

3. Before addressing those issues the parties are entitled to an explanation and apology for the delay in these proceedings since the Preliminary Hearing. Due to an administrative oversight the parties' written submissions were not placed before the Employment Judge, the Employment Judge having been informed that the parties had resolved the dispute through settlement. That, evidently, is not the case and the dispute remains alive.
4. The Tribunal had before it an agreed File of documents, marked "C1", two statements from the Claimant, a statement from Carmen Alonso on behalf of the Respondent, a Skeleton Argument prepared by Mr Sykes on behalf of the Claimant and Outline Submissions prepared by Mr Fodder on behalf of the Respondent, extensive case law authorities submitted by both parties and (delivered to the Tribunal after the Preliminary Hearing) further written submissions from the parties (two set of submissions from the Respondent), judgment having been reserved by this Tribunal on the day of the Preliminary Hearing to accommodate Mr Sykes because Mr Sykes was committed to be at the Royal Courts of Justice imminently to represent a client, the Hearing before the Tribunal having occupied longer than its allocated time-provision.
5. The Tribunal heard evidence from:
 - (1) Michael Ptasnik - the Claimant
 - (2) Carmen Alonso - the Respondent's General Manager

THE ISSUES

6. The Claimant was dismissed by the Respondent on 5 April 2017. Accordingly, the deadline for engaging mandatory ACAS Early Conciliation before presenting those claims expired on 4 July 2017. The Claimant engaged Early Conciliation with ACAS on 5 October 2017, and issued these proceedings on 6 October 2017.
7. All five claims have been commenced more than three months late and the Tribunal has no jurisdiction to hear them, and determine whether or not they are well founded, unless it exercises its limited discretion to extend the deadline, in order to validate the claims..
8. The issues in respect of the claim of direct race discrimination are whether the Employment Tribunal considers it would be just and equitable to extend time beyond 4 July 2017, and if so, for what period.
9. The issues in respect of the other claims are whether the Employment Tribunal is satisfied that it was not reasonably practicable for those complaints to be presented by 4 July 2017, and, if satisfied, to determine the duration of any period of extension which the Tribunal would consider to be reasonable.

THE FACTS

10. The Claimant was employed by the Respondent as a waiter in its Marylebone club from 1 March 2004 until his dismissal with immediate effect on 5 April 2017 by Carmen Alonso, the Respondent's General Manager, allegedly for leaving work without permission, drinking during working hours, and irregularities in recordings working hours.
11. The Claimant received a payment in lieu of notice, and was advised of his right of appeal.
12. The Claimant considered from the outset that the Respondent had wrongfully dismissed him in breach of its contractual obligations owed to him, that his dismissal was unfair, and that his treatment by the Respondent was causally connected both with his nationality and ethnic origin and with health and safety whistleblowing concerns

expressed by him regarding the risk of injury to customers arising from flooding which had taken place at the club premises.

13. Nevertheless the Claimant did not lodge an appeal, and although he was aware of his right to issue legal proceedings against the Respondent, and contemplated such litigation, he did not do so.
14. Unhappily, there was illness affecting his mother and the bereavement of a close family members in Poland, which involved multiple trips there. The Claimant made four return trips by air to Poland in the three month period between his dismissal and 4 July 2017, spending only about 22 days in the United Kingdom.
15. Between 5 July 2017 and the presentation of the Claim Form to the Tribunal on 6 October 2017 the Claimant made one trip to Poland, driving there, departing the UK on 27 July 2017, and flying back on 31 August 2017. Otherwise, he was in the United Kingdom throughout that period, present therefore for just under two of the three months period between 4 July and 6 October 2017 the date on which these proceedings were instituted in the Tribunal.
16. During the six-month period between the Claimant's dismissal and commencing these proceedings the Claimant undertook occasional days of casual work in London whenever the opportunity presented itself.
17. On 11 September 2017 the Claimant retained his present legal advisers, over five months after being dismissed. Those advisers confirmed that the deadline for any claims had expired more than two months earlier.
18. The Claimant's legal advisers requested his evidential documentation, including the paperwork regarding his flights and the road trip dates, which the Claimant sought to gather and deliver to his lawyers.
19. The Claimant's Claim Form was presented to the Employment Tribunal 25 days later with the explanation for the delay set out in the above terms, primarily the preoccupying distraction and prioritisation of his mother's well-being.
20. The Claimant's witness statement introduces additional delay-factors, missing from his Claim Form, including the assertion of a genuine mistake based on defective legal advice about the time limit.
21. The Claimant told the Tribunal that he had talked to a friend, Sylvia, a qualified practising solicitor but one he knew was not working in the employment law field, and was "given [the] idea" that he had six months in which to bring his claims. He believed the deadline for starting Employment Tribunal proceedings was therefore 5 October 2017.
22. The Claimant also asserts he had told his general manager, Carmen Alonso, that he was proposing litigation, and that when he told her he felt encouraged to delay proceedings by Ms Alonso's response that she would speak to a director, informing the Claimant that "it was not necessary to go further than that", the Claimant taking that expression to mean that Ms Alonso was telling him that it was "not necessary to go to court" in order to get a satisfactory resolution, rather that the Claimant should wait for the director to contact him.
23. The Claimant also asserts that other communications with Ms Alonso reinforced such an expectation.

24. There is a direct conflict of evidence between the testimony received by the Tribunal from Mr Ptasnik and Ms Alonso in that respect. The Tribunal is not satisfied, weighing the likelihoods on the evidence, that during any of the conversations between Mr Ptasnik and Ms Alonso she said anything capable of constituting reasonable encouragement, directly or indirectly, to Mr Ptasnik that he would get a satisfactory resolution through the intervention of the director without the necessity of going to court.

25. SUBMISSIONS

Both parties have presented their submissions in writing, extensively and helpfully, to which the Tribunal has had close and careful regard.

26. THE LAW

Concisely identifying the relevant law, as required by Rule 62(5), in the context of both parties being legally represented, and having extensively addressed the statutory and case law within the Claim Form, the Response, and the Written Submissions, the discretion available to the Tribunal to extend time in relation to a discrimination claim based on a protected characteristic varies from the discretion to extend time in respect of claims of conventional and automatically unfair dismissal, breach of contract and detrimental treatment for making a lawful public interest disclosure.

Time Limits

In respect of a discrimination claim section 123 of the Equality Act 2010, provides that:

Proceedings... 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*

In respect of a claim of unfair dismissal the statutory language provides that:

An Employment Tribunal shall not consider a complaintunless 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.*

The statutory deadlines for claims of public interest disclosure detriment and breach of contract are expressed in comparable terms.

There is a wealth of authorities from the Appellate Courts regarding the meaning, effect and the consequent principles to be applied in the Employment Tribunal to cases where Claimants invite the Tribunal to exercise its discretion in their favour. The key cases were placed before the Tribunal and referred to in the submissions.

They include but are not limited to the seminal Court of Appeal cases of Wall's Meat Co Ltd v Khan [1979] IRLR 52, Palmer and Saunders v Southend-on-Sea Borough Council [1984] ICR 372, Dedman v British Building and Engineering Appliances Limited 1974 ICR 53, and Marks & Spencer plc v Williams-Ryan [2005] IRLR 562, as well as the valuable guidance in the EAT authorities placed before this Tribunal, namely:

Trevelyan (Birmingham) Ltd v Norton [1991] 488
Asda Stores Limited v Kauser UKEAT/0165/07/RN
Wright v Wolverhampton City Council UKEAT/0117/08/LA
Cullinane v Balfour Beatty Engineering Services Ltd and NRL Ltd/UKEAT/0537/10/DA
Lezo v OCS Group Limited UKEAT/0104/10/SM, and
Nolan v Balfour Beatty Engineering Services UKEAT/0109/11/SM

The guidance from the Court of Appeal in *Palmer and Saunders* invites the Employment Tribunal to consider the substantial cause of a Claimant's failure to comply with the statutory time limit and any substantial failure on the part of the Claimant, which led to the failure to comply with the time limit viewed against the background of the surrounding circumstances.

The *Wall's Meat Co* case and *Dedman* are concerned with ignorance, or a genuine mistaken belief about the time limit, reasonably held in all the circumstances, particularly if there has been reliance on a skilled legal adviser.

Deposit Orders

Rule 39 in Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. Provides that:

- (1) *Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument.*

27. CONCLUSIONS

- (1) The Claimant's own account is that from the very outset he considered that he had been unfairly dismissed and that the cause of his dismissal after many years of service was racially motivated and additionally connected with whistleblowing by him, that he knew of the option of pursuing legal claims, that he spoke with his friend, Sylvia about time limits for making claims, but knew that she was not an employment lawyer, and that he (the Claimant) told Ms Alonso that he would be making claims against the Company.
- (2) It is abundantly clear to the Tribunal that from the moment of his dismissal in April 2017 the Claimant considered he had suffered at the hands of his employer the various injustices of which he complained to the Employment Tribunal in October 2017, namely that his dismissal was unfair, that it breached his contractual rights, that he had been unlawfully mistreated for disclosing, in the public interest, health and safety risks to the public, namely the Respondent's customers, and had suffered racial discrimination against which the law protected him.
- (3) It is also evident to the Tribunal from the materials placed before it that the Claimant knew that the law not only gave him rights against his former employer, but that those rights were enforceable through legal process in the courts of law.

- (4) The Claimant has not satisfied the Tribunal about the integrity of his account of a legally qualified friend giving him defective advice about the time limits in the employment Tribunal. He did not bring Sylvia to the Tribunal for her to verify his account under oath. He did not produce an affidavit, or tender a signed statement from Sylvia in evidence, or even the most minimal confirmation in writing from her, confirming the Claimant's account. Significantly, the Claim form is silent about Sylvia. It is evident from the Claim Form that the Claimant's legal advisers, quite properly, asked him why he had delayed progressing his litigation against the Respondent and, evidently, the Claimant gave those explanations regarding his preoccupation with family affairs in Poland set out in the Claim Form. It is a legitimate inference to draw, from the absence in the Claim Form of any reference to a genuine mistake regarding the time limit due to defective advice from a qualified lawyer, that he did not tell his current legal advisers that he had been informed by a qualified solicitor, Sylvia, that he had up to 6 months in which to start his Tribunal proceedings. Had the Claimant done so it is inconceivable that his solicitors would not have relied on that additional factor expressly within the Claim Form.
- (5) Given that conclusion reached by the Tribunal it is unnecessary to address the interesting issue as to whether reliance upon a friend's advice, in respect of a legal discipline in which, to the Claimant's knowledge, the friend does not specialise, would have assisted the Claimant gain a discretionary extension in time.
- (6) The Claimant has not satisfied the Tribunal about his asserted reliance on Ms Alonso referring him to a director as a basis for delaying legal proceedings. On the contrary, the Tribunal is satisfied that there was no actual encouragement from the Respondent, through Ms Alonso, to rely upon a dialogue with a Director to gain redress for his treatment by the Respondent rather than to pursue his employment protection rights in the Employment Tribunal.
- (7) The Tribunal has not identified any material obstacle to the Claimant initiating the mandatory ACAS Early Conciliation process on or before 4 July 2017. The Tribunal is sympathetic, genuinely, to the significant stressors in respect of family matters during that three month period and the significant travelling involved, but the Claimant was in London for 22 days or so, was unemployed apart from odd casual shifts he could find, harboured serious concerns that he had been treated unlawfully in the knowledge that he could pursue remedies in the Employment Tribunal. The Claimant could and should have sought advice in a timely manner or alternatively, progressed the claims he intended to make as a litigant-in-person, as so many Claimants do on a self-reliant basis, and compliantly within the Tribunal's time limits. There is a wealth of information on the Internet regarding the process and the ACAS Early Conciliation procedure. The ACAS on-line Early Conciliation form is short and simple to complete and submit.
- (8) The central aim of the Employment Tribunal is to provide those aggrieved with their treatment at work, who consider that their employment protection rights have been breached, with a fair trial resulting in a just outcome, not for legitimate claims to founder through technicalities. The entire system is structured and managed to get cases to trial and outcomes which give the parties justice.
- (9) Nevertheless, the parties have an obligation to bring their claims within the rules. Parliament decided that the time limits in the Employment Tribunal would be short and those time limits are exercised strictly in employment cases. A Tribunal cannot hear complaints such as unfair dismissal, whistleblowing detriment, and breach of contract unless the Claimant satisfies ("convinces" is an expression used by the Court of Appeal) the Tribunal that it was not reasonably practicable to bring the claim in time. The Employment Tribunal cannot hear complaints of discrimination which have not been presented in time unless the Claimant convinces the Tribunal that it is just and equitable to extend time. The Court of Appeal has said repeatedly that the exercise of discretion is the exception rather than the rule.

- (10) The Judgment of the Tribunal is that it was reasonably practicable for the Claimant's two complaints of unfair dismissal and the complaints of breach of contract and public interest disclosure detriment, to be have been presented within the three month period starting on the date of the Claimant's dismissal on 5 April 2017, and that there are no issues of justice and equity which require an extension of time in respect of the Claimant's discrimination claim.
- (11) Accordingly, the Employer Tribunal does not have jurisdiction to consider and determine the merits of these claims and they are dismissed.

Employment Judge Hemmings

Date 31 October 2018

JUDGMENT AND REASONS SENT TO THE
PARTIES ON

1 November 2018

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FOR THE TRIBUNAL OFFICE