EMPLOYMENT TRIBUNALS

At an Open Preliminary Hearing
By Cloud Video Platform

Claimant: Mr Q Hu

Respondents:
1. Nicholas Associates Group Ltd trading as Stafforce
2. Young's Seafood Ltd

Heard at: Midlands (East) Region by CVP
On: 16 and 17 February 2022
Before: Employment Judge M Butler (sitting alone)
Interpreters: Day 1 – Ms Shu-Hui Poon
Day 2 – Ms Jing Wu

Representation
Claimant: In person
Respondent 1: Ms S Harkins, Employment Consultant
Respondent 2: Ms T Clifford, Solicitor

Covid-19 statement:
This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

JUDGMENT

The Judgment of the Employment Judge is:

1. The application to amend the claims to include a claim of age discrimination and/or harassment because of age is dismissed.

2. The claims of disability discrimination and race discrimination are dismissed as they were submitted outside the 3 month time limit, as further extended by early conciliation, and it is not just and equitable to extend time.

3. The claims of unfair dismissal and automatic unfair dismissed are dismissed. They were brought outside the statutory time limit of 3 months, as extended by early conciliation, and it was reasonably practicable for them to have been submitted in time.

4. The claims for wages and holiday pay are dismissed because they were

brought outside the statutory time limit of 3 months, as extended by early conciliation, and it was reasonably practicable to submit them in time.

5. The claim of breach of contract is dismissed as it was submitted outside the statutory time limit of 3 months, as extended by early conciliation, and it was reasonably practicable to submit it in time.

6. The Claimant is not entitled to a redundancy payment.

REASONS

Background

1. This open preliminary hearing was listed at a closed preliminary hearing held before my colleague, Employment Judge Adkinson, on 30 June 2021. Employment Judge Adkinson considered the issues in significant detail and directed which issues should be decided at the hearing before me. Those issues are set out below.

2. The Claimant's first language is Mandarin and it was necessary to engage the services of two Mandarin interpreters who, at the commencement of proceedings on each day, took the Interpreter's Oath. I am very grateful for their assistance. The Claimant is a litigant in person and I assisted him as much as I could in terms of practice and procedure and the law but explained that I could not give him legal advice in order to avoid any allegation of bias. It was, however, still apparent that he had significant difficulty in understanding the legal principles to be considered. Further difficulties arose in that the Claimant gave different accounts in this hearing to those he gave before Employment Judge Adkinson and I consider these matters further below.

The issues

3. As directed by Employment Judge Adkinson, the purpose of this hearing was as follows:

    3.1 further clarification of the claims, in particular the claim for detriment or dismissal for making protected disclosures in light of the clarification ordered;

    3.2 consideration of whether permission should be granted to the Claimant to amend his claims to allow a claim for age discrimination or harassment because of age, and any consequent issues that arise from that (such as a deposit order);

    3.3 whether some or all of the claims are in time, and if not

        3.3.1 whether it is just and equitable to extend time for the claims brought under the Equality Act 2010;

        3.3.2 whether it was not reasonably practicable to bring the claim in time, but it has been brought within such further time as is

reasonable, in respect of claims under the Working Time Regulations 1998 and the Employment Rights Act 1996 Part II

3.4 such further consequent case management as is necessary.

The law

4. Section 111 of the Employment Rights Act 1996 provides at subsection (2) that an employment tribunal:

"*… shall not consider a complaint under this section unless it is presented to the tribunal—*

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) 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."

5. Section 207B ERA extends time to facilitate conciliation before the institution of proceedings by providing:

"(2) In this section—

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.**"**

6. Article 4 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides:

> "***4.*** *Proceedings may be brought before an employment tribunal in respect of a claim of an employer for the recovery of damages or any other sum (including breach of contract) which is outstanding on termination of the employee's employment. The same time limit for submitting claims as under the ERA with its provisos applies to such claims.*"

7. Section 123 of the Equality Act 2010 provides:

> **"*123 Time limits***
>
> *(1) … proceedings on a complaint within section 120 may not be brought after the end of—*
>
> *(a) the period of 3 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*."

The early conciliation provisions apply to the submission of such claims.

8. Regulation 30 of the Working Time Regulations 1998 provides:

> *"(2) An employment tribunal shall not consider a complaint under this regulation unless it is presented—*
>
> *(a) before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;*
>
> *(b) 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*."

9. Regulation 30B extends the time limit to facilitate conciliation before the institution of proceedings as set out above.

10. I took into account the case law cited below in this Judgment.

<u>The evidence</u>

11. The Claimant gave oral evidence having affirmed. I also had regard to the various documents he had submitted to the tribunal in response to requests for further and better particulars from the Respondents and the orders made by Employment Judge Adkinson. There was also a bundle of documents running to 337 pages and a few additional documents were admitted during the course

of the hearing as relevant. References to page numbers in this Judgment are to page numbers in the bundle.

The factual background

12. I consider each of the issues I am required to determine below. However, it is worth noting at this stage those facts which are clear from the evidence before me and which are relevant to those issues.

13. The Claimant identifies his race as Chinese Asian and says that he was disabled by virtue of type 1 diabetes. The First Respondent (Stafforce) is an employment agency which deployed the Claimant along with some of their other employees to work at Young's Seafood Ltd (Young's). He commenced employment with Stafforce on 13 December 2019 and the effective date of termination of that employment was 1 July 2020. He was engaged as a packing worker. He submitted claims against both Respondents on 30 November 2020. His argument before me was essentially that he was employed by Young's because he worked there. Unfortunately, this flies in the face of his comments to Employment Judge Adkinson at the last preliminary hearing where he acknowledged that he was employed by Stafforce. In fact, what was produced at the hearing was an assignment signed by the Claimant providing details of the fact that he was to be deployed at Young's and what his duties would be. Again, unfortunately, the Claimant sought to persist in his argument that he had no knowledge of this and had never seen the assignment.

14. It is Young's argument that the Claimant, although a good worker, was somewhat argumentative whilst at work and found it difficult to relate to his work colleagues. Accordingly, Young's terminated his assignment, which they were entitled to do under its terms. It is accepted that he made one complaint about working conditions at Young's which he committed to writing dated 1 June 2020 dealing largely with alleged racial discrimination. He also said he complained on numerous occasions by email and text message about working conditions at Young's but produced no evidence of these communications. Young's terminated his assignment and Stafforce then tried to find alternative assignments for him. Assignments which were offered to the Claimant were rejected as a result of which Stafforce terminated his employment .

15. I am conscious of the issues before me and address each of them in turn.

Application to amend to include age discrimination/harassment

16. In his Claim Forms the Claimant ticked the box to indicate a claim for age discrimination. However, he gave no further details in his particulars of claim. When ordered to do so by Employment Judge Adkinson, he said (page 225) that he was "*nearly 60 years old, suffers from type 1 diabetes, is Chinese, is short, and they don't like it*". He further said he was: "*the oldest person in the production line*". In his evidence before me, he gave no further detail, even when pressed to do so, other than making reference to a finding allegedly made by the World Health Organisation to the effect that 50% of employees in the 49 to 60 age group suffered discrimination at work.

17. In considering whether to allow this amendment, I had regard to the judgment of the Employment Appeal Tribunal in ***Selkent Bus Co Ltd v Moore EAT/151/96***. Consequently, I must take into account all the circumstances and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The relevant circumstances include:

    (a) the nature of the amendment;

    (b) the applicability of time limits;

    (c) the timing and manner of the application.

18. Given the lack of any detail of acts of age discrimination by the Claimant in the Claim Form and in the Claimant's oral evidence, I have to conclude that this is effectively not a relabelling of an existing claim but an entirely new cause of action. Further, the claim is considerably out of time. This is relevant in this case because a number of those who worked at Young's at the relevant time will no longer be there and it will be difficult to produce reliable evidence in relation to the Claimant's somewhat sparse allegations. In this regard, I also consider the merits of the claim which, on the basis of the information before me, must be said to have no reasonable prospect of success.

19. Accordingly, the balance of hardship in allowing he amendment rests more heavily with the Respondents and I dismiss the application.

The not reasonably practicable extension

20. The possibility of the time limit for presentation of many claims made under the ERA and Working Time Regulations 1998 on the grounds that it was not reasonably practicable to present the claim in time is often referred to as an "*escape clause*". In ***Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53 CA***, the Court of Appeal said that the application of this ground should be given a liberal construction in favour of the employee. What is reasonably practicable is a question of fact. In ***Wall's Meat Co Ltd v Khan [1979] ICR 52 CA***, Lord Justice Shaw said:

    "*The test is empirical and involves no legal concept. Practical common-sense is the key note and legalistic footnotes may have no better result than to introduce a lawyer's complications into what should a layman's pristine province. These considerations prompt me to express the emphatic view that the proper forum to decide such questions is the [employment] tribunal, and that their decision should prevail unless it is plainly perverse or oppressive*."

21. The onus of proving that it was not reasonably practicable to present his claims in time rests with the Claimant. Lady Smith in ***Asda Stores Ltd v Kauser EAT 0165/07*** said:

    " … *the relevant test is not simply a matter of looking at what was possible but asking whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done.*"

22. The Claimant's main argument as to why it was not reasonably practicable to

present his claims in time relies upon his alleged complete ignorance of employment tribunals and his right to bring a claim there, his poor English and his difficulties in finding a solicitor to represent him. In ***Porter v Baindridge Ltd [1978] ICR 943 CA***, the Court of Appeal, having referred to the judgment in ***Dedman***, decided that the correct test is not whether the Claimant knew of his rights but whether he ought to have known of them. I further note the judgment of the Employment Appeal Tribunal in ***Avon County Council v Haywood-Hicks [1978] ICR 646 EAT*** which rejected the notion that ignorance, however abysmal and however unreasonable, is a universal excuse.

23. At the last preliminary hearing, Employment Judge Adkinson noted the relevant dates of the claims against Stafforce as being:

    (i) The claim was presented on 30 November 2020;

    (ii) early conciliation day A was 9 October 2020; and

    (iii) early conciliation day B was 9 November 2020.

24. In relation to the claims against Youngs;

    (i) The claim was presented on 30 November 2020;

    (ii) early conciliation day A was 29 September 2020; and

    (iii) Early conciliation day B was 29 October 2020.

    Accordingly, the claims were submitted out of time.

25. The Claimant's evidence was that he was ignorant of his right to claim in the employment tribunal until he consulted his doctor on 17 July 2020 who told him of the possibility of bringing a claim in the employment tribunal. Notwithstanding this, the Claimant did not commence early conciliation until almost 6 weeks after the expiry of the statutory 3 month time limit. The claims are accordingly out of time.

26. It follows that the Claimant had knowledge of his right to bring a claim in the employment tribunal several months before he began early conciliation. Whilst he makes reference to his alleged disability (which is not conceded by either Respondent), he did not explain why suffering from type 1 diabetes prevented him from bringing his claim within time. Instead, the Claimant introduced a further disability, not previously pleaded, of anxiety and depression stating, in terms, that he was in no fit state to address the issue. There is no medical evidence to support his contention that these conditions prevented him from addressing his right in the employment tribunal.

27. Notwithstanding the above, it did occur to me that the Claimant's lack of English would have meant that he faced a difficult hurdle to overcome in researching how to bring a claim in the employment tribunal. He said, specifically that he had difficulty in finding solicitors who could advise him but

gave no detail of the actual efforts he made to achieve this.

28. In the last preliminary hearing, Employment Judge Adkinson, at paragraph 20 of his case management summary, makes reference to the Claimant having said he had presented a claim for personal injury against Young's in the County Court. Ms Clifford was able to produce a copy of the notice of claim Young's had received from the Claimant's solicitors giving details of the claim for personal injury, many of which closely resemble the complaints made by the Claimant in the employment tribunal. Somewhat surprisingly, the Claimant in his oral evidence initially denied all knowledge of having made a claim in the County Court. When faced with a copy of the notice of claim, he continued that denial and denied all knowledge of the firm of solicitors named in the notice as acting on his behalf. He said he had never seen the notice of claim before even though I pointed out to him that he had signed it and ticked the box indicating he had been given a copy of it. On the second day of the hearing, the Claimant seemed to change that evidence by acknowledging a claim had been submitted on his behalf by a firm of solicitors who had agreed to act on a no win, no fee basis. In his submissions, he developed this further by saying it was his right to claim compensation in any forum available to him.

29. I found the Claimant's evidence in this regard to be entirely lacking in credibility. Whilst allowances may be made for his difficulties with the English language, it is quite clear to me that he knew all along that he had submitted a claim to the County Court. He could, therefore, as he had done with the County Court claim, have made enquiries of firms of solicitors having been put on notice of his right to bring a claim in the employment tribunal by his doctor on 17 July 2020. I therefore conclude that it was reasonably practicable for him to have submitted his claims in time.

30. Even if I am wrong in this conclusion, I must take into account two further matters. Firstly, it is clear that Young's were at no time the Claimant's employer and therefore the claims of unfair dismissal and the monetary claims cannot succeed against them. Moreover, the Claimant did not have two years' continuous employment with the First Respondent so by virtue of section 108 ERA the Claimant cannot bring a claim of ordinary unfair dismissal because he had not been continuously employed for a period of 2 years ending with the effective date of termination.

The just and equitable extension

31. The just and equitable extension under section 123(1)(b) EqA is broader than the reasonably practicable test found in the ERA. In ***Robertson v Bexley Community Centre [2003] IRLR 434 CA***, the Court of Appeal said that when an employment tribunal considers exercising the discretion under the just and equitable provisions:

"… *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*."

32. Following the decision in ***British Coal Corporation v Keeble & others [1997] IRLR 336***, the Employment Appeal Tribunal confirmed that tribunals may be assisted in determining whether the discretion to extend time on just and equitable grounds by considering the factors in section 33 of the Limitation Act 1980. However, these factors do not need to be slavishly adhered to and all the circumstances of the particular case must be considered. I am also entitled to consider the prejudice which each party would suffer as a result of my decision.

33. As with his claims under the ERA, the Claimant relies on his ignorance of his right to bring claims of discrimination. Following the decision in ***Perth and Kinross Council v Townsley EAT 0010/10***, the EAT confirmed that although there is a discretion to extend time where a claimant is ignorant of his rights, it will only apply where that ignorance is reasonable. In this case, the Claimant became aware of his right to complain to an employment tribunal when attending an appointment with his doctor who mentioned the existence of employment tribunals and ACAS to him. As mentioned above, the Claimant, being already familiar with solicitors and how to instruct them, took no action until the time limit had already expired. I do not find this to be a credible reason for his failure to act promptly.

34. But I also bear in mind the fact that the Claimant claims to have a disability. For the record, the only disability relied on by the Claimant in these proceedings is type 1 diabetes. In his evidence and submissions, he sought to rely on anxiety and depression, of which no medical information has been provided. Indeed, whilst his diabetes is accepted, there is no medical evidence to confirm that this condition played any part in his failure to submit his claim in time. Whilst the Respondents do not concede disability, the Court of Appeal in ***Department of Constitutional Affairs v Jones [2008] IRLR 128*** held that an alleged disability itself is a factor to be taken into account. However, given the absence of any medical evidence from the Claimant to substantiate his claim that his diabetes prevented the submission of his claim in time, I must find that it cannot be relied on.

35. I have also considered the factors set out in section 33(3) of the Limitation Act 1980. In relation to the length of, and the reasons for, the delay on the part of the Claimant, I do not consider the length of the delay to be particularly material but the Claimant's evidence in relation to the reason for the delay is not credible for reasons stated above. Considering the extent to which evidence adduced, or likely to be adduced, by the Claimant or Respondent is likely to be less cogent than if the action had been brought within the limitation period, I bear in mind that the Young's, who would produce the relevant witnesses, relies heavily on agency staff and it may be difficult for those staff members to be traced in order to give such evidence. This is likely to be the case even given the fact that the delay in submitting the claim was just a matter of weeks. However, having said that, the Claimant in providing further details of alleged acts of discrimination has adopted a scattergun approach with little information as to the specific acts upon which he relies. He does not give any dates nor is his method of communicating those acts to Young's clear. This is also relevant in relation to the extent to which he responded to requests reasonably made by the Respondents and ordered by Employment Judge Adkinson for the purpose of ascertaining facts which might be relevant

to the Claimant's case.

36. The extent of his disability has already been discussed above. I do not consider that the extent to which the Claimant acted promptly and reasonably when he knew whether the acts of which he now complains were capable of giving rise to a claim for discrimination is relevant since, as noted above, he was aware of his right to bring a claim in the employment tribunal in July 2020 but simply failed to act upon that right. The final factor set out in section 33(3) refers to the steps, if any, taken by the Claimant to obtain legal advice. It seems to me that, although he was in a position to seek such advice, he simply failed to do so. The same applies to obtaining medical advice which might support his contention that he was unable to bring the claim due to his disability.

37. Accordingly, for the above reasons, and considering all of the circumstances, I conclude it is not appropriate to exercise my discretion to extend time on just and equitable grounds and the discrimination claims are dismissed.

The redundancy claim

38. Employment Judge Adkinson set out in his case summary of the last preliminary hearing that I should consider whether all of the claims should be dismissed. In relation to the claim for a redundancy payment against Young's, that claim cannot succeed because the Claimant was not employed by that Respondent. In relation Stafforce, the claim would appear to be in time because the Limitation Period is six months. However, the requirement to have completed two years' continuous employment before being able to bring a claim for a redundancy payment still subsists. The Claimant's argument was that all of his claims were in time because had Stafforce not terminated his employment, that employment would have continued for at least two years. This is an argument with no merit whatsoever. Accordingly, the claim for a redundancy payment is dismissed.

General comments

39. As noted above, I made such allowances as were appropriate to take into account the fact that the Claimant is a litigant in person and English is not his first language. Whilst during the majority of this hearing he was respectful, there were times when he became excitable and refused to accept the effect of the relevant statutory provisions applicable to his claims. The detail of his claims was often unclear, and I spent a considerable amount of time asking him questions which were relevant. The fact that he changed his evidence in relation to his personal injury claim was highly relevant in forming my view of his evidence. He had the benefit of Mandarin interpreters and, whether he had difficulty with the English language or not, his blanket denial of the personal injury claim he instructed solicitors to bring on the first day of this hearing made me question the credibility of his evidence. The fact that he changed his evidence only when he was presented with irrefutable documentary evidence that he had instructed solicitors to bring this claim, weighed heavily against him when assessing his evidence generally.

40. For the above reasons, the claims are dismissed.

Employment Judge M Butler

Date: 16 March 2022

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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