EMPLOYMENT TRIBUNALS

Claimant: **Mr D. Bowen**

Respondent: **London Underground Limited**

London Central

Employment Judge Goodman

Judgement having been with oral reasons at a hearing on 10 November 2024, these written reasons are provided following a request by the claimant under rule 62(3) of the 2013 Rules of Procedure for reasons in writing.

REASONS

1. This is a public preliminary hearing to decide an application by the claimant to amend the claim, and an application by respondent to strike out the claims on the grounds that they have no reasonable prospect of success, alternatively, that the tribunal has no jurisdiction to hear them.

2. The claim was presented on the 6th October 2024. It concerns a dispute about the claimant's participation in the employer's pension scheme.

3. The tribunal has not heard evidence but has considered the pleaded case of each side and heard representations from each party, which in the claimant's case included material about why he did or did not claim. Some items of correspondence were before the tribunal.

   Factual Summary

4. The claimant joined the employer as a customer service assistant, on the 3rd April 2000. For the first four weeks he underwent training, at a slightly reduced salary of just over £13,000. On completing his training, on 7th May 2000 he was entered into the about £16,000. His contributions to the pension scheme then and later were calculated on the basis of his fully trained salary.

5. In 2003 the employer recognised that the terms of the employment contract in fact required that employees join the pension scheme at their start date, not at the end of their initial training. According to the claimant, some of those doing their initial training when that point was conceded were able to join the scheme partway through the training.

6. There was then a period of negotiation between the trade union and the employer about what should be done about those who had started earlier than 2003, and so had missed out on four weeks pensionable service. In 2008, following negotiation, a letter went out to pre-2003 starters making an offer that they could buy back missing service. It would be credited to them if they paid a contribution to the scheme for the missing weeks. The claimant says that he did not get letter sent to him in October 2008, nor a reminder sent in December 2008, because he had moved house and had a new address. There are no facts before the tribunal about when he had moved house or whether he notified the employer of the change.

7. In 2021 it came to his attention that he had missed out on the buyback opportunity and he lodged a grievance. He had a reply from Martin Boots. This told him about the negotiation and its outcome. It explained that there had been disadvantage to employees, that the calculations for the bought back service were to be at the fully trained salary, rather than the starting salary, and that there were other benefits to employees by this, namely the National Insurance arrangements, and that tax would be paid or credited in the current year rather than past years. The claimant having received this answer to his grievance was made an offer to buy back his pension for the sum of £62.63, but he did not reply, either to say yes or no. There it was left until at some point in 2024, when he took it up again. He says at this point, with advancing age, and hearing colleagues talking about making additional voluntary contributions to their pensions, he started to think about his own pension, and gathered more information, contacted his employer's pension fund, has some information from the trade union pension fund trustee, and eventually presented his claim in October 2024.

Unauthorised Deduction from Wages

8. There are two parts to this claim. One is the missing 34 days of service, which he says he should be allowed to buy back at the lower training rate, not the trained rate of pay.

9. The other part is that for the first year that he was in the scheme he was paying pension contributions at the higher trained rate, when according to the scheme rules, had he joined at the start of his employment, he should have been paying contributions calculated for the year 2000 on the basis of his salary at the beginning of that year, so at the lower rate for the rest of the

calendar year. He calculates the difference is £168 overall, or £122 if he subtracts what he would have to pay in buyback to get the extra four weeks service credit. Whatever the figures involved, this is a small claim.

10. It is also a very old one.

11. On filing a response to the claim on ET3, the respondent argued that the claim was made for unauthorised deductions from wages that is, too high an employee pension contribution in the year 2000. As a claim made under section 23 of the Employment Rights Act 1996, it should be struck out for a number of reasons.

12. The relevant law is set out in section 23. An employee may present a complaint that an employer has made an unauthorised deduction from his wages in contravention of section 13, provided it is presented within three months of the deduction, or, where there is a series of deductions, from the date of the last deduction. There is a proviso in section 23 (4) that where the employment tribunal is satisfied that it was not reasonably practicable for a complaint to be presented before the end of the relevant period of three months the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

13. In 2014 the 1996 Act was amended to introduce section 23(4A): “an employment tribunal is not despite subsections 3 and 4 to consider so much of a complaint brought under this section as relates to deduction where the date of the payment of the wages from which the deduction was made was before the period of two years ending with the date of the presentation of the complaint”. This is commonly referred to as the two year backstop, meaning that whenever the claim was made, if the deduction complained of is more than two years old the tribunal has no jurisdiction. Section 23 (4A) is thus an absolute bar to the claimant’s claim in any event.

14. In case I am wrong about that, I consider section 23(4), that is, whether it was not reasonably practicable to present it within three months of the deduction. The claimant‘s principal argument is that he was not aware that there was any error, and could not have known until 2008, when letters were being sent out by the employer about the negotiation with the trade union, and that he was not aware at that stage because he had moved house and had no idea that he should have had a letter. The next stage on from that is 2021, when he was offered a buyback, when he says that he was not aware that there was anything wrong with what his employers then told him was the correct position until 2024, when it came to his attention that this was not the whole story, that there were errors made, and that they were continuing.

15. The case law on how to decide what is reasonably practicable outlines that the tribunal does not just look at what was reasonable, or what was practical; reasonably practicable means that must be a factual focus on what it was that prevented the claimant from bringing his claim in time – **Walls Meat Limited v Khan (1979) ICR 52, Palmer and anor v Southend on Sea Borough Council (1984) ICR 372.**

16. It might be said that as of 2000 he did not know about the detail of the contract terms on when he should be entered into the scheme (four weeks earlier, at a lower rate for the rest of the year), and in 2008 he did not know because the letter never reached him, but in 2021 it seems to have been made pretty clear to him that he should have been entered earlier and that there was an issue about whether buyback should be at the training rate or the higher rate, and that differing views about this this had been compromised in negotiation. The claimant has not explained why he did not reply to the letter then, a letter which might have prompted him to think about his pension, and his account of why he did decide to think about it in 2024 is sketchy. The claimant has not shown why it was not reasonably practicable for him to question his employer's assertion in 2021, or what changed in 2024 to make it reasonably practicable then. The burden is on the claimant to establish that it was not reasonably practicable – **Porter v Bandridge Limited (1978) ICR 943**. He has not discharged that burden.

17. If I were to hold it was not reasonably practicable to present a claim until the response to his grievance in 2021, a great deal more than three months elapsed since then, and I am not satisfied that the claimant presented it within a reasonable time thereafter.

18. I conclude that even if there were jurisdiction to hear a complaint about a deduction made more than two years before the claim was presented, there is no jurisdiction to hear this claim because of the operation of the time limit in section 23.

19. The respondent also argues that the claim should fail because section 27(2)(c) excludes pension contributions from the definition of wages. That section excludes "payment by way of pension, allowance or gratuity in connection with worker's retirement", and employer's pension contributions have been held to be so excluded - **Somerset County Council v Chambers EAT 0417/12**. However, the second part of this case concerns not the employer's contribution to pension, made to pension scheme members in addition to their ages (and not made in any form to those who do not join the scheme) but the calculation of the deduction made by the employer from the wages to which the employee would otherwise be entitled to receive for his work. The extra benefit to the worker comes not from any obligation to pay wages but from the tax treatment. This part of the claim is about over-

deduction due to a mistake in the reading of the contract as to the rate at which deductions were to be made in any year, so the 1996 Act applies to the payment, though the claim is barred for other reasons.

20. Arguably however section 27(2)(c) does bar a claim for the first part of the claim, namely the failure to enter him into the scheme four weeks earlier, as that is not a claim about making deductions from wages, but about a failure to make deductions. As a claim in contract it has to be brought in the courts; the tribunal has jurisdiction in contract claims only when the employment has ended.

Age Discrimination

21. I turn now to the additional claim of age discrimination. Earlier in this morning's hearing I allowed an application by the claimant to amend by adding a claim of age discrimination. (*Reasons were given orally, I assume that the claimant's request for written reasons for the judgment did included reasons for allowing the amendment as it hard to see how they would serve a purpose*). I now consider whether this claim is out of time, so whether the tribunal has jurisdiction to hear it, or whether under the terms of order 37 (1)(a) it has no reasonable prospect of success. The amendment argues that the group of employees who started training in 2003 or later and were admitted to the pension scheme on the proper terms (from their start date and with the first year deductions being made at their starting salary) have been treated more favourably than those admitted earlier. It is argued that they are older people, and that the reasons for the less favourable treatment is age. The respondent replies that as a direct discrimination claim under section 13 of the Equality Act 2010 there is no reasonable prospect of establishing that age was the reason for the policy being applied or misapplied, and that it was age blind. Trainees could be old or young.

22. The time limits provisions of the Equality Act are in section 123: a complaint must be presented must not be presented after the period of three months starting with the date of the act to which the complaint relates, or such other period of employment tribunal thinks just and equitable. As to the date of the act to which the complaint relates, section 123(3) provides that conduct extending over a period is to be treated as done at the end of the period.

23. I start with whether there was conduct extending over a period. The claimant argues that the effect of the decisions made in 2000 has extended over a very long time, which has not yet ended. The counter to that is that the decision was made in 2000; it is the effect of that decision that has continued, but not the conduct complained of. If that is wrong and there was conduct extending over a period, the conduct complained of was put right in 2008, when the letters were written, or, in the claimant's case, in 2021 when he received a

response to his grievance in effect making the same buyback offer to him as was made to other people in 2008. If correct, the claimant must explain or establish that it is just and equitable to allow the claim to be considered out of time.

24. When considering what is just and equitable in extending time that there is considerable case law. For many tribunals followed Keeble v British Coal Corporation, that the tribunal should look at a list of factors, similar to those under the Limitation Act in personal injury claims, that is what delay there was, why there was delay, whether there was concealment on the part of the employer, the effect of the delay on the cogency of the evidence, and then to balance the hardship caused to each side by allowing it to proceed out of time or not. In **Abertawe Bro Morganwd University Local Health Board v Morgan (2018) EWCA Civ 640**, tribunals were told not to follow a slavish checklist, but focus on the delay and the reasons for it and then to balance the hardship. **Ahmed v Ministry of Justice UKEAT 390/14** establishes that the burden is on the claimant to establish that time should be extended, not for respondent to show it should not.

25. I examine the factors. As to why the claimant delayed, it is fairly clear: he didn't get the letters in 2008, he didn't hear about it from colleagues until 2021 or thereabouts, and when he got the letter answering his grievance in 2021 he thought that if a highly paid manager was telling him that this was the position that must be right, and it was not until 2024 that he heard that there had been some action by the employer in 2006, and that it might not be within the scheme rules to have made an agreement with the trade unions on how to deal with the four weeks service problem. The reasons why the claimant delayed after 2021 are largely unexplained just that he did not consider whether he could dispute a senior manager's decision, and it was only when he heard about it later. As to the age claim, he did not initially bring it but says that he has subsequently learned that there was a group of people in 2003 who were put onto the scheme straight away, and it occurred to him that these were now much younger than him and therefore he should bring the claim.

26. What access did the claimant have to advice? I do not know whether the claimant is a member of a trade union, but I note that in his workplace there is significant trade union organisation, that many of his colleagues will be members of Aslef or RMT unions, and even of not, there are places where he could inquire - he could ask a manager or payroll department, he could check with the Pensions Ombudsman, he could go to Citizens Advice Bureau, he could, as he now has, contact the trade union pension fund trustee. Not knowing he could dispute the employer's offer does not appear a very strong reasons for the delay or why the claimant could not bring it earlier.

27. As for the effect of delay on the evidence, on the face of it the facts are not largely in dispute, at any rate as regards the claimant's own position. The delay ay however ,make it difficult to establish the relevant age cohorts in 2000 and 2003. Files on those no longer employed may well have been destroyed.

28. What is more difficult for the claimant in the age discrimination claim as pleaded (direct discrimination) is that the claimant has a very poor prospect of success in establishing that when the respondent entered people into the scheme only when their training period was completed, or when they calculated their contributions to the scheme on the basis of the trained rate of pay, that age had anything to do with it. Nothing indicates that age played any part in the employer's reasons for these errors (as they now concede that they were). The claimant says only that people who started after 2003 tend to be younger than him and they are all more favourably treated, which is more like an indirect discrimination claim. I consider this because the claimant has not had legal advice and it is a complex area. If so it would be necessary to examine the effect of on age groups as of 2000 when the decision affecting the claimant was made, or possibly 2006 or 2008, when the deal was done with a view to rectify the error, and again possibly 2021 when the claimant was made his offer. If we look at the position in 2008, that is a long time ago . The employer has to assemble evidence about the age of the new starters to decide whether there was disparate impact in different age groups at the time the policy was being applied and before it is rectified in 2003, then whether there was disparity between new starters from 2003 and those who started earlier. As a matter of history it is now more likely to affect those who are older, but the effect of the discrimination must be assessed at the date when the discrimination occurred, or at the latest, when it was there was possible to put it right, that is in 2008. It is now the older age group affected only because of the claimant's delay in presenting the claim. N merits, this is a weak claim, which means there is less prejudice to the claimant when balancing hardship. There is considerable documentary difficulty for the respondent finding the information to defend the claims . Employers are obliged to keep their records for at least six years (and possibly 12) for tax purposes, but going back 24 years they may have no records at all of who was on their payroll at that time. It will be an enormous effort to get the information because of the large numbers of drivers and customer service assistants employed by London Underground.

29. If I balance the prejudice between the parties, the claimant loses a point of principle (which I do not altogether discount, as it is important to him) and in terms of financial loss, he loses £122 (the over deduction in the year 2000/2001) or he loses 34 days service, which will impact on his pension entitlement as and when he reaches retirement age, but which he has had the

opportunity to put right by buying back service, and presumably still could at little cost to himself. On the other side of the scales is the enormous difficulty for the respondent of assembling documentary evidence of general and particular disadvantage to different age groups, to resolve which a solution has already been agreed and negotiated with the trade union. The claimant's age discrimination claim already has a time difficulty, so he has to rely on what is just and equitable, it has difficulty on its merits, regardless of delay bringing it, and presents great difficulty to the respondent assembling evidence of the effect on different ae groups in the workforce. I conclude that balancing the prejudice the parties it is not just and equitable to extend time. I bear in mind that discrimination claims are fact sensitive; I take the claimants claim at its highest therefore, that is, I assume that the matters set out in his claim form and in his further particulars (the claim form itself was relatively bare) and assume that he could establish those at a hearing. Even making those assumptions, the balance is against him. Nothing there shows prospects of success for a claim based on differences between older and younger people in 2003 or 20028, when a solution was offered.

30. I conclude that the age discrimination claim is out of time as it would not be just and equitable to extend time on the basis of what is pleaded.

31. The respondent also seeks to strike out the claim under rule 37(d) as having no reasonable prospect of success. I conclude it does not, taking the claim at its highest. Nothing in the claimant's analysis or asserted facts shows age had anything to do with the respondent's error before 2003 or its negotiation from then to 2008 (the direct discrimination claim). If there were an indirect discrimination claim (none has been pleaded) he has not set out any rule prmpolicy or practice that was applied across the board and to him which could have discriminatory impact. They ceased to apply the four week training requirement when the error came to their attention, regardless of anyone's age. They then addressed the problem of those who had stared earlier, again regardless of age. There is no reason to hold that people who started 3 years before the mistake was discovered (the claimant) were disproportionately impacted and if they were no doubt the employer would show the reason for treatment was the difficulty of putting the clock back. The age discrimination claim has no reasonable prospect of success.

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Employment Judge Goodman

Date 6 January 2025

JUDGMENT SENT TO THE PARTIES ON

20 February 2025

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