EMPLOYMENT TRIBUNALS

Claimant: Mr J Lewis

Respondent: Sky In-Home Services Limited

RECORD OF AN OPEN PRELIMINARY HEARING

Heard at: Reading by Cloud Video Platform **On:** 4 October 2022

Before: Employment Judge Britton

Appearances
For the claimant: Ms R Omar, Counsel
For the respondent: Ms A Mishra, In House Legal Counsel and Solicitor

JUDGMENT

1. The claim for unfair dismissal is struck out it having been presented out of time and it having been reasonably practicable to have presented it within time or a reasonable period thereafter.
2. The claim of direct race discrimination pursuant to s.13 of the Equality Act 2010, it being the only other remaining claim as at the presentation of the ET1, is similarly struck out as being out of time it not being just and equitable in the circumstances to extend time.
3. That means that there are no longer any claims before the tribunal.

REASONS

Introduction

1. The claim (ET1) was presented to the tribunal by the Claimant on 17 January 2022. It had been prepared by his then solicitors. The boxes ticked denoted claims for unfair dismissal and race discrimination. It was initially presented to the Glasgow tribunal albeit the Claimant gave his address as being in Reading. This was because the address given for the Respondent was its registered office in Livingston, Scotland. It was transferred to the Watford region on 11 March 2022. My task today is first to deal with out of time issues in relation to the claims. This stems from the fact that the out of time issue was raised by the Respondent in the

response (ET3) in this matter as long ago as 17 February 2022. The issue of out of time was then also flagged up by Regional Employment Judge Foxwell on 30 March 2022. The Claimant's then solicitors gave an explanation on 11 April. The Regional Employment Judge directed it would be further discussed at the case management hearing already listed before Judge Anstis. This took place on 12 July 2022 and today's hearing was listed. Although the learned judge sought to suggest that the issues of out of time would only be considered if the Respondent renewed its application for strike out including on that basis, with great respect I would observe that issues of out of time are jurisdictional. In other words, the Tribunal has to deal with them even if they are not raised by a party if, on the face of it, the claims are out of time and that is because it is a matter of statute that the jurisdiction of the Employment Tribunal cannot engage unless a claim which starts off being out of time is in fact allowed to proceed in terms of the exercise of the judicial discretion which I shall now briefly come to.

2. Thus, in terms of an unfair dismissal claim, s111 of the Employment Rights Act 1996 (ERA) requires that a claim must be presented within three months of the effective date of termination. Not in dispute in this case is that the Claimant was summarily dismissed on 24 February 2021. Thus, in that respect, he had to present the claim by 23 May 2021. There is a caveat to that in that before presenting a claim to the Tribunal the Claimant must have entered into a period of early conciliation via ACAS for which he has a certificate; and he must provide details of that certificate, ie, including number and a copy thereof when presenting his claim to the Tribunal[1]. But if he enters into early conciliation, then pursuant to s207B of the ERA the period of the conciliation will extend time for presentation but only if the conciliation period started within the three month time limit to which I have thus now referred[2]. The ACAS certificate in this case runs between 17 and 19 November 2021 and therefore it does ride to the rescue to extend time Thus, when the claim was presented to the tribunal on 17 January 2022 it was almost 8 months out of time.

3. Cross referencing to the Equality Act 2010 (the EqA) and thus the claim of race discrimination, s.123 again requires that a claim must be presented within three months of the last act complained of. For reasons I shall come to, as per the ET1 it was the date of dismissal. Thus, the same time limit applies. Again, ACAS early conciliation is a prerequisite to presentation of the claim. As to it extending time, there is an identical provision to that at s207B of the ERA and which is to be found at s.140B of the EQA. But as per s207B (4) likewise the ACAS EC period will not extend time and because it commenced after the expiration of the primary time period. As this is the same ACAS EC certification likewise this claim is also almost 8 months out of time.

4. That brings me back to the jurisdiction of the tribunal. First engaged as to the claim for unfair dismissal is s111 (2) of the ERA:

> *" …an employment tribunal shall not consider a complaint …unless it is presented to the tribunal –*

[1] Rule 10 of the Employment Tribunal 2013 Rules of Procedure.
[2] See section 207B (4).

> *(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 the that period of three months".*

5. In terms of the test of the Equality Act based claim, engaged is section 123 (1)

> *(a) the period of three 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.*

So they are different tests.

6. I have heard extensive evidence from the Claimant today, him being under oath. I have had regard to an extensive bundle of documentation placed before me by the parties and I have also considered the seminal jurisprudence. What I am going to do is first of all deal with the facts as I find them so to be.

The facts

7. The Claimant, who is of Afro Caribbean ethnicity, commenced his employment with the Respondent on 5 September 2016. He was an MDU engineer and the role essentially involved installing Sky including the satellite dish for Sky customers. He was at the time of material events based on the SKY premises in Isleworth, Middlesex. On 20 October 2020 he was suspended from duties in relation to what was seen to be a serious health and safety failure by him by way of breaching working practices when he was undertaking his duties as a senior installer for Sky. Put simply, he was seen by his Manager, Mr Khan, to not be wearing all his safety equipment and his hard hat. I am not going into the pros and cons of the merits of this case today but, prima facie that kind of breach of health and safety is, of course, serious. In any event, he was suspended. There was then an investigation followed by a disciplinary process and he was summarily dismissed essentially for gross misconduct on 25 February 2021. On 5 March 2021 he appealed his dismissal and at about the same time contacted the ACAS Helpdesk by telephone. As to what then happened is set out in the letter from his then solicitors (Bp[3]44): to the Tribunal dated 22 April 2022 following the raising of the out of time issue by REJ Foxwell. As to the contacting of ACAS stated was:

> "Mr Lewis contacted ACAS for advice on 1 March 2021. We attach copy of the email from ACAS to him of that date. He was advised that he could not enter into early reconciliation as his appeal was still ongoing and he was awaiting the outcome. ACAS advised him that once he received the outcome he would have 90 days to start early reconciliation or to take it to tribunal. At no time did they advise him that the time limit for bringing a claim in the ET was three months from the date of his dismissal. He reasonably relied on their advice."

[3] Bp=bundle page.

8. Attached to that letter to the tribunal was the email from ACAS (Bp46). It did not actually offer any advice directly; it thanked him for calling the Helpline and gave him four hyper- links. Behind that was a screen shot of those ACAS documents (Bp47) in terms of their headings, ie, to be accessed by using the hyperlinks. The second of these was titled "if you want to make an employment tribunal claim" then and at the last paragraph was stated "*If you raised a problem with your employer first the time limits to make an employment tribunal claim do not change".* I note the emphasis as underlined on the reference to time limits. Accessing the full document and the Claimant would have found, as I was able to do with the parties today, and thus read as follows:

> ***TIME LIMITS***
>
> *" A claim to an employment tribunal must usually be made within three months less 1 day. The time limit is the "limitation date".* ***For example if an employee wants to claim for unfair dismissal they have three months less 1 day from the date their employment ended to make the claim."*** [4]

9. This guidance document then cross referenced to early conciliation and the requirement to have a certificate in usual circumstances, of which this incidentally is one, before presenting the claim to the employment tribunal, and it was stated:

> *"…A claimant will have a minimum of 1 calendar month from the date of the receipt of the certificate to make a claim to the employment tribunal"*

10. Not spelt out in what is a short document was what if the period of ACAS early conciliation only started after the end of the limitation period, but stated was that:

> *"In some cases a claimant might have longer that 1 month to make a claim to the employment tribunal. Working out the exact time limit can be complicated. You might want to get legal advice*[5]
>
> ***It's the claimants' responsibility to make sure that their claim is made to the tribunal in time. Only a tribunal can decide whether the claim is in time or not. The conciliator cannot decide or advice on this point".*** [6]

11. It is to be noted that in none of the hyper-linked documents is there any reference to that a claim cannot be brought to tribunal until the outcome of any internal appeal. But the Claimant says that he thought from those documents and what he understood he was being told on the Helpline, that he did so have to wait before he could do anything and he would not then be able to then present his claim to the tribunal until he had first gone through the early conciliation process.

12. The Claimant was very honest with me in saying that he was not specifically told that: it is what he had gathered from the conversation and then in turn in terms of researching the hyper-links and therein concentrating on the conciliation process and as a precursor the guidance provided by ACAS as to how to go about putting

[4] My emphasis.
[5] The emphasis is to be noted.
[6] My emphasis

in such as a grievance or an appeal against dismissal to his employer. This included looking at the templates in the guidance. In fact, he used a template to submit a grievance to his employer which was circa the same time as the appeal. Much more important to me in that respect is that on 10 May 2021, the Claimant now being somewhat concerned at the delay in the passage of his appeal he made this clear to the Respondent. The hearing of the grievance/appeal then took place on 20 May 2021. But he did not get the outcome until the 21 October 2021.

13. Reverting to his concerns viz the 10 May 2021, on that day he contacted ACAS and from what I can gather this was again the Helpline. Before me he was very clear that he was reassured that he did not need at that stage to proceed to early conciliation or thus a claim to tribunal until the outcome of the appeal was given at which stage he would need to start ACAS early conciliation. I have no evidence to contradict him; and I found him an honest and credible person. It follows that I accept his evidence. It thus means that he was wrongly advised by ACAS. Unlike advice given by such as a solicitor, such wrongful advice may establish that it was not reasonably practicable to present a clam within time, depending of course on what happened thereafter. In other words, such wrongful advice may thus mean that the Claimant establishes that it was "not reasonably feasible" to present the claim before it was. [7]

14. However, accepting the above explanation from the Claimant, the crucial issue is what happened post the Claimant receiving the decision viz his appeal which, allowing for posting, would have been circa 23 October 2021. The Claimant started ACAS conciliation on 17 November 2021 (Bp 180). On this point he has told me that he contacted ACAS post the appeal outcome on 12 November 2021. As to the short period of the ACAS early conciliation ending as it did on the 19th, he realised he needed to get moving and so given all that had happened there was not much point in a lengthy period of conciliation.

15. But if so why the delay between 23 October and 12 November 2021? This brings in the Claimant's personal circumstances. First of all, I will accept that when he was dismissed he was suffering from at least stress, and it possibly could have been tipping into anxiety, as to which read the Occupational Health report dated 7 January 2021 and the fit notes commencing November 2020. He raised all these issues about the stress factors in considerable detail in his explanation when the investigation started post suspension; also in his disciplinary hearing. That he had breached health and safety appears not to have been in dispute And I have learnt today that during 2021 he was undergoing a series of counselling, some 11 sessions in all.

---

[7] The seminal guidance on establishing whether or not it was not reasonably practical and the importing thereto of "not reasonably feasible" is **Palmer and another v Southend on Sea Borough Council [1984] ICR 372 CA**, per Brandon LJ. Also see as to wrong advice not provided by a legal advisor **London International College Ltd v SEN [1993] IRLR 33 CA and thus then as applied in the case of Drury v Carphone Warehouse Limited ET 320305706**. This latter case is in some respect on all fours in terms being given incorrect advice by ACAS. Also see the very helpful commentary on this aspect of not reasonably practicable in the IDS Handbook Employment Tribunals Practice and Procedure 2013 edition at paragraph 5.72 -5.73.

16. Secondly, I factor in that if from May 2021 he was juggling the demands of a new job as an AB Engineer. It involved extensive travelling and he would be out by about 6am and not be back before late in the evening, ie, well after ACAS opening hours. At weekends he had under a custody arrangement with his former partner visiting access with his then nine year old daughter. She would come and stay with him at the home where he lived with his mother. I can appreciate that it was very important for the Claimant to give priority to his daughter at the weekends. So, what he tells me is that he only found space in his life to actually start things moving again with ACAS circa 12 November. I can add that he told me that when he got home from work he would be so tired that he frequently fell asleep without even having an evening meal. I have no evidence to contradict him.

17. So, I find in the circumstances that this is a reasonable explanation up to commencing ACAS early conciliation.

18. But then I get the period from 19 November when the ACAS early conciliation period ended all the way through to 17 January 2022 when he presented his claim to the employment tribunal. Why the delay this period? Well, first of all I have the same factors that play in that I have now referred to but of course he had now said that he found "space in his life" to concentrate on the claim.. But the Claimant says that he was not comfortable completing the ET1 form himself. I would accept that he lacks legal knowledge although he was able to plead in his ET1 the unfair dismissal and has set out a case for direct race discrimination. He did not need to put the labels, they were obvious, and he was able to tick the boxes, and he also gave the succinct but clear narrative as the basis of his claims. Furthermore, the Claimant was an articulate individual in terms of expressing himself throughout the internal process to which I have touched upon. The same applies before me. This is not someone who is unable to make his case.

19. He should by now have given absolute priority to this case. I have given him the leeway in the period before he contacted ACAS the second time around on 12 November 2021. But on his own evidence on that occasion the ACAS advisor could not have been clearer. He was told that whatever the advice he thought he had got previously from ACAS, it was wrong; that in fact the period of time for the bringing of the claim to the tribunal ran from the date of dismissal not from the end of the appeal period. Thus, he was now told that his claim was well out of time but of course he would have to go through the early conciliation period first albeit as per his wishes it would be completed quickly, and that he must then get his claim into tribunal. So, why not do it? The Claimant gave me the same explanation about his working hours and regime and the need to care for is daughter at weekends. But by now he had the clearest possible advice from ACAS. His mother of course shared the home with him. I heard nothing to the effect that she could not have looked after his daughter whilst he completed the ET1. He knows how to use a computer, and he is on the internet. Indeed, he took part in the internal proceedings by way of Microsoft Teams. Also why not complete the ET1 online when his daughter has gone to bed. Additionally, the tribunal is well used to unrepresented people and frequently may need in due course further particulars; thus it does not need to be legally formulated or comprehensive as long as it sets out an identifiable claim. Also, the filling in of the ET1 form is really quite straightforward. It is designed to be user friendly.

20. As it is the Claimant says that he delayed because he wanted to first get legal advice. So, he tried various legal points of ports of call. But they either did not have time to assist him on such as a pro bono basis, or they wanted money which he could not afford.

21. But I then learnt from him that the solicitor, Nigel, of Nigel Brothers whose name as his representative was on the ET1, had become known to him when he was representing a colleague whose case I gather is not dissimilar in that there are similar features to both cases both in terms of what they were dismissed for, the alleged unfairness of the procedure and the claiming in the context of race discrimination. So in that period he had at least touched upon his case with Nigel who had informed him that once he got through the appeal he should come back to him and he would see if he might be able to give a bit of help. I do not know, because it is still not clear when the Claimant started to try to make contact again with Nigel. Was it before Christmas, ie, in those six weeks at least from 19 November? On the face of it, I am not persuaded that he did. And, in those circumstances, is it really a justification in terms of it still not being reasonably practicable to be unable to fill in and send the ET1 form to the tribunal knowing now that it is an absolute priority? As it is, on the evidence, the Claimant seems to have waited to sometime after Christmas at which stage he made contract with Nigel who helped him to complete the ET1. I have not heard from Nigel. His firm of solicitors ceased to act some months ago. If he did assist to complete the claim, and I am not saying that he might not have done, it does not seem to have been a professional input in that legal labels were not given to the claims under the EqA albeit the factual matrix was set out. In other words, the narrative in the claim reads like that of a reasonably articulate layman. And the Claimant is such a person. Although he may have been suffering from the stressors to which I have referred, by now he was well outside the counselling period; he had decided many months previous not to take the possible offer of antidepressants from his GP and he had only taken prescribed sleeping pills for a short period.

22. I note in the submissions provided for the Claimant both written and oral that emphasis is placed on the dicta in ***Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53 CA***, that the test as to what is reasonably practicable should be given a liberal interpretation in favour of a claimant. But this doesn't detract from the oft repeated observation in the jurisprudence that the starting point is that the time limits are there for a purpose and should be construed strictly in the context of course that the onus is on the Claimant to provide a persuasive explanation as to why he did not present his claim until he did. It could be argued as to the just and equitable test on the EqA claim to which I shall come that it is more generous to the Claimant, even so the limitations of what is meant by a liberal interpretation were made very plain by their Lordships in Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA[8].

Conclusion on the out of time issue as to the claim for unfair dismissal and the not reasonably practicable test

[8] Also see paragraph 24 of the judgement of Underhill LJ in **Adedeji v University Hospitals Birmingham NHS Trust (2021) EWCA Civ 23**

23. Albeit I have found that it was not reasonably practicable for the Claimant to present his claim up until he got that clarification from ACAS circa 12 November. for the reasons I have also now given the same does not apply to the period post the issue of the ACAS Early Conciliation Certificate (ECC) on 19 November 2021 and up the presentation of the ET1 on 17 January 2022. He has not discharged the onus upon him to satisfy me that he could not have brought his claim to the tribunal before he did. In other words, albeit it was not reasonably practicable because of what ACAS told him in May 2021 and I will just about find that it was not reasonably practicable to go to ACAS as between 23 October and circa 12 November, I do not find that once it was made absolutely plain to him by ACAS that he was out of time and needed to get moving fast that he then prioritised putting in the claim to the Tribunal. On the evidence as I have it I cannot see why he could not have done that late on a Saturday night say when his daughter was in bed or even over the Christmas period. Reliance upon Nigel is only of a limited value because I do not know when he first contacted Nigel and I have had no evidence from the latter on said point. Finally, there is clear guidance on the ACAS website anyway as to how to complete an ET1 form and it is specifically there to assist unrepresented people.

24. Accordingly, I dismiss the claim for unfair dismissal, it being out of time as even though it was not reasonably practicable to have presented it within the limitation period it was not presented within a reasonable period thereafter.

The race discrimination claim; applying the Just and Equitable test

25. I referred earlier to the time limits for claims based upon the Equality Act 2010 (the EqA) and the test for deciding whether to permit an out of time claim. The second limb of the claim presented to the tribunal on 17 January 2022 and linking into the unfair dismissal and events prior thereto, is that the claimant was the victim of race discrimination as to why I have already rehearsed. Furthermore, as already stated it is also out of time.

26. So, I have to decide whether it is just and equitable in the circumstances to extend time. Core is invariably where the balance of prejudice lies. In that respect of course on the one hand justice should not be denied to a claimant per se in terms of being disallowed the prosecution of his claim because he is out of time. On the other hand, I have to balance the prejudice to a respondent, even if it might be still able to defend said claim, of being put to the expense of having to do so I whereas in this case the claim has been presented substantially out of time.

27. The authorities on the topic of just and equitable and extension of time and the proper exercise of the discretion by the tribunal, are most helpfully encapsulated in the judgment of Underhill LJ sitting with Lord Justices Moyle and Newey in the case of ***Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23.*** At the start of this morning, I referred the parties to that authority. In particular therein as per paragraph 23 is reference to the well-known case of ***British Coal v Keeble*** and which assists the tribunal in setting out factors which can be considered in terms of the exercise of the discretion to extend time albeit it is not a tablet of stone. Thus:

    (a) The length of and reasons for the delay

(b) The extent to which cogency of the evidence is likely to be affected by the delay.

(c) The extent to which parties sued have cooperated with any request for information.

(d) Promptness which the claimant acted once he/she knew of the facts giving rise to the course of action.

(e) The steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking action.

28. But to be stressed is the following paragraph of the judgement of Underhill LJ at paragraph 37:

"…*The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it consider relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) " the length of and reasons for the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."*

29. Taking that dicta into account, in fairness to the parties I will nevertheless address the ***Keeble*** factors leaving aside at this juncture factor (a) and addressing the other factors:

- As to factor (b), there is no evidence that the respondent will not be able to address the issues as per the ET1 at a hearing because of such as witnesses no longer being available or memories having faded.

- (c) Is not engaged. There is no reliance advanced by the Claimant thereto on that he was prevented from presenting his claim because of such as being thwarted by the Respondent in knowing the facts upon which he could mount a claim because of such as failing to answer a request for information prior to presentation of the claim.

- (d) I have dealt with that. The Claimant knew about what his complaints were by at least the time he raised his appeal internally; ie, amongst other things, the unfairness of his dismissal and his contention in the context of alleged direct race discrimination.

- (e) I have dealt with. The Claimant, I will accept, could not afford professional advice and did not start to consider enlisting the help of Norman, the solicitor, until he did because of initially being misled by ACAS. That will cover him, as I have already said, up to circa the end of the ACAS early conciliation period.

30. So in terms of the balance of prejudice, the scales in terms of those factors are weighted towards the Claimant. But it is back to factor a) The length and reasons for the delay. And in that context and assessing prejudice I will finally refer to paragraph 38 of the judgement of Underhill LJ in which inter alia he cites paragraphs 18 and 19, with approval from the judgement of ***Leggatt LJ in Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640*** Thus in particular:

> " 19. That said factors which are almost always relevant to consider when exercising any discretion whether to extend time are:
>
> (a) The length of and reasons for the delay and
>
> (b) Whether the delay has prejudiced the respondent (for example by preventing or inhibiting it from investigating the claim while matters were fresh"

31. As to the length of and reasons for the delay I have already found that the Claimant could have brought this claim to the tribunal swiftly after the end of early conciliation on 17 November 2021 but that he unreasonably delayed. But is the Respondent prejudiced? It is not as per the passage as set out above from the judgment of Leggatt LJ, but he gives only an example of prejudice. The real prejudice here in a case where the Claimant did unreasonably delay is that the Respondent therefore is faced with the need to prepare its defence in terms of such as interviewing witness and statements then being obtained; document preparation etc; the attendance at the final hearing; representation; and all the costs involved. It is for those reasons that I conclude that the weight of the prejudice falls in favour of the Respondent. Hence, I exercise my discretion in concluding that it is not just and equitable to extend time and permit the claim to proceed.

Conclusion

32. The claim of race discrimination having been presented out of time it is struck out it not being just and equitable in the circumstances to extend time.

The amendment application

33. On the 8 August the Claimant applied to amend his claim. But unless I allow the claims to proceed there is nothing upon which to amend. Thus, it follows that I do not need to address the amendment application.

Employment Judge P Britton

1 November 2022
Sent to the parties on:

13 November 2022
For the Tribunal Office:

GDJ