



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr F Olanosu  
**Respondent:** Excellerate Services UK Limited  
**Heard at:** East London Hearing Centre  
**On:** 18 January 2022  
**Before:** Employment Judge Jones

## Representation

**Claimant:** in person  
**Respondent:** Ms S Harkins (Solicitor)

# JUDGMENT

- 1. The complaint of unfair dismissal was issued outside of the statutory time limits. It was reasonably practicable for the claim to have been issued in time. The tribunal has no jurisdiction to hear the complaint of unfair dismissal and it is dismissed.**
- 2. The complaints of race, age and sex discrimination were issued outside of the statutory time limits. It is not just and equitable to extend time to allow those claims to be considered. The tribunal has no jurisdiction to hear those complaints and they are dismissed.**

# REASONS

1. The Tribunal apologises to the parties for the delay in the promulgation of this judgment and reasons. This was due to the pressure of work arising from the Covid-19 pandemic.
2. This was an open preliminary hearing to determine whether the Claimant could proceed with his complaints of unfair dismissal; age, race and sex discrimination; and failures to pay holiday pay, wages and notice pay.
3. The Claimant had been employed by the Respondent as a security officer from 2006. His employment ended. The Claimant contacted ACAS on 7 September 2020 and issued his ET1 claim at the employment tribunal on 5 October

2020.

4. The issue for this Tribunal was whether, given the provisions of section 111 of the Employment Rights Act 1996 (as amended by section 207B), section 123 Equality Act 2010 and Regulation 30 of the Working Time Regulations 1998; the Tribunal has jurisdiction to consider the Claimant's complaints.

5. The Tribunal heard live evidence from the Claimant. There were some documents in addition to the Claimant's witness statement.

6. The Tribunal had closing statements from both parties.

7. The following are the relevant facts:

### **Facts**

8. The Claimant was advised that his effective date of termination would be 29 January 2020. The actual effective date of termination was 5 February 2020. The Claimant was aware of his dismissal at the time. The Claimant attended the disciplinary hearing. The Claimant was dismissed for gross misconduct. The Claimant had trade union representative assisting him in the disciplinary process as Mr Botswain, his trade union rep, accompanied him to the disciplinary and appeal hearings.

9. The Tribunal finds it highly unlikely that Mr Botswain would have spoken to the Claimant after the dismissal hearing in February about the possibility of reinstatement, about his claim for backpay and holiday pay and about the possibility to go to court to claim money owed to him; but not told him about the existence of the employment tribunal and his right to bring a claim here about his dismissal. It is likely that he also spoke to the claimant about the employment tribunal and his right to bring his complaints here.

10. The Claimant travelled to Nigeria 8 March 2020 for a holiday, which had been booked since 2019. The Claimant submitted his appeal against dismissal, before he left the UK. He was due to return to the UK on 1 April 2020. Due to the coronavirus pandemic, restrictions on travel to the UK were imposed from March 2020.

11. The Respondent made attempts by email and telephone to contact the Claimant while he was in Nigeria to set up an appeal hearing but the Claimant failed to respond. The Claimant submitted that the telephone service in Nigeria was poor. The Tribunal finds it unlikely that it had been impossible for him to use the Internet throughout the whole period of time that he was there so that he could respond by email or by telephone. It is unlikely that he could not respond in any way to the Respondent's attempts to contact him. It was not his case that he did not receive the communications from the Respondent. The Claimant tried to get seat on a flight back to England at the end of March but was unsuccessful. He was unable to return to the UK until he secured a seat on a flight chartered by the UK government to bring British nationals back to the UK on 8 June 2020. The Respondent accepted that the Claimant was unable to return home until June 2020 but did not accept that he was unable to respond to its attempts to contact him, until he returned to the UK.

12. The appeal hearing was conducted on 25 June 2020. The Respondent had been trying to contact the Claimant to arrange the appeal hearing which they were prepared to do remotely, online. The Claimant did not respond to their attempts to contact him and they did not hold the appeal hearing in his absence. Once the Claimant contacted the Respondent on his return to the UK, the appeal hearing was arranged and took place on 25 June. The Claimant was informed of the result of the appeal hearing by letter dated 5 August 2020 which it is likely that he received on the following day, 6 August 2020. The Claimant did not contact ACAS until 7 September. The Respondent submitted that this was inordinate delay and unreasonable.

13. It was also the Claimant's case that he was unaware of the existence of the employment tribunal until, after he received the outcome of the appeal hearing, when he was told by friends that he should contact ACAS. It was the Claimant's case that on his return from Nigeria, and once he knew the outcome of his appeal, between 5 August and 7 September 2020, he spoke to his friends about his situation and it was only then that he was told about the employment tribunal and his right to bring a claim here for unfair dismissal and race discrimination. Even so, Claimant did not contact ACAS until 7 September 2020. Although the ACAS certificate was issued on 7 September, the Claimant was not issued until 5 October 2020.

14. The Claimant's case in relation to dismissal is that the Respondent constructed allegations of gross misconduct in order to dismiss him so that it would avoid having to pay him a redundancy package because his posting was coming to an end and it had no other work to give him. It was the Respondent's case that the Claimant's misconduct which led to his dismissal predated the Respondent's knowledge of the impending closure of the site.

15. In relation to the Claimant's complaint of race discrimination, the claimant refers to matters that occurred well before the Claimant's dismissal. There is an allegation that the Respondent paid his colleague Mr S Jilani a higher hourly rate than he was paid. The Claimant clarified that this occurred sometime in 2017. In the hearing he also referred to the level of his pay at another site, in 2018, as discriminatory. Lastly, he referred to 2 female agency members of staff who worked at the same site as he did, in 2019 and who he says were paid at a higher hourly rate than he was. Although he did not label it as such, it is possible that these three incidents form his sex discrimination complaint as well as his complaints of unlawful deduction of wages. The Tribunal finds that all of those matters occurred well before the Claimant's dismissal in February 2020. He failed to bring a complaint about them within 3 months from the dates on which they occurred. The Claimant referred to the allegation concerning Mr Jilani in his claim form but the others were referred to in the hearing. He referred to different allegations in his claim form. Although the Claimant's case is that he was aggrieved about these incidents and he believed that they were instances where he was treated less favourably on grounds of race, sex and age; he did not take this up with the Respondent at the time and he did not bring claims in the employment tribunal about them until October 2020.

16. The Respondent submitted that it had been 2 years since the Claimant's dismissal and it would be difficult to gather the evidence to defend the claim, should

be allowed to proceed.

17. The Tribunal considered the following law.

### **Law**

18. The Tribunal was conscious that time limits in employment tribunals must be strictly applied. Where claims have been issued outside of the statutory time limit, the power to extend time in an unfair dismissal complaint and a complaint of a failure to pay holiday pay/wages only exists where the tribunal is satisfied that it was not reasonably practicable for those complaints to have been issued within the relevant statutory time limits. The tribunal has a discretion to extend time where discrimination complaints have been issued outside the statutory time limits but that discretion can only be applied where the Claimant has shown that it would be just and equitable to do so.

19. Dealing with the discrimination complaints first. Section 123 of the Equality Act 2010 states that a complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act to which a complaint relates, or such other period as the tribunal thinks just and equitable. If a complaint is issued outside of the three-month period, the tribunal has to consider whether there was an act extending over a period. If not, then the Claimant submitted that the tribunal should extend time on a just and equitable basis to allow it to consider all complaints in the case.

20. Section 111(2) of the Employment Rights Act 1996 stipulates that employment tribunal shall not consider a complaint made under this section unless it is presented to the tribunal before the end of the period of 3 months beginning with the effective date of termination or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonable practicable for the complaint to be presented before the end of that period of 3 months. Subsection 2(A) provides for an extension of time limits to facilitate conciliation before institution of proceedings under the ACAS early conciliation process. However, the Claimant does not benefit from that extension in this case as he began the early conciliation process on 7 September, after the three-month period had expired on 3 May 2020. His dismissal date was 4 February and three months less one day after that date is 3 May.

21. In relation to the money claims, if the complaints of unpaid wages and holiday pay are made as unlawful deductions of wages and breach of the Working Time Regulations then they also had to be issued within 3 months of the date of which they became payable as stipulated in section 23(2) of the Employment Rights Act and Regulation 30 of the Working Time Regulations 1998. The Claimant does not benefit from any extension of time limits to facilitate conciliation that may have applied under the ACAS early conciliation process, because as already stated, he began that process after the initial three-month time period had already expired. Where the tribunal is satisfied that it was not reasonably practicable for a complaint under section to be presented before the end of the relevant period of 3 months, the Tribunal may consider the complaint if it is presented within such further period as the Claimant considers reasonable.

22. The complaint of a failure to pay notice pay is a complaint of a breach of contract. This is brought under the Employment Tribunal's Extension of Jurisdiction (England and Wales) Order 1994 which stipulates at Article 7 that the complaint must be brought to the employment tribunal within the period of 3 months beginning with the date of termination of the contract given rise to the claim, unless the Tribunal satisfied that it was not reasonably practicable for the Claimant to be presented within the applicable period.

23. The Claimant issued his claim on 5 October 2020. The Claimant's early conciliation certificate is dated 7 September 2020. The Claimant does not get the benefit of any extension under the ACAS conciliation process. This means that if the discrimination could be said to have continued until his dismissal or if there is an allegation that the dismissal was discriminatory, the limitation date in this case is the 3 May 2020. It was not clear from the claim form or from the Claimant's submissions in the hearing whether it was his case that this was all part of a continuing act or that the dismissal was discriminatory. If the dates of the allegations in relation to pay are considered as they were explained in the hearing, he referred to not being paid at the correct rate in 2017, 2018 and 2019. Therefore, for those alleged acts of race/sex/age discrimination, the limitation date would be sometime in 2019, at the latest, making these complaints considerably out of time, as they are brought in this claim issued on 5 October 2020.

24. As far as the discrimination complaints are concerned, the Claimant did not submit that these were all part of a continuing act. However, the Tribunal did consider whether it could be said that there was "*an act extending over a period*" rather than a succession of unconnected or isolated specific acts as the Respondent submitted. The tribunal was aware of the principles set out in the case of *Hendricks v Commissioner of Police for the Metropolis* [2003] IRLR 96. The effect of *Hendricks* is that a claimant would not have to prove that the incidents referred to in the claim indicate some sort of general policy or practice but rather that they are inter-linked, are discriminatory and that the respondent is responsible for the continuing state of affairs. The court stated that tribunals should focus on the substance of the complaints and whether the respondent "*was responsible for an ongoing situation or continuing state of affairs. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, from which time should begin to run from the date when each specific act was committed*".

25. In the case of *Hutchinson v Westward TV* [1977] IRLR 69 it was held that the words '*just and equitable*' give the tribunal discretion to consider any factor which it judges to be relevant. In the case of *Robertson v Bexley Community Centre* [2003] IRLR 434 the Court of Appeal held that "*time limits must be exercised strictly in employment cases, and there is no presumption that a tribunal should exercise its discretion to extend time on a 'just and equitable' ground unless it can justify failure to exercise the discretion; as the onus is always on the claimant to convince the tribunal that it is just and equitable to extend time 'the exercise of discretion is the exception rather than the rule'*".

26. In *Abertawe Bro Morgannwg University Local Health Board v Morgan* 2018 EWCA Civ 640, the Court of Appeal made the following points: -

27. The reference to (such other period as the Employment Tribunal thinks just

and equitable) indicates that Parliament chose to give the tribunal the widest possible discretion;

28. There is no prescribed list of factors for the tribunal to consider in determining whether to use its discretion. However, factors which are almost always relevant to consider (and are usually considered in cases where the Limitation Act is being considered) are the length of and the reasons for the delay and whether the delay has prejudiced the Respondent.

29. There is no requirement that the tribunal has to be satisfied that there was a good reason for the delay before it could conclude that it was just and equitable to extend time in the Claimant's favour.

30. It was also said in that case that there are 2 questions to be asked when considering whether to use this discretion: *'the first question ..... is why it is that the primary time limit has not been met; and insofar as it is distinct the second question is (the) reason why after the expiry of the primary time limit the claim was not brought sooner than it was'*.

31. The tribunal was also aware of the principles set out in the case of *British Coal Corporation v Keeble* [1997] IRLR 336 and section 33 of the Limitation Act 1980.

32. In *Schultz v Esso Petroleum Ltd* [1999] IRLR 488 the Court of Appeal identified that when asking whether it is reasonably practicable to lodge a claim within 3 months, the overall limitation period should be considered but the tribunal should focus on the closing rather than the early stages of that period of time. The tribunal should consider carefully any changes in the claimant's circumstances throughout the primary limitation period and where they occurred in that period.

33. As far as the unfair dismissal and money complaints are concerned, in the case of *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119, the court reviewed the law up to that date and stated that *'perhaps to read the word "practicable" as the equivalent of "feasible" and to ask colloquially and untrammelled by too much legal logic - "was it reasonably feasible to present the complaint to the employment tribunal within the relevant 3 months?" - Is the best approach to the correct application of the relevant subsection.'*

34. In the case of *Dedman v British Building and Engineering Appliances Ltd* 1973 IRLR 379 the Court of Appeal held that in a case where a claimant is receiving legal advice by skilled advisers, it will be practicable for him to present his claim within the time limit. In that case, the claimant knew that he had rights and was being advised by solicitors, well before the expiry of the time. Therefore, it was not impracticable for him to present his claim in time. The fault of his advisers in not advising him about his right to present a case to the employment tribunal did not excuse the claimant from presenting his claim in time as the court held that by exercising reasonable diligence, he could have found out about his right and the complaint could have been presented in time. it was the Court's judgment that in those circumstances, the claimant remedy lay against his legal advisers and his claim could not proceed.

35. A trade union adviser is not considered a skilled legal representative. In this case the Claimant stated that he was not aware of his right to go to the employment tribunal until he spoke to friends in August 2020. However, he had been accompanied to the disciplinary hearing and the appeal hearing by a trade union representative. If the Claimant's mistake or ignorance which resulted in him missing the primary deadline for issuing the claim arose because of negligent advice from a professional adviser, the law is that it would have been reasonably practicable for him to have submitted that the claim in time. Where the mistake or ignorance on the part of the litigant was not the result of any faulty professional advice then the question for the tribunal is whether the litigant's mistake or ignorance was reasonable.

36. In *Walls Meat Co Ltd v Khan* [1978] IRLR 499 Brandon LJ stated "*the impediment to a timeous claim may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand or the mistaken belief on the other, is itself reasonable.*"

37. In the case against *Marks & Spencer plc v Williams-Ryan* [2005] EWCA Civ 470, the court stated that one of the first points of principle in this analysis is that the question of what is reasonably practicable should be given '*a liberal interpretation in favour of the employee*'.

### **Decision**

38. It is this tribunal's judgment that the Claimant's complaint of unfair dismissal, unlawful deduction of wages, breach of contract and unlawful race discrimination should have been brought in the employment tribunal, at the latest, by 3 May 2020. The claims were issued on 5 October 2020 and are therefore all out of time.

### Unfair dismissal

39. The first question the tribunal has to ask itself is why was this complaint not made in time? The claim was not made in time because the Claimant stated that he was ignorant of the time limit and of the existence of the employment tribunal.

40. It was not the Claimant case that he did not know the date of his dismissal or that he had somehow been misled by the Respondent. The tribunal did not find the Claimant's submission that it was impossible to contact the Respondent between March and June 2020, to be credible. It is reasonable to assume and the Tribunal concludes that it is highly likely that between March and June 2020, while in Nigeria, the Claimant would have had access to the Internet through his own devices whether a phone, laptop or PC, local Internet café's, telephones at the British Embassy where he visited to put his name down on the list for repatriation to the UK or devices owned and/or used by friends and family.

41. It is correct that during that time there was a national lockdown in the United Kingdom but Claimant was in Nigeria and it was not his submission to this Tribunal that there was lockdown there. The respondent made attempts to contact him and he failed to respond to those attempts. He did not submit that he had not received

any communications from the Respondent. He received communication from the Respondent but chose not to respond to them. This meant that the claimant's appeal was delayed until his return to the UK in June 2020.

42. The Tribunal also did not find credible, the Claimant's submission that he spoke to his trade union representative about monies owed to him and what action he could take to get money from the respondent, should it fail to pay him voluntarily but that discussion did not include a mention about the employment tribunal. It is highly likely that his trade union representative told him about the employment tribunal as a venue where he could bring his claim for payment of money that he considered the respondent owed him.

43. If the claimant's failure to bring his complaint to the employment tribunal was due to ignorance of his rights to do so, it is this Tribunal's judgment that it was not reasonable for him to be ignorant of those rights as he made no attempts to respond to the respondent, to seek advice from Mr Botswain or a solicitor, advice centre or anyone else as to what he could do about the situation or the respondent's delay in setting up the appeal hearing, to challenge his dismissal or to recover money that he considered was owed to him. The claimant took no action between March and June 2020.

44. It is not this tribunal's judgment that the trade union representative incorrectly advised the Claimant or that Mr Botswain was responsible for the Claimant's failure to issue his claim in time. The Claimant never gave the matter to Mr Botswain to issue on his behalf. The Claimant retained control of his matter at all times.

45. It was not the Claimant's submission that he believed that he had to wait for the outcome of the appeal hearing before he issued his claim. It was also not his case that he was unwell or had any physical or mental impairment preventing him from issuing his claim. The Claimant's communication with ACAS and with the employment tribunal were conducted by telephone and email, all of which he could have done from Nigeria. There were no attempts by the Claimant to contact the respondent, the employment tribunal or as far as the Tribunal is aware, his trade union representative during the three months following his dismissal. He did not chase up his appeal while he was in Nigeria and he failed to respond to the communications sent to him by the respondent during the period March to June 2020. The Claimant simply submitted his appeal in February, left the country in March and took no further action on this matter until he returned to the UK in June 2020.

46. The fact that there was a national lockdown in March 2020 in England as part of the country's response to the coronavirus pandemic which meant that the Claimant could not physically return to the UK did not prevent him from responding to the respondent's attempt to contact him to arrange an appeal hearing, contacting the employment tribunal to bring a claim against the respondent, or contacting his trade union representative to ask for assistance in taking the action they discussed after the dismissal hearing. The Claimant did none of those things. In this tribunal's judgment it was reasonably feasible and reasonably practicable for the Claimant to have done those things. This applies to the whole period following his dismissal as the Claimant was in Nigeria for the whole three month period following



his dismissal.

47. It is this tribunal's judgment that it was reasonably practicable for the complaint of unfair dismissal had been presented before the end of the three-month time limit.

48. The Tribunal has no jurisdiction to hear the complaint of unfair dismissal and it is struck out.

49. The Tribunal also judges that it was reasonably practicable for the Claimant to have presented his complaints that the respondent had failed to pay him wages that he alleges are owed to him, owed him notice pay and holiday pay; before the end of the three-month time limit which would also have been on 3 May 2020.

50. Having spoken to the trade union representative about taking court action against the respondent for money that he considered he was owed; the Claimant then took no further action. It was reasonably practicable for him to have done so.

51. The Tribunal has no jurisdiction to hear the Claimant's complaint of unlawful deduction of wages, breach of contract and failure to pay holiday pay. Those claims are struck out.

#### Race discrimination

52. The complaints of race discrimination were poorly described in the ET1 complaint form. In the hearing, the Claimant referred to different allegations, apart from the allegation that he was paid less than Mr Jilani in 2017. There was no explanation as to why the Claimant had not made complaints to the employment tribunal in 2017 or in 2018 and 2019 when he says that he was paid less than his contractual hourly rate. The Claimant had access to trade union representation during those times or could have sought legal advice on how to do so.

53. He also would have been able to seek legal advice or advice from an advice centre on his rights in relation to his pay. The Tribunal would expect him to have done so in 2017, 2018 and 2019 if he considered that the reason for the failure to pay him the correct hourly rate was due to his age, race and/or sex, as alleged. This Tribunal was not told whether the managers who dismissed the Claimant were the same managers involved in setting the pay rates for the jobs in 2017, 2018 and 2019. The Claimant did not submit that his money claims were part of a continuing act culminating in his dismissal.

54. It was not clear if the Claimant considered that his dismissal was related to race, because apart from appealing his dismissal, the Claimant took no other action to raise this with the Respondent.

55. This Tribunal considers that it is not reasonable for the Claimant to have been ignorant about his right to bring his complaint of race discrimination to the employment tribunal. When he says he was told about the employment tribunal in August, he did not contact ACAS until 7 September and although the certificate was issued on the same day, he did not issue his claim until 5 October 2020. This is inordinate delay and the Tribunal was not given any reason for it.

**Case Number: 3202644/2020 & 3202709/2020**

56. The Claimant has failed to persuade this Tribunal that it is just and equitable to extend time in his case to allow him to proceed with his complaints of race discrimination. It would not be just and equitable for the Tribunal to extend time.

57. The complaints of race discrimination were issued outside of the statutory time limits. The Claimant does not get the benefit of an extension under the ACAS procedures as the conciliation process began after the expiration of the primary time-limit.

58. The Tribunal has no jurisdiction to hear the Claimant's complaints of race, sex and age discrimination. The complaints are struck out.

59. The Claimant's complaints are dismissed and any hearing dates are vacated.

**Employment Judge Jones  
Dated: 30 August 2022**