



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Monks

**Respondent:** Peter J Douglas Engineering Limited

**Heard at:** Nottingham                      **On:** Wednesday 15 November 2017

**Before:** Employment Judge Britton (sitting alone)

## Representatives

**Claimant:** In Person

**Respondent:** Mr A Macmillan, Solicitor

## JUDGMENT

1. As to the wages claims they are dismissed as being out of time it having been reasonably practicable to have brought them within time.
2. The age discrimination claim is dismissed as being out of time it not being just and equitable to extend time.
3. The breach of contract claim is dismissed for want of jurisdiction as the Claimant remains an employee.

## REASONS

### Introduction: the issue for today

1. This Preliminary Hearing is being held because the Claimant accepts that the claims are out of time. Thus unless I extend time, they must be dismissed for want of jurisdiction. The claims can be divided into two categories; first the claims based upon unlawful deduction from wages and in particular in that respect Section 13(3) of the Employment Rights Act 1996 (the ERA). The second claim is one of age discrimination which I have analysed as being a claim of direct discrimination pursuant to Section 13 of the Equality Act 2010 (the EQA). The Claimant was at the time of material events aged 63.

2. The claim (ET1) was presented to the Tribunal on 28 April 2017. Prior thereto the Claimant had engaged in the early ACAS conciliation process which of course he is legally obliged to do before he can bring a claim to Tribunal. Thus the ACAS certificate in relation to conciliation runs between 24 March and 4 April 2017. That period can extend time but for reasons I now come to it cannot in this case.

3. Why are the claims out of time? In each case the time limit is, subject to ACAS EC, three months from the date of the act complained of; and if it is in relation to a series of acts such as deductions in a wages claim or discriminatory actions in relation to such as his age claim, it is the date of the last act complained of from which time runs. In this case there appears to be now no doubt on the facts that the last date from which time would run on both fronts is 2 March 2016. Thus time ran out on 1<sup>st</sup> June 2016. Thus the period of ACAS EC between 24 March and 4 April 2017 cannot extend time as it comes well after the primary time limit<sup>1</sup>. Thus of course it means that when the claims were presented they were approximately 11 months out of time.

### **The law engaged**

4. As to the wage claims s23 (2) of the ERA provides that an employment tribunal shall not consider such a complaint unless it is presented before the end of three months beginning with essentially the last non payment cited. But crucially there is a caveat at ss4:

*“Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.”*

5. As to the age discrimination claim and the time limit s123 (1) (a) of the EQA makes plain that in this type of case the primary time limit is three months starting with the date of the last act complained of but with the caveat at (1) (b) :

*“such other period as the employment tribunal thinks just and equitable.”*

6. From either standpoint the jurisprudence makes plain that the tribunal should start from the standpoint that time limits should be applied strictly and thus it is for the claimant to prove on a balance of probabilities that his explanation meets the appropriate test.

### **Findings of fact and explanation**

7. I start from this stand point; the Claimant's not a scholar. He is good however at setting out the narrative in his case which he has done on 3 occasions at least for the purposes of the Tribunal and he has kept documentation, much of which he has supplied. He knows his case in that respect although I think he is obsessional about it but I don't hold that against him at all. He feels that he has been done wrong by the employer. What are the circumstances that I am actually engaged with distilled down from the morass of that detail and structuring it in an appropriate way as a Judge must do in terms of what I might describe as the issues?

8. Thus the Claimant commenced work as a coded pipe welder for the Respondent on or about 25 November 2011. He is a very skilled man whose job is peripatetic. In other words he goes from his home which is in Wigan to wherever the Respondent wants him to work which is primarily at power stations.

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<sup>1</sup> See s207B of the ERA. The provision in the EQA is the same.

Obviously that needs to be times in relation to whenever possible shutdowns and that of course includes in emergencies. The Claimant had what is described as a temporary contract of employment sometime after he actually started in the job. He signed this contract 23 April 2012. It is at Bp<sup>2</sup> 63 in the Respondent bundle. This document as a written particulars of employment for the purposes of Part 1 of the ERA fails to set out the wage rate, but it was set out in the enclosed offer letter which is referred to. It is said to contain the basic rates of pay albeit it is not before me. So assuming there is such a document, I am not with the Claimant that this doesn't constitute the provision of written particulars of the employment pursuant to the ERA. What I do know is that the rate that the Claimant was paid before one gets into such as overtime was £16.04: certainly as at 2015/16. I do not know what the rate was prior thereto. But what the Claimant is saying, certainly encapsulated from 2015, is that he was being underpaid because "the others" were getting £16.55 per hour. So the issue there is going to be was that an hourly rate which he was properly due construing Section 13(3). I am not dealing with that today. If the case proceeds that will be a fundamental.

9. The second of his claims is that when he was not undertaking a job of work for the Respondent, and there were clearly times when he wasn't, that he should not have been on a standby rate which essentially was nil but notionally recorded so that the payroll continued so to speak at 0.5 pence per hour. He says that he should have been receiving his basic pay on a 38 hour week basis at the rate of £16.55, certainly from 2015 onward, as the standby payment and obviously at whatever was the prevailing hourly rate in the years prior thereto starting with the commencement of the employment.

10. The response (ET3) in relation to the first of these two issues appears to be that there has been some underpayment but nothing like what the Claimant is about; and so that will be an issue for findings of fact in due course should the case proceed. On the notional rate it pleads that the Claimant has not been treated any differently to any other employee and that furthermore it is the standard practice in the industry. Clearly if that issue proceeds, it is going to start with the stand point of were other **employees**<sup>3</sup> doing welding or such like jobs for the Respondent paid standby as per the guaranteed minimum working week at the prevailing hourly rate or were they paid as per the Claimant. For the purposes of today I am not dealing with that and thus I haven't heard evidence in relation thereto.

11. So where does that take me? For the purposes of today I will accept what the Claimant is telling me which is to the effect that from at least 2015, if not earlier, he was raising these issues with several of the line management. None of them remain in the employment of the Respondent. He was in my parlance fobbed off by being told it would be looked into but it never was.

12. As at 18 January 2016 Andy Graham (AG) comes into the picture. He was the Director of HR at the material time for the overarching group of which this Respondent was a subsidiary company. The overarching group is called the Power Industrial Group Limited (PIG).

13. On 18 January 2016, having given them prior thereto due warning that they were "at risk" in a letter, AG saw a welding team employed by the Respondent. Those seen were the Claimant; Kevin W, who is in his fifties, Callum Bryce, the

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<sup>2</sup> Bp = bundle page.

<sup>3</sup> I so emphasise as agency workers used from time to time may have been paid differently.

son of one of the Supervisors, and in his early twenties; and Ryan Leather, son of David another Supervisor, who was again in his early twenties. All four were told that the needs of the business for employees had so reduced that it was proposed to make all four of them redundant. They were invited to take away with them proposed settlement agreements, which would comply with Section 203 of the ERA, with a requirement that they should each go and see a solicitor for independent legal advice and the employer would pay a fee of £150.00 plus VAT. That in my judicial experience is a frequent practice. I gather that what was being proposed is that each was offered a redundancy package doubtless including notice pay. The others all accepted the proposal and so they all left the employ by reason of redundancy. There was a hiatus so to speak of about 3 weeks when they were put on paid leave so they could take advice viz the settlement agreement and reach a decision. This included the Claimant. As far as I can see this would take the last payroll run for them up to about the end of February 2016.

14. Unlike the other three the Claimant made it abundantly clear that he was rejecting the deal because of these issues relating to pay which I have now addressed. In that context there was then e-mail traffic (Bp 47-63) starting in February and continuing in March 2016 in which the Claimant and AG, who was in turn liaising internally within the business, were putting their competing positions. And in the process, which is blanked out before me because it is in that sense privileged as being without prejudice, competing offers were put forward. Then, AG made very plain indeed in his e-mail of 2 March 2016 (Bp48-49) that the Respondent did not accept that the Claimant had any entitlement in particular to the standby payment, and that in any event he had had years in which to raise his grievance and he hadn't and thus so to speak had waived his rights. It was however made clear that on the underpayment of the hourly rate wages front that there might be something due but they were not going to pay him anything like what he was seeking to claim which I think was about £4,500. So I have no doubts whatsoever that the Claimant knew that there was no deal as at 3 March 2016. So in that respect by that time the last payment in dispute having been made prior to the redundancy meeting, and because the Claimant was not working from January, but being generous, and Mr Macmillan doesn't stand in my way, I will take the very last date from which time would run using the payroll run as being 2 March. So time would run out on 1 June 2016. That therefore leads me to first of all apply the jurisprudence on the issue of not reasonably practicable. The judicial approach is to follow the dicta of their Lordships in **Palmer and Another v Southend-on-Sea Borough Council** [1984] ICR 372CA:

“Reasonably practicable does not mean reasonable which would be too favourable to employees and does not mean physically possible which would be too favourable to employers but means something like reasonably feasible.”

15. And as per Lady Smith in *Asda Stores Ltd v Kauser* EAT 0165/07 explained:

“The relevant test is not simply a matter of looking at what was possible but to ask whether on the facts of the case as found it was reasonable to expect that that which was possible to have been done.”

So the focus of my enquiry becomes a simple one. What stopped the Claimant bringing a claim and in that sense first of all involving ACAS under the EC

process by at the latest 1 June 2016? I will therefore look at the headings<sup>4</sup> so to speak of that which the Tribunal Judge should enquire about and make findings in relation to:-

16. Ignorance of rights. The Claimant knew his rights. In the context of the redundancy scenario he had spoken to a friend who knows about these things and he told him that he had 3 months, less one day in which to bring a claim. Leaving aside the issue of the one day which matters not, therefore the Claimant knew essentially about the 3 month time limit. This is about a year before he gets into contact with ACAS to which I shall come. So why didn't the Claimant proceed? He says he was waiting on a reply from AG. Why? There was no reply required. AG could not have made the position clearer than he did in the e-mail of 2 March 2016. Thus simply hanging on hoping that something might turn up, rather like Mr Micawber in David Copperfield, is not objectively reasonable. The Claimant knew or should have realised that there was nothing left to argue: either accept the position or sue. Thus advisors at fault is not engaged and the Claimant was not ignorant of the facts as he saw them.

17. Sickness and such like. The Claimant was off sick from 9<sup>th</sup> March 2016 and has done no work for the Respondent since. By now in terms of the issues he had met AG at Hartishead Moor Services shortly before the 4 February 2016 (Bp 45-46). As to his state of mind in terms of health getting in the way of it being reasonably feasible to have proceeded he has also raised before today that his sister suffered a stroke the complications of which meant he could not think about making a claim. But when? Was it before 1 June or thereabouts? I don't know. Given the Claimant would have needed to get the ACAS early conciliation process going before the end of the 3 month period, he would have needed to get his skates on. So he would be expected to be in contact with ACAS vis early conciliation at the latest say mid May.

18. And as to not reasonably feasible, I have before me the GP report dated 6 August 2016 following a referral by the Respondent 15 June 2016 (Bp104-5) because the Claimant was by now off long term sick. What does the doctor say in what is a relatively comprehensive report<sup>5</sup>? Does he refer to an impediment in terms of the Claimant's mental functioning being the having to deal with his sister's stroke? The doctor makes no reference to it at all. He refers only to the Claimant has been absent from work with a diagnosis of stress at work (my emphasis) since 9 March 2016. "*He presents with poor sleep, headaches, difficulty relaxing, agoraphobia, irritability, low confidence and low esteem*". The Doctor stated that these presented symptoms had manifested themselves following "a dispute with a manager at work" and then we get back to the redundancy and pay issues by reference to such as the Hartishead meeting. The doctor then opines:

*"I am sure that dispute resolution would lead to a rapid improvement in Mr Monk's anxiety symptoms and he would be able to return to work..."*

He does not say that the Claimant is incapable of participating.

19. And If I look to the detailed explanation that the Claimant gave to the Tribunal very recently on 8 November (Bp 28) as to the lateness of his claim and the explanation as to why, he did not refer to his health or his sister's stroke or

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<sup>4</sup> See IDS Handbook Employment Tribunal Practice and Procedure May 2014 edition commencing at 5.44.

<sup>5</sup> It was placed before at the hearing: I have numbered it Bp106-7.

indeed any family problems at all. Indeed in terms of his evidence before me he has contradicted himself in confirming he knew about the three month time limit and his rights to complain whereas he said the opposite in that letter.

20. Nevertheless there has emerged today under oath from the Claimant the health and the sister issue and which has been corroborated by his wife, also under oath, and who I found particularly convincing. Thus I accept for the purposes of today that the Claimant was already becoming irritable at home post the breakdown in communication with AG, before his much loved sister suffered a very severe stroke. Subsequent to that he was dealing with first of all visiting the hospital more or less everyday because his sister was profoundly disabled by reason of the stroke: one side of her body paralysed, inability to read or write and loss of speech. I think from what I have heard from him and his wife that they spent a lot of time indeed with his sister. These weren't just brief visits. They were also having to deal with the added complication that the sister's husband had complications from a prostate operation affecting his mobility. Eventually the sister was discharged to her home with a care package of physiotherapy, speech therapy and carers. But I have no doubt from listening to Mr and Mrs Monks that they continued to resolutely visit, and the Claimant was trying to help his sister to be able to communicate because she was extremely frustrated. As to the impact upon the Claimant, Mrs Monks has told that her husband was losing interest in life; unable to sleep at night but nodding off in the daytime; irritable; and as she put it she doesn't know how the marriage really survived. Maybe it's because they have 41 years behind them.

21. However does all of this mean that it was not reasonably feasible to have brought the claim within the time limit? The GP report makes no mention of the sister and other issues, albeit the Claimant says he is a proud man. The burden of proof is on the Claimant. He did not flag up this issue before today and he has brought no documentary evidence to pinpoint that the sister suffered the stroke in May; and finally I have a Claimant who was able to function and explain himself to the GP and who would have been able to function at a dispute resolution meeting.

22. It follows that up to around the end of May 2016 I do not have sufficient evidence, with the burden of proof being upon the Claimant and that to extend time is the exception rather than the rule, to establish that it was not feasible for the Claimant to have started ACAS EC and thus to stop his claim going out of time. Thus I have concluded in what has not been an easy exercise which is why I have given so much time to it today, that it was reasonably practicable to have brought the wages act claims in time.

23. Accordingly it is dismissed for want of jurisdiction it being out of time.

### **The age discrimination claim**

24. I am going to utilise in terms of applying the just and equitable test the helpful guidance set out in **British Coal Corporation v Keeble and Another** [1997] IRLR 336 EAT. For reasons I now come to it comes down to where does the balance lie in terms of the interests of justice. In that respect the Tribunal can if necessary also look into the merits of the claim in terms of exercising its discretion as long as it puts the parties on notice, which I have: see **Southwark London Borough Council v Afolabi** [2003] ICR 800 CA.

25. This brings me to events relevant to the issue post those I have already dealt with. The Respondent went through a traumatic period at the end of 2016. PIG

was in a parlous financial state, so the management of the Respondent led of course by Mr Hale did a management buy out (MBO). Post the MBO it became quickly apparent that the debts of the Respondent inherited via that MBO were such that it could not legally trade without reaching an arrangement with its creditors. This it duly did; and thus it entered into a creditors voluntary arrangement (CVA) on 21 December 2016. At the same time PIG, which of course employed the HR team for the overall group including AG, went into liquidation on 30 December 2016. The premises in which the Respondent was trading had to be surrendered. It then got temporary accommodation and thenceforth moved again. It is in a 5 year CVA with 75% of the profits for each year to be paid to the creditors, the list of which I have. PIG, as is usual with many liquidations, simply shut shop and the liquidators, Deloitte's, dismissed everybody. Had the Claimant been an employee of PIG he would therefore have been made redundant. I say redundant because curiously in this case the Claimant is still an employee of the Respondent. He has been unable to work for the reasons I have gone to since at the latest March 2016. His statutory sick pay ran out months ago but the Respondent has kept him on its books. At one stage I was shown a P45 which made me wonder as to whether in fact the employment had ceased, but I have been informed by the parties and accept that this is a device utilised by the Benefits Agency on occasions for the purposes of facilitating Jobseekers Allowance. So the Claimant at law remains on the books of the Respondent but is not being paid anything.

26. However as to the time point in the period prior to the demise of PIG and the MBO, the Claimant had a welfare meeting with Jackie Stevenson of HR at PIG on 25 October 2016. She is no longer employed as she was a casualty of the liquidation of PIG. But she produced meticulous minutes of the meeting commencing at Bp66. These show that inter alia the Claimant raised his grievances so to speak on these long standing pay issues. Now Jackie didn't say to him "sorry that's all a closed book. We told you the outcome of that back on 2 March and we aren't going to look at it again". Instead she recorded:

*"Conclusion*

*I will go away and consider the information you shared and come back to you."*

Jackie never did come back because what then happened is the trauma of the hiving of the Respondent and the collapse of PIG.

27. But where does it take me on the age claim? Is this silence intended to be relied on as a further triggering event such as to re-start time? The Claimant has not pleaded as such. And if he did prima facie in the circumstances the lack of action has nothing to do with any such claim for the reasons I have now given; furthermore Jackie and indeed PIG, and the Respondent post the MBO, did not have the necessary knowledge to so act to further discriminate

28. The age claim is also fatally flawed in that it is based upon the premise that he as the oldest person was discriminated against in comparison with younger employees in terms of not being paid the appropriate standby rate and receiving the reduced hourly rate. That was never articulated at all at any stage of the internal process. Add in that when the Claimant thence started to write what I would call chase up letters as to what's happening post the meeting with Jackie, and these are on 5 January, 5 February, and 27 February 2017, he never raised age. He then made a subject to access request on 3 April 2017 for his "personnel file, time-sheets, contract of employment from 25 November 2011"

(Bp85). Prior to bringing his claim to tribunal he raised no request for comparator data so as to support an age related claim. Indeed the first time he raised the age claim appears to have been in the ET1: there is nothing in the bundle to the contrary. So of course it means that the Respondent never knew prior thereto that it was having to face an age discrimination claim. Thus I cannot see how time re-started with the meeting with Jackie in October 2016. Thus the last act, if there was Age Discrimination, would be the last payment to the Claimant at latest end of February/ start of March 2016.

29. Prejudice. And as to comparators and thus needing to preserve data and documents as at the liquidation of PIG and the move of the Respondent post the MBO, such as dates of birth of welders; rates of pay per welder; standby payments etc, this data whether it related to the Respondent in its pre MBO aegis or other companies in the group, was held in the main by PIG as they all employed welders and there was a central HR and Payroll function. The only senior managerial person left appears to be the Managing Director, Mr Hale; and albeit the Claimant doesn't agree, I found him convincing when he said that apart from reputation so to speak viz this case, he does not know him. What is pretty clear is he can't help at all in terms of source data on the comparator issue for the reasons I have now given. So the Respondent is severely prejudiced in trying to defend such a late claim.

30. Length and reasons for delay; possible obstruction by the Respondent preventing knowledge of a claim.

31. The Respondent was not refusing the Claimant any requests for comparator information during the limitation period from March 2016. As I have already found the SAR was limited to the Claimant's details. And so that does not assist the Claimant as a factor in the balancing scales. In other words it wasn't an impediment upon the Claimant bringing his claim within time because he wasn't asking for the comparator information. Indeed for reasons which I trust are now self evident I conclude that he did not have in his mind an age claim until shortly before the ET1.

32. Finally onto the balancing scales I place **Afolabi**. Why? The Claimant seeks as I say to contend that the treatment of him is age related. I can't see how it can get off the ground for this very simple reason. When the four employees were seen on 18 January all four of them had been selected for redundancy. Two are in the youngest of what I would describe as the usual 3 age groups. But the Claimant has a like comparator who was treated as he was which of course is Kevin who is in his mid fifties. And what is more the two young people were dismissed as well as Kevin. Indeed the only one of the four who was not dismissed was the Claimant.

33. So how can that conceivably work as evidence of less favourable treatment by reason of age? Going backwards from there Kevin, who also appears to have been unhappy about the standby pay, raised the matter via his union the GMB and indeed threatened via the GMB to take the matter to a Tribunal unless he got satisfaction. I don't actually know if the case ever reached the ET1 or the mechanism by which it was settled, but what I do know from that stated before me today is that the Respondent paid Kevin a relatively substantial sum and restored him to I assume a normal rate of pay as opposed to a notional standby rate. The Claimant knew all that at the time. So this contradicts what the Claimant pleaded before the Tribunal prior to this hearing that no other employee was paid the notional rate. Kevin was for a while but then succeeded in getting himself a standard rate and back pay. So Kevin, a man in the same age group



as the Claimant was treated in that sense more favourably than the Claimant. So it flies in the face of alleged discrimination. Finally of course why didn't the Claimant ride on his coat tails? I have no satisfactory explanation.

### **Conclusion**

34. Accordingly I have concluded, again after the most careful consideration, that it is not just and equitable to extend time for the age claim.

### **Residual issues.**

35. Codified was a breach of contract claim. In effect it is subsumed in the wages claim which I have dismissed. If it was not, then leaving aside the three month limitation period which also applies, there is no need to consider it and because pursuant to the provisions of s3 of the Employment Tribunals Act 1996, the Tribunal has no jurisdiction to entertain such a claim unless the employment has ended and which has not occurred. Thus for completeness it is dismissed.

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Employment Judge P Britton

Date: 6<sup>th</sup> December 2017

JUDGMENT SENT TO THE PARTIES ON

6 January 2018

FOR THE TRIBUNAL OFFICE