unlawful discrimination based on the protected characteristic of race and religion.

2.2.4 At the time of termination of the 2011 engagement C was initially suspicious that this was because he had made disclosures of unlawful discrimination based on race/religion (he says they go together in his

case and the perception of the respondents). He was conscious that there had been conversations and even emails referring to racial slurs. These were all live issues in C's mind at the date of termination.

2.2.5 C was told that there was one full time equivalent worker more than required on the project; this was the reason given to him for termination of his engagement. C says that he did not question the rationale or motivation behind his selection. There is no evidence before me to suggest, and C has not said, that there was anything specific to his role that meant that he would be the automatic and obvious choice for termination in the event of over staffing.

2.2.6 Given C's evidence and his pleaded case, I do not accept his evidence that he had no reason to, and did not, suspect racial or religious motivation for his selection. For the same reasons, he had every reason to believe that he was being discriminated against unlawfully if he was genuine at all in his earlier complaints. I find that C was genuinely suspicious as to how and why he was treated as he had been during his engagement. He even copied a work email on the matter to his private email address at the time in 2011. C was aware at the end of his engagement of all the matters he alleges now to be discriminatory detriments, save that he says he accepted that the termination was because of overstaffing (although he implausibly says he did not suspect unlawful discrimination was the reason for his selection in those circumstances).

2.2.7 C did not then and does not now believe, or think he has reasonable grounds to believe, that anything that occurred to him during his engagement in 2011 most by reason of, or in relation to either his age or his sex; C is a male, and he was aged 34 years at the material time. I have no evidence before me as to the gender or sex breakdown of those similarly engaged, nor of the age profiles of relevant comparators. I find that in making claims of unlawful discrimination other than in relation to religion belief and race, C has merely thrown his net as wide as possible and that he has no evidential basis for claims of sex and age discrimination; he clearly had no conviction today in giving evidence about making such claims.

2.2.8 C knows his rights in relation to his protected characteristics and is capable of, in fact did, raise matters formally and informally that concerned him. He was able to, and did, raise them at the time of his engagement. C engaged in the 2018 litigation without even then referring to what he now claims to be discrimination by R1 in 2011. He signed the COT3 having had the benefit of professional advice and drew a line under the 2018 litigation.

2.2.9 I accept that C then heard from former colleagues in the light of the 2018 litigation, and that some former colleagues shared their misgivings about managerial actions in 2011; they shared that they had shared his

misgivings held at the time. The anonymised statements and that of Ms Mango illustrate that C was not alone in having suspicions in 2011 that race, and religion & belief, were factors in acts and omissions during the 2011 engagement; but he knew that at the time. C may not have known who exactly shared his misgivings and suspicions, but he knew he was not alone in believing that discrimination was being effected, whether he was right or wrong. The evidence that C says is lately acquired, since the COT3, is no more than corroboration of C's understanding from 2011 in respect of which he complained and collected evidence (the saved email(s)), with additional confirmation that there was criticism of his performance, hence selection. That latter evidence is not direct evidence of unlawful discrimination, and I find that he was not given evidence recently that he was selected for termination in 2011 on the grounds of race or religion; he was given evidence that he was selected for termination because of performance (which he disputes as being a fair reason, with some reasonable conviction) and for taking a holiday.

2.2.10 There is no evidence before me from C, other than that in relation to late and recent alleged disclosure of the alleged real reason for termination (which I have dealt with above) to explain C's delay in presenting his claim. I infer that the experience of the 2018 litigation, ending with the COT3, motivated C to make claims in relation to the 2011 engagement, litigation he commenced by way of early conciliation hot on the heels of the COT3; these were a claims of discrimination that he was able to make any time after his termination had he thought to do so and been so motivated; the 2018 litigation and COT3 motivated him to do so and not any revelation or sudden realisation that he had new evidence and corroborative witnesses such that he could pursue his 2011 claims, whereas before he could not reasonably have done so.

2.2.11 C decided for his own reasons not to litigate in 2011; it was his choice to let matters lie. Likewise, he decided to use the 2011 engagement as the basis for further litigation post COT3 for reasons of his choice and his choice of timing; he could have done it sooner. Perhaps the experience of the 2018 litigation emboldened him further; but what his former colleagues told him in 2023 did not empower or enable him where he was unempowered and unable any time before.

2.2.12 Since termination of the 2011 engagement Rs to his claims have lost access to a great deal of contemporaneous documentation by way of emails, minutes of meetings, notes and the like. I accept R1's evidence in this regard. I take judicial notice of R2's interlocutory application based in part on lack of available documentary evidence as confirmed today by Counsel for R2, noting Counsel's duty to the Tribunal.

2.3 The Law: There is an initial three-month limitation period for the presentation of a claim taken from the act complained of or the last in a series of such acts. A claimant ought to commence early conciliation within that time, whereupon the clock stops temporarily on time running; subject to such stoppage and the

consequential extended limitation period, a claimant ought to present any claim within the extended period. If a claim is presented out of time as so described the Tribunal has a wide discretion to extend time and can extend time to the date of eventual presentation of any claim if it would be just and equitable to do so. Whilst it is accepted that an extension of time is not a given, there is no fetter on my discretion which must be exercised in the light of all relevant circumstances and in the interests of justice. Relevant circumstances include the state of knowledge of the parties, in this case during and at the end of the 2011 engagement, what was said and done in and around that time, the subsequent activity or inactivity on the part of C in particular in relation to this engagement and a later engagement with R1, the fact that with the passage of time the quality of witness evidence is compromised and some documentary evidence may no longer be available, that it is important in a democratic society that issues of alleged unlawful discrimination are given proper consideration, including that people are not unfairly deterred from pursuing meritorious claims in a situation where there may be initial difficulty and reluctance to make such serious allegations or even to accept that's something as egregious as race or religion & belief discrimination has taken place.

2.4 Submissions:

2.4.1 Rs1, 2 & 4 made brief oral submissions in support of their written submissions and R3 made oral submissions. C made oral submissions. No party disagreed fundamentally with the others' legal submissions, save obviously for emphasis and the conclusions urged upon me in the light of authorities.

2.4.2 R1 & R4: in addition to written submissions, which I read and took into account, Counsel elaborated. It was clear that C had suspicions about Rs' treatment of him in 2011, suspecting discrimination on the grounds of his race and/or religion; he saved an email on the point at the time; he knew in 2011 of all the treatment of which he now complains including, obviously, that his engagement had been terminated and he had been chosen for some reason when there was alleged overstaffing; not only did he present and pursue the 2018 litigation but even applied to amend that claim and hence had knowledge of how to go about matters even then, but he "sat on his hands"; the respondents no longer have the evidence they need because they do not have access to all relevant documents, but only some and in any event they are more prejudiced than C because this claim is more than a decade late of his choosing, in the absence of a plausible alternative explanation.

2.4.3 R2: in addition to written submissions, which I read and took into account, Counsel elaborated. R1 & R4 have set out the tests in written submissions; C's alleged "new" evidence relates only to the Discrimination Claims; no case has been advanced for claims of age or sex discrimination or victimisation but the overall assessment is the same for all claims in that C is very late, there is no good reason and balance of prejudice is against the respondents, R2 no longer having relevant

documents (because of its data retention policy), and their potential witnesses no longer being employed/engaged by them; any prejudice to C is “illusory” and extending time would defeat the objects of time limits, this case being “not even border line”. In answer to Mr Ahmed’s point for C (see below) that the question is whether a fair hearing can be held, Mr Way submitted that this was not the test; the test is one of justice and equity.

2.4.4 R3: Mr Brown concurred with respective Counsel above; C said in evidence he had effectively an “encyclopaedic memory” (which I recall being Mr Brown’s reasonable interpretation of an answer C gave rather than C’s claim) but still he took no action for over 10 years on those maters he recites in his claim form; in the circumstances the respondents have been deprived of the opportunity to “allow for a reasonable defence” because they have no documentary evidence any more.

2.4.5 C: Mr Ahmed made oral submissions. “Generally speaking” he agreed with the above legal submissions, but he emphasised the wide discretion at my disposal; relying on authorities, there is no formal burden of proof save where a positive case, such as prejudice, is asserted and Rs have not proven prejudice by C’s delay; I need not be satisfied as to the reason for, or reasonableness of, any delay although any reason is relevant, but the “main point is prejudice”; emphasis must be on whether the delay affects the fairness of any hearing; the anonymised statements have weight and should be in account as they all refer to issues the respondents are said to have had with ethnic minorities, and with minorities in the financial world at large, which is “important in relation to extending time” (fear of reprisal and “backlisting” (Mr Ahmed’s and C’s repeated expression) which deters action); the question of C’s motivation was not put to him; R1 called the wrong witness on document retention and R1 could obtain documents from R2 but gave no evidence on attempts to obtain documents in a situation where I cannot rely on judicial notice of what R2 says, as it is untested; “racism” affects C’s livelihood and “impacts… on the community”, the fact that C had some knowledge of relevant concern to him at the time in 2011, does not prevent him making claims now –
“there is no automatic bar”; C was relaxed in 2011 and not “overthinking” matters but conversations in 2023 crystallised his mind about “causation” where he was given a different reason for termination to one known by an anonymised witness and told recently to C (“obscurity”, “concocted reason”); C found it difficult to focus on the 2018 litigation and invested in that over other things such that it would be wrong to criticise him now for not investigating 2011 matters; the question to be answered is whether a fair trial is possible (on which point see Mr Way’s oral submission above).

2.5 Application of law to facts:

2.5.1 I am satisfied that C believed in 2011 that he was the victim of unlawful discrimination on the basis of his race and religion, which he still believes today. I am further satisfied that he was well aware of circumstances that could have led him to make a claim to the Employment Tribunal in 2011 concerning not only the detriments he now alleges but also the circumstances of termination of his engagement. He complained about various specific matters which he attributed to unlawful discrimination, and he chose not to include in that ambit the termination. In all the circumstances, I find it hard to believe that he did not suspect that the termination was discriminatory when he did suspect that it was as a result of alleged protected acts. I conclude on balance that it is more likely than not C believed that his race and religion, as well as the alleged protected acts, were relevant to the circumstances of his dismissal. In all the circumstances I do not consider that C has any conviction in alleging the relevance of sex and age which he appears to have included as make-weights; he has no basis for believing, or firm belief, that they are relevant.

2.5.2 C could have litigated in 2011 but chose not to do so. He chose to do so in 2018 relying on similar factual matters and legal issues. By no later than 2018 he knew of the legal issues at stake and was conversant with the appropriate procedures to make claims. He still chose not to do so in respect of 2011 matters.

2.5.3 Parties to litigation are entitled to certainty. Being aware of claims or potential claims allows parties to collect and collate both witness and documentary evidence in a timely fashion. Delays in litigation compromise this. Significant delay may, in this context, amount to an effective ambush, even if that was not anyone's intention. I do not say that C deliberately delayed matters so as to ambush the respondents, however they are prejudiced in that this is the effect of a 10-year delay in litigation. As was stated in submissions this is not a borderline case. It is an extreme case of delay in circumstances where I do not accept the reasonableness of C's explanation, namely that he has only recently acquired necessary information. Allegations of discriminatory conduct were openly discussed by staff in 2011 and specifically raised by C in what he relies upon as protected acts; he was suspicious as to the true rationale for termination at the time, but he chose not to investigate matters either directly with the respondents or via Tribunal proceedings.

2.5.4 Despite his misgivings as to Rs' alleged treatment of him in 2011, C continued to work in the financial world, and this is despite issues that he raised about racism and religious bigotry, including by way of alleged protected acts. In 2018 C embarked on what turned out to be several years of litigation culminating in a settlement of remedy issues following a partly successful claim. He was not deterred by any fear of repercussion. At that stage at latest, upon presentation of the 2018 claim, C had no reason known to me to withhold claims in respect of most if not all of the matters about which he now claims.

2.5.5 It is obvious that memories will have faded in relation to various meetings and conversations held in 2011. In answer to Mr Brown's cross examination questions about specific dates of meetings and conversations held in those meetings as alleged by C, C conceded that he could not be sure of the dates of those meetings, or the exact words spoken, or the targets to be imposed, but he had approximated. He conceded a vagueness of his evidence which was not apparent in his pleaded case. If C is vague about matters that are so inherently and essentially important to him, as they would have been at that time, one cannot expect others to have any more vivid recollection; given that many allegations will be denied and it is impossible to prove a negative, one can expect essential witnesses to have an even more vague, if any, recollection.

2.5.6 It is inevitable that some at least of the essential documentation that is relevant and necessary in this case will not be available to one or more of the parties. On balance I accept the evidence from R1 & 4 and look favourably on the submission of R2 & 3 that they do not have access to significant, relevant, and necessary documentation (which is not the same as saying they have no access to anything at all that dates back to 2011).

2.5.7 Although it is not the legal test, I consider that after a time lapse of in excess of 10 years it is highly unlikely that a fair hearing is possible. There are bound to be missing documents and poor recollections that would severely compromise one or more, likely all, parties. In this context I refer above to concessions that C has already made to Mr. Brown, who is not a professional advocate.

2.5.8 Having due regard to the evidence I have heard and seen, the applicable law and submissions upon law and facts that I have heard, I conclude that it would not be just and equitable to extend time for the presentation of this claim to the date of its presentation. I am aware of the breadth of my discretionary power, but I must be guided by the interests of justice; I cannot see how those interests would be served by extending time in this instance, where Rs would be so disproportionately and unfairly prejudiced, and any prejudice to C is of his own volition. C had his opportunity to make his claim in 2011 and at latest 2018 (although I do not say that a just and equitable extension would, necessarily, have been to a date in 2018 either); he chose to do nothing. At a time of his choosing, and for whatever reason of his own, (and I do not accept that it was late disclosure of essential but newly discovered evidence) C decided to litigate on 2011 matters in 2023. That is manifestly unfair, in all the circumstances the balance of prejudice being so heavily against the respondents, and it would therefore be unjust and inequitable to allow the extension sought.

6. Consideration of time issues in relation to the ERA claims:

6.1. The Issues: in a situation where these claims were presented out of time even allowing for any extension of time by way of early conciliation, the question here is whether or not it was reasonably practicable for C to have presented his claim within time, and if he has then presented it within a reasonable time, that is after it became reasonably practicable.

6.2. The Facts/matters considered:

6.2.1. C's 2018 litigation became known to some of his former colleagues. In 2023 some former colleagues discussed with C circumstances that arose during the time of their respective engagements/dealings with one or more of Rs, and their opinions based on information they had received in relation to some of the treatment that C alleges. C Was told that his performance and a holiday that he had taken were relevant to the decision to terminate his engagement. C was told at the time of termination that the reason for it was over staffing by one full time equivalent worker. He does not say what he was told or believed as to the reason for his selection, in circumstances where there is no evidence to suggest that he was the natural and obvious choice where there was alleged overstaffing because of his role. What C was told corroborated his opinion that he was mistreated and that the reason, or, if more than one reason, a materially significant reason, was either or both his religion or race. This was C's opinion during the course of the engagement in 2011 in relation to much of the treatment that he alleges in his current claim; at the time of termination of his engagement he was suspicious as to the true reason for it, at least believing that it was related to his having made alleged protected acts in which he claimed that he had been the subject of discrimination based on race and religion.

6.2.2. C chose to take no action about any matters relating to his engagement in 2011 or its termination at the time. He was aware of monies paid to him whether it be by way of wages, notice pay, holiday pay or otherwise, and by the same token he was aware of what he ought to have been paid if he believed that he was not paid in full.

6.2.3. Other than his will, there was no reason for C to refrain from litigating about his concerns in relation to treatment received by him by any one or more of Rs. Having concluded the COT3, and taking encouragement from comments made to him that were supportive of his long-held suspicions, C decided in 2023 to embark upon this litigation. Once again this was a matter of his choice. Nothing prevented him from litigating in respect of the 2011 matters in the interim, save for his own free will.

6.2.4. It was reasonably practicable for C to have commenced litigation sooner, and indeed within three months of termination of his employment. There was nothing rendering presentation of a claim reasonably impracticable from the date of termination in 2011, 2 October 2011, and before these proceedings were commenced on 14 August 2023.

6.3. The Law: s.111 ERA provides that claims such as the ERA claims shall not be considered unless presented before the end of the period of three months beginning with the effective date of termination, date of non-payment, 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. The early conciliation provisions, allowing for an extension of time during the conciliation period, were introduced in in 2013.

6.4. Submissions: I took note of the parties' respective submissions. In oral submissions Mr Ahmed relied upon C not being aware of the what he says was the true reason for termination, capability and holidays taken, and was not told that he could receive holiday pay, although he knew about the situation with regard to what he had been paid or not paid by way of notice pay and wages and holiday pay; he submitted that I should look at the matter on the whole and consider whether it was reasonable or feasible for him to have made a claim sooner in that situation; this is a "smaller set of claims with lower value", and he urged me to exercise my "discretion".

6.5. Application of law to facts:

6.5.1. the test in respect of the ERA claims is different to that in the discrimination claims, where in the latter I have a wide discretion to extend time. Here the first question is whether it was reasonably practicable for C to have presented his claim in time, within three months effectively of termination or when the monies would have then been due, and if I was to find it was not reasonably practicable for C to have done that then to consider whether he presented his claim within a reasonable time. Any discretion is therefore relatively limited.

6.5.2. Save for the corroborative conversations in 2023 about the working conditions in 2011, there is no evidence to suggest that C was unable to present his claim in time or was in any way hampered in presenting his claim in time.

6.5.3. It was reasonably practicable for C to present these claims to the Tribunal at any stage from 2 October 2011 to date. He chose not to do so until 14 August 2023. In these circumstances I shall not consider his ERA claims. They are dismissed, or alternatively struck out as C has no reasonable prospect of establishing that it time should be extended.

7. Alleged Breach of COT3 contract by C:

7.1. The Issues: Briefly the issue here is whether or not C had compromised and settled these claims by virtue of the COT3. If the current claims were included within the ambit of the COT3, C would be in breach of that contract by presenting this claim.

7.2. The Facts/matters considered:

7.2.1. The COT3 related to the 2018 litigation. R1 alone of today's respondents was party to that contract.

7.2.2. The contract did not relate to the engagement that is the subject of this litigation.

7.2.3. C's current claims were not in the contemplation of the contracting parties at the time they entered into the COT3.

7.2.4. In terms, the COT3 settled claims made in the 2018 litigation and specifically related to C's engagement with Bank of America. It did not relate to the 2011 engagement with R2.

7.3. The Law: A COT3 agreement is a binding contract between litigants resolving claims between them. The wording of a contract should be given its natural meaning, and it would be improper for a tribunal to add or alter or infer wording save where strictly necessary to give effect to the contract. Such a contract ought not be expressed to be for all times in respect of all or any claims, even claims not in the contemplation of the parties, as this would be unenforceable.

7.4. Submissions: Mr Salter for R1 & 4 submitted that this issue and that below of abuse of process "elide"; C could have easily and reasonably brought the current claims in the 2018 litigation, and, in any event, it is a matter of construction for the Tribunal whether it finds that the COT3 covers them. Mr Ahmed on the other hand submitted that the current claims relate to different parties, bar one, and different events and time frame such that the COT3 cannot be said to cover them, when also its wording is clear and does not include them, and claiming cannot be said to be abusive of either set of discrete litigation processes.

7.5. Application of law to facts:

7.5.1. A reasonable interpretation of the COT3 excludes these claims from its ambit. The COT3 is expressly in relation to the later engagement.

7.5.2. I prefer C's submissions, namely that the current claims relate to mostly different parties, different circumstances, different factual matrix, in a different time frame; it seems to me that they were not in the contemplation of the parties to the COT3 (although I have little direct evidence of the intentions of the parties), but there's certainly nothing to suggest that they were in mind. The two sets of litigation are separate and discrete.

7.5.3. I conclude that C has not acted in breach of contract by instituting the current proceedings.

8. Alleged Abuse of Process by C in issuing these proceedings:

8.1. The Issues: The issue here, in reliance on well-known authority (Henderson) cited by both parties, is whether C ought reasonably have included the current claims in the 2018 litigation, as he was aware that he could make claims in relation to the matters now pleaded and they predated presentation of the 2018 claim, involving at least one common respondent.

8.2. The Facts/matters considered:

8.2.1. R1 was a respondent to the 2018 litigation. C's claims are under the same employment law jurisdictions and to the same, the Wales, Tribunal in this litigation as the 2018 litigation.

8.2.2. The claims relate to C's engagement in 2011 which had long since finished before any of the matters relevant to the 2018 litigation. There were some people who played a role in both of C's engagements (2011 and 2018), but Rs are not all the same.

8.2.3. Albeit under the same jurisdictions, the 2011 claims relate to different circumstances, situations and time. The two engagements are wholly distinct and there was no substantive cross-reference.

8.3. The Law: as accepted by R1 and C, a claimant ought reasonably to include all known existing claims, actually known or where one ought reasonably to know of them, in any Claim presented against a respondent; to do otherwise and thereby to litigate piecemeal, would be an abuse of process.

8.4. Submissions: the parties submitted as above in paragraph 7.4.

8.5. Application of law to facts:

8.5.1. I in part rely on my findings as above in relation to the breach of contract allegation at paragraph 7.2.

8.5.2. There being different parties, bar C and R1, timeframe, circumstances, and allegations (albeit the same jurisdictions) I conclude that there are two distinct and discrete processes here, that in relation to 2011 and the 2018 litigation. There are similarities between them, but they are not the same. C cannot be debarred under the Henderson principle from all litigation ever against R1.

8.5.3. There is insufficient nexus between both processes, as I have described them, for these proceedings to amount to an abuse.

9. Reconsideration of the dismissal judgment of Regional Employment Judge Davies dated 8 November 2023 (by delegation to me, consented to by all parties):

9.1. The Issues: I have to decide whether there is a reasonable prospect of the judgment being varied or revoked, and if I consider that to be the case then I could reconsider the dismissal judgment. If the judgement is to be reconsidered

I may either confirm, vary, or revoke it. In these considerations I am guided by the interests of justice at all times, the overriding objective of the Tribunal.

9.2. The Facts/matters considered:

9.2.1. C was engaged between 11 April 2011 and 2 October 2011; regardless of employment status (which is disputed) he was not engaged for a continuous period of two years prior to termination. C concedes that he did not have two years' continuous employment. Rs do not concede employment status, but that apart they also argue that the engagement was too short for C to qualify for the claimed protection and rights.

9.2.2. C presented a claim on 14 August 2023 alleging, amongst other things, "ordinary" unfair dismissal, automatically unfair dismissal in relation to public interest disclosures and entitlement to redundancy pay.

9.2.3. C was given the opportunity to show cause why the claims should not be dismissed; he did not take that opportunity.

9.2.4. The dismissal judgment dismissed the unfair dismissal and redundancy pay claims for want of qualifying employment, in terms of duration of the engagement.

9.3. The Law:

9.3.1. Two years' continuous employment is required for an employee to have protection against "ordinary" Unfair Dismissal and for entitlement to redundancy pay. There is no qualifying period of employment or worker engagement for a "whistle blowing" Unfair Dismissal claim.

9.3.2. The Tribunal may dismiss claims of its own volition where it does not have jurisdiction to entertain them because qualifying requirements have not been met by a claimant; in other circumstances envisaged by Rule 37, it may dismiss them including where the claims have no reasonable prospect of success.

9.4. Submissions: C submitted that the claim of automatic Unfair Dismissal ("whistle blowing" claim) ought not have been dismissed as there is no qualifying period. C relies on his submissions in relation to the ERA claims and reasonable practicability in seeking an extension of time for presentation of this claim. For all the reasons set out above and in their respective submissions, Rs argue that there is no reasonable prospect of C successfully arguing that it was not reasonably practicable for him to present his claim sooner and within a reasonable time, albeit out of time; they say that if there is any reconsideration of the judgement the "whistle blowing" claim ought to be dismissed in any event taking the time point as with the ERA claims.

9.5. Application of law to facts:

9.5.1. The dismissal judgment is correct insofar as it dismisses Cs claim to redundancy pay and claim of “ordinary” Unfair Dismissal. Given that “whistle blowing” automatic dismissal claims do not require a qualifying period, this claim ought to be differentiated from the “ordinary” Unfair Dismissal claim.

9.5.2. Insofar as making this differentiation is required I consider that it is appropriate to both reconsider the dismissal judgment and to vary it to the extent that I conpfirm it relates to the redundancy pay claim and, in respect of the Unfair Dismissal claim, it relates solely to the claim under s.94 ERA (“ordinary Unfair Dismissal”); I revoke the apparent dismissal of the automatic Unfair Dismissal claim advanced under s.103A ERA.

9.5.3. The automatic Unfair Dismissal claim advanced under s.103A ERA is however dismissed as it was presented out of time in circumstances where it was reasonably practicable for C to have presented it in time; for the avoidance of doubt, further and in the alternative, I strike out the claim because C has no reasonable prospect of establishing otherwise.

Employment Judge T.V. Ryan

Date: 05 March 2024

JUDGMENT SENT TO THE PARTIES ON 6 March 2024

FOR THE TRIBUNAL OFFICE Mr N Roche