



THE EMPLOYMENT TRIBUNALS

Claimant: Mr N Polhossy

Respondent: Endeavour Automotive Limited

TELEPHONE PRELIMINARY HEARING

Heard at: East London Hearing Centre (by CVP)

On: 11 October 2021

Before: Employment Judge Lewis

Representation

Claimant: In person - with Hungarian interpreter

Respondent: Ms Julie Knight, HR Representative

JUDGMENT

- 1. The claims in respect of unauthorized deductions from wages, breach of the Working Time Regulations, failure to permit the right to be accompanied were presented out of time when it was reasonably practicable to have presented them in time.**
- 2. The claims direct sex and race discrimination were presented more than 3 months after the last act complained of and it is not just and equitable to extend time.**
- 3. The claims are dismissed as the Tribunal does not have jurisdiction to hear them.**

REASONS

PRELIMINARY HEARING (OPEN)

- 1 At a telephone preliminary hearing before Employment Judge Goodrich this preliminary hearing (open) was listed to take place by Cloud Video Platform, Preliminary Hearing to consider:
 - 1.1 Whether to order the Claimant to pay a deposit (not exceeding £1,000) as a condition of continuing to advance the claim of unauthorised deduction of wages, breach of contract, unfair dismissal, sex and/or race discrimination if the Tribunal considers that the allegations have little reasonable prospect of success (as directed by Regional Employment Judge Taylor in the Employment Tribunal's letter to the parties dated 30 December 2020).
 - 1.2 Subject to the discretion of the judge if he/she considers appropriate, to determine whether the Claimant's complaints of unlawful deductions from wages, breach of contract, breach of working time regulations, failure to permit the right to be accompanied and sex and race discrimination complaints should be dismissed because the Claimant is not entitled to bring it if the statutory time limit has expired.
- 2 A Hungarian interpreter was provided for this Preliminary Hearing.

Background and the Issues

- 3 The Claimant presented his Employment Tribunal claim on 16 July 2020.
- 4 The Claimant's claim form was rejected owing to there being different names on the early conciliation certificate and the Claimant's ET1 claim form. The name given on the early conciliation certificate from Acas was "Endeavour Automotive Ltd. The date of receipt by Acas of early conciliation notification was 20 May 2020; and the date of issue by Acas of the certificate was 20 June 2020. The names given for the employer, in section 2.1 of the Claimant's ET1 claim form, were "Adrian Wallington (Managing Director) and John Caney (CEO) Andrew Gore (Brand Director)".
- 5 By letter dated 15 August 2020, directed by Employment Judge Russell, the claim form was rejected because of the name of the prospective Respondent on the early conciliation certificate not being the same as the name of the Respondent on the claim form.
- 6 The Claimant subsequently resubmitted his claim form on 19 October 2020, having amended the name of the Respondent at section 2.1 to "Endeavour Automotive Ltd".

- 7 By letter dated 5 November 2020 the claim was accepted. It appeared to Employment Judge Goodrich that the claim was treated as having been presented on 16 July 2020. However I am satisfied that the correct date for the presentation of the claim is 19 October 2020, in accordance with Rule 13 (4) of the Employment Tribunal Rules of Procedure 2013 which provides that where a claim has been rejected due to a defect, where the defect is rectified the claim is treated as being presented on the date the defect was rectified.

The Issues

- 8 The issues were identified at the hearing before Employment Judge Goodrich as follows;

Direct sex discrimination

- (1) The Claimant contends that he was less favourably treated because of his sex than his comparator called Rosita (Rosie), or alternatively a hypothetical comparator. He says that he was required to do all the car moving whereas Rosie was not required to do so which mean a higher responsibility for him and the risk of losing wages if he damaged a car. The Claimant says that this was required throughout his employment with the Respondent.
- (2) The Claimant says that, around November 2019, Rosie was given an additional day's holiday pay on her birthday; but the Claimant was not given it on his birthday on 10 November 2019.
- (3) The Claimant says that he was refused his request for one week's holiday in August 2019, but that Rosie was permitted three weeks holiday in August 2019.

Direct Race Discrimination

- (4) On one occasion, at some point in the autumn 2019, Mr Andrew Gore, Head of Business for the Respondent, attended the Claimant's work premises for a meeting with the team the Claimant worked in. The Claimant says that he offered and bought everyone in the team coffees or cookies but did not offer to do so for the Claimant. The Claimant compares his treatment with the other members of his team, or alternatively a hypothetical comparator.

Unlawful deduction from wages

- (5) The Claimant contends that he was paid less wages than was due to him, commission and holiday pay between 1 January 2020 and the termination of his employment on 20 March 2020.
- 9 The Respondent contends that the Claimant was paid all wages, commission and holiday pay due to him.

Right of accompaniment

10 The Claimant says that Mr Andrew Gore called him to what was, in effect, a disciplinary meeting on 15 November 2019, without permitting him to be accompanied by a work colleague to the meeting or inform him in advance of the purpose of the meeting, contrary to section 10 Employment Relations Act 1999.

11 The Respondent denies that the meeting in question was a disciplinary meeting.

Breach of working time regulations

12 On various dates,[the claimant referred to this happening on 3 occasions the last of which was possibly 3 January 2020 but certainly no later than 20 March 2020], the Claimant contends that the Respondent failed to give him the 11 hour rest breaks required by the working time regulations.

Time Limits

13 The Respondent contends that some or all of the Claimant's complaints are out of time. The Claimant contends that his complaints of unlawful discrimination were acts extending over a period so as to be within time, or that time limits should be extended on the basis that it will be just and equitable to do so. Further or alternatively, in so far as the time limits concern whether it was reasonably practicable to present the complaints in time and whether the complaint was presented within a reasonable period after the time limit, he would ask for time limits to be extended.

14 Given the date the claim form was presented, 19 October 2020, and the dates of early conciliation, any complaint about something that happened before 20 July 2020 may not have been brought in time.

14.1 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010?

14.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

14.1.2 If not, was there conduct extending over a period?

14.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

14.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

- 14.1.4.1 Why were the complaints not made to the Tribunal in time?
 - 14.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?
- 14.2 Was the claim for unauthorised deductions/ failure to provide rest breaks/ breach of Working Time Regulations/ failure to provide right to accompaniment made within the time limit in section 48 / 23 of the Employment Rights Act 1996/ Reg 30 Of the Working Time Regulations 1998 / s11 Employment Relations Act 1999.:
- 14.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of / date of payment of the wages from which the deduction was made?
 - 14.2.2 If not, was there a series of similar acts or failures /deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
 - 14.2.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
 - 14.2.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

Relevant Law

Time limits in discrimination claims

- 15 Section 123(1) of the Equality Act 2010 provides that a complaint 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 Tribunal thinks just and equitable. Under section 123(3) conduct extending over a period is to be treated as done at the end of the period; and failure to do something is to be treated as occurring when the person in question decided on it. Under section 123(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something (a) when P does an act inconsistent with doing it; or (b) If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.
- 16 If the claim is presented outside the primary limitation period (that is, after the relevant three months), the tribunal may still have jurisdiction if, in all the circumstances, it is just and equitable to extend time. This is essentially an exercise in assessing the balance of prejudice between the parties, using the following principles:
 - 16.1 The claimant bears the burden of persuading the tribunal that it is just and equitable to extend time. There is no presumption that time will be

extended, however, nor is there any magic to that phrase and it should not be applied too vigorously as an additional threshold or barrier;

- 16.2 The tribunal takes into account anything which it judges to be relevant and may form a fairly rough idea of whether the claim appears weak or strong. It is generally more onerous for a respondent to be put to defending a late, weak claim and less prejudicial for a claimant to be deprived of such a claim;
- 16.3 This is the exercise of a wide, general discretion and may include the date from which a claimant first became aware of the right to present a complaint. The existence of other, timeously presented claims will be relevant because it will mean, on the one hand, that the claimant is not entirely unable to assert his rights and, on the other, that the very facts upon which he seeks to rely may already fall to be determined.
17. In considering whether it is possible to have a fair trial of the issues, the Tribunal will take into account the general prejudice that inherently follows from being required to respond to a claim which is presented out of time (the prejudice of meeting the claim) and any prejudice to the evidence caused by the delay (the forensic prejudice);
18. There is no requirement to go through all the matters listed in section 33(3) Limitation Act 1980, provided no significant factor has been left out of account, British Coal Corporation v Keeble (length and reason for delay, effect on the cogency of evidence, cooperation between the parties and steps taken once the party knew that it had a possible cause of action).
19. The relevance of each factor depends on the facts of the individual case and Tribunals do not need to consider all the factors in each and every case; see Department of Constitutional Affairs v Jones [2008] IRLR 128.

Reasonably practicable time limit

20. The burden of proof in showing that it was not reasonably practicable to present the claim in time rests upon the Claimant; see Porter v Bandridge Ltd [1978] ICR 943 CA. If the Claimant does succeed in doing so then the Tribunal must also be satisfied that the time in which the claim was in fact presented was in itself reasonable. One of the leading cases is Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119 CA in which May LJ referred to the test as being in effect one of “reasonable feasibility” (in other words somewhere between the physical possibility and pure reasonableness).
21. In Adsa Stores Ltd v Kauser EAT 0165/07 Lady Smith described the reasonably practicable test as follows: “the relevant test is not simply looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done”.
22. A number of factors may need to be considered. The list of factors is non-exhaustive but may include:

22.1. The manner and reason for the dismissal; The extent to which the internal grievance process was in use; Physical or mental impairment (including illness – see Shultz v Esso [1999] IRLR 488 CA, a case concerning a claimant suffering from a depressive illness, as to the approach for the Tribunal to adopt when determining the “reasonably practicability” question):

22.2. Whether the Claimant knew of his rights. Ignorance of the right to make a claim may make it not reasonably practicable to present a claim in time, but the claimant’s ignorance must itself be reasonable. In such cases the Tribunal must ask: what were the claimant’s opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? See Dedman v British Building and Engineering Appliances Ltd 1974 ICR 54 CA. In other words, ought the claimant to have known of his rights? Ignorance of time limits will rarely be acceptable as a reason for delay and a claimant who is aware of his rights will generally be taken to have been put on enquiry as to the time limits.

22.3. Other relevant factors include: any misrepresentation on the part of the Respondent; reasonable ignorance of fact.; any advice given by professional and other advisors (such as the CAB). A claimant’s remedy for incorrect advice will usually lead to a remedy against the advisors and the incorrect advice unlikely to have made it not reasonably practicable to have presented the claim within the statutory time limit. See for example: Dedman (cited above); Wall’s Meat Co Ltd v Khan 1979 ICR 52 CA. Postal delays/losses. The substantive cause of the Claimant’s failure to comply.

A two-stage test

23. Where a claim is presented outside the period of 3 months it is necessary to ask firstly whether it was not reasonably practicable to present the claim in time and, only if it was not, go on to consider whether it was presented in a reasonable time thereafter. The two questions should not be conflated. There is no general discretion to extend time and the burden of proof rests squarely on the Claimant to establish that both limbs of the test are satisfied.

A reasonable period thereafter

24. The question of whether an employee has presented their claim within a reasonable time of the original time limit is a question to be determined objectively by the employment tribunal taking into account all material matters see Westward Circuits Ltd v Read [1973] ICR 301, NIRC.

25. In Cullinane v Balfour Beatty Engineering Services Ltd UKEAT/0537/10 the then president of the EAT said:

The question at “stage 2” is what period – that is, between the expiry of the primary time limit and the eventual presentation of the claim – is reasonable. That is not the same as asking whether the Claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time.

It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted – having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months. If a period is, on that basis, objectively unreasonable, I do not see how the fact that the delay was caused by the Claimant's advisers rather than by himself can make any difference to that conclusion.”

26. In assessing whether proceedings have been brought within a reasonable period after the expiry of the original time limit, it is necessary to have regard to all relevant matters including, where appropriate, the factors that made it not reasonably practicable to present the claim in time. Whether or not they remained operative may be an important matter.

Findings of fact

27. Working back from the date of receipt of the claim from, i.e. from 19 October 2020, the three month time limit is reached on 20 July 2020. Coincidentally, working forward from the date of dismissal and allowing for the period of the ACAS conciliation the applicable time limit for bringing a claim about any matters continuing up to the date of dismissal expires on 20 July 2020. The Claimant also complains about failures to pay his correct wages up to the date of his dismissal. Payment was made one month in arrears and the last wages were due in April 2020; payment was usually made on 28th of each month where that was a working day. We established that 28 April 2020 was a Tuesday. I find that the last date for any deduction in respect of wages, commission and holiday pay was 28 April 2020.
28. The claim was received on 19 October 2020, over 5 months after the date of the last payment being due, allowing for the early conciliation period, stopping the clock between 20 May and 20 June 2020, and the further one month extension under Section 207B(4) the claim for unfair dismissal had to be presented by 20 July in order to be within the primary time limit and the claim for unlawful deductions from wages had to be presented by 26 August 2020 to fall within the primary time limit.
29. The Claimant also brings complaints of discrimination which he alleges took place as follows: in August 2019, refusal of his holiday request for one week's holiday in August 2019; in November 2019 – failure to give him a day's holiday on his birthday; the failure to include him in the provision of cookies and coffee in the autumn of 2019; and the requirement to move cars which he alleges was a continuing state of affairs throughout his employment, that is up to his last day on 20 March 2020, although the last date on which he was required to do so was probably in January 2020.
30. The Respondent pointed to the pay slips and holiday records contained in the bundle prepared for this hearing: the holiday records show the claimant as being on holiday from 9 to 14 November 2019, which included his birthday, it was submitted that he was given an additional day's leave to allow for his birthday, the leave year runs from January to December in any event and the holiday he was paid for on termination was that accrued from January 2020 to 20 March 2020.

Delay

31. I heard evidence from the Claimant in respect of the delay in presenting his claim. In summary, he explained that he had returned to Hungary as a result of the pandemic; he felt the 3 month deadline was very short, particularly in light of the pandemic. He was unwell from December 2019 to mid-January 2020, which he later found out was Covid, In January /February 2020 before he left, he was thinking about what to do, he knew his notice period was 1 month, he couldn't risk staying in London during the pandemic and was concerned he would not be able to get home. He decided to resign in February so that he could travel in March. When he got to Hungary he was initially spending his efforts on looking for work, he was living at home with his mother who had also lost her job as a result of the pandemic; he had to find an income to pay for rent, food and bills, and was only able to dedicate 2 days per week to thinking about his tribunal claim. The Claimant was out of work for 5 or 6 months and used up all his savings. His first priority was finding work. He contacted Acas on 20 May 2020 and issued a claim on 16 July 2020, he was informed by the Tribunal on 15 August that he had named a different Respondent on his early conciliation certificate to that on his claim form.
32. The Claimant was asked to explain the period from 15 August to 19 October 2020 when he submitted his amended claim. He explained he was ill again with covid for about 1 month in this period. He started his new job on 23 September and had then concentrated on his new job. He could not think of any other specific thing.
33. In response to questions from the Respondent's representative about the substance of his claims, the Claimant accepted that he was able to take 1 week's holiday in August 2019, he clarified that he considered it discrimination that Rose had been allowed 3 weeks and everyone else had been told they could not have time off as a result and he had to go through HR to get his week's holiday. He accepted he had been told that the reason that Rose had been granted 3 weeks was that this was pre-planned leave to attend a wedding, but he did not see why she would need 3 weeks off for a wedding and this should not mean that no one else gets to take a holiday in August.
34. In explaining his complaint of discrimination in relation to being asked to move cars in the showroom, the Claimant suggested that Rose was allowed not to do it because she did not drive cars with right hand drive. However, when it was suggested that in fact it was because her licence was not accepted by the Respondent's insurers the Claimant did not dispute that this was the reason. The Claimant referred to another person, a man, who was not required to move cars in the showroom, namely Claudio, who it was accepted was not asked to move cars because he did not have a driving licence. The Claimant confirmed that the last occasion when he was asked to move a car was on 3 January 2020 on the night shift. He accepted he had not raised a grievance that mentioned discrimination.

Conclusions

Reasonably practicable and such further period thereafter as is reasonable

35. I am satisfied that the Claimant was aware of his right to bring his claims to an employment tribunal. He contacted Acas and was aware of the time limits, he attempted to bring a claim in time but it was rejected. All that was required of him at that stage was to re-submit his claim with the correct information about the Respondent. I find that he has not adequately explained why it took him a further two months to resubmit his claim. Although he told me that for some of the relevant period from August to October 2020, he was ill with covid, he has not provided any supporting evidence of that. I note that he was able to secure and start a new job by 23 September, which is in that period. Even if his efforts to find work took up a large part of his time, as from 23 September 2020 he was no longer having to look for work and had he has not explained why it took him up to 19 October to resubmit his claim. I do not find that the Claimant brought his claim within a reasonable time after the expiry of the primary time limit.

Just and equitable

36. I find that the last date for any of the acts of discrimination upon which the Claimant seeks to rely is 3 January 2022). If I am wrong about that and there was an act continuing throughout his employment the last date upon which he can rely is 20 March 2020. The Claimant was informed on 15 August 2020 that his claim had been rejected, it took a further 2 months to resubmit his claim rectifying the defect. In the context where the primary time limit set by Parliament is three months, subject to any extension for Acas early conciliation, a further two months is a substantial period of time.
37. The Claimant had already been through early conciliation, all that was required of him was the relatively straightforward step of correcting the name of the Respondent so that it matched the name on the early conciliation certificate. The Claimant's explanation for the late presentation of his claim – save for a period of illness which is unsupported by any medical evidence- was to the effect that that he had other priorities at the time.
38. In considering whether it is just and equitable to extend time I took into account the balance of prejudice to the parties. Whilst there is no evidence before me of actual prejudice to the cogency of the evidence, there is general prejudice to the Respondent in being required to answer an out of time discrimination claim of which it had no knowledge until the Claimant first presented the claim form to the Tribunal. I have taken into account the prospective merits of the claims in balancing the respective hardship to the Claimant in being deprived of the ability to pursue his discrimination claims and to the Respondent in having to meet those claims. I am satisfied that the claims appear to have little merit. I find that the prejudice to the Respondent in have to meet an out of time claim with little or no merit outweighs that to the Claimant in not being able to pursue claims of discrimination which appear to be unmeritorious.
39. As a result of my decision in respect of time limits, the tribunal has no jurisdiction to hear the Claimant 's claims and they fall to be dismissed.

Deposit Orders

40. I also heard submissions in respect of deposit orders and the Claimant gave evidence about his means. I do not set those submissions and evidence, or my findings, here as it is not necessary to do so given my decision, set out above, that the Tribunal lacks jurisdiction to hear the claims.

**Employment Judge Lewis
Date: 13 December 2021**