



# EMPLOYMENT TRIBUNALS

## Claimant

Mr R Bediako

## Respondent

Arriva the Shires Ltd

v

**Heard at:** Bury St Edmunds (Hybrid)

**On:** 5 October 2023

**Before:** Employment Judge K J Palmer (sitting alone)

## Appearances

**For the Claimant:** In person

**For the Respondent:** Mrs A Mosley-Ford (In-house Solicitor)

## RESERVED JUDGMENT PURSUANT TO A PUBLIC PRELIMINARY HEARING

**It is the Judgment of This Tribunal that the  
Claimant's claims are dismissed.**

## Reasons

1. The Claimant presented a claim to this Tribunal on 7 October 2022. The claim was homemade and the Claimant did not have the benefit of legal advice. The Claimant has been employed and remains employed as a bus driver since 29 October 2018.
2. In his claim he ticked the box for race discrimination, arrears of pay and other payments. The detail of his claim at paragraph 8.2 of the ET1 was brief.
3. He argues that he has been unfairly treated because of race. He says he has been harassed, victimised and threatened because of his race for raising pay related matters. He argues discrimination because of his race as a result of his rate of pay at Arriva Milton Keynes. He argues unfair distribution of Furlough Scheme. He alleges that there is personal hatred of him within the

payroll department. He relies on the use of many racial names, slurs and racial backbiting. He says he was assaulted because of racial backbiting and ganged up on back in 2019 by the now current payroll officer.

4. The Respondent filed an ET3, denying any claims but essentially arguing that there were no proper particulars in respect of any claims for them to properly plead to. The matter was listed as a telephone Preliminary Hearing to determine Case Management issues. That hearing took place on 23 March 2023 and was before my colleague, Employment Judge Hanning.
5. Judge Hanning identified that the claim was inadequately pleaded and particularised. He spent some considerable time discussing matters with the Claimant and was able to distil the Claimant's claims into five paragraphs. These are numbered 3.1 to 3.5 in EJ Hanning's summary.
6. Employment Judge Hanning went on to say that Mrs Mosley-Ford, who appeared at that hearing as well as this one, put forward the argument that during those discussions the Claimant had, besides adding much more detail to those claims in the ET1, raised completely new claims and that these new claims constituted claims for which the Claimant would require leave to amend.
7. He also pointed out that there were considerable questions of time as to whether any, or all of the Claimant's claims were out of time.
8. As a result, EJ Hanning listed the matter for an open (public) Preliminary Hearing to determine the following issues:
  - 8.1. So far as it may be needed, whether the Claimant has permission or not to add or amend his claims;
  - 8.2. Whether any of his claims were brought in time or not;
  - 8.3. If any claim was not brought in time, whether as may be applicable:  
either
    - 8.3.1 It was reasonably practicable for the claim to be made to the Tribunal within the time limit and, if not, whether it was made within a reasonable period,
    - or
    - 8.3.2 Is it just and equitable in all the circumstances to extend time?
  - 8.4 He then indicated that in the other applications which either party could make in writing should be sent to the Tribunal.
9. Subsequent to that, the Respondent sought to pursue an application for the Claimant's claims to be struck out under Rule 37 of the Employment Tribunal Rules of Procedure on the basis that they had no reasonable

prospect of success and/or whether the Claimant's claims had little reasonable prospect of success and a Deposit Order should be made under Rule 39 of the Employment Tribunal Rules of Procedure.

10. Employment Judge Hanning ended by saying that any other further Case Management Directions as were required, would be made at the end of that hearing.
11. The matter then came before me, listed to be heard by Cloud Video Platform on 14 July 2023.
12. I do not propose to repeat the contents of my Notice of Postponement and relisting but, in essence, it was impossible for us to proceed with the hearing by CVP due to the Claimant's internet connection. It was necessary, therefore to relist the matter to be heard in person.
13. Yesterday the Respondents sought to have the hearing postponed due to the difficulty in travelling to the Bury St Edmunds Employment Tribunal from Carlisle due to a rail strike. The matter was put before my colleague EJ Laidler and she converted the hearing to a hybrid hearing whereby the Claimant attended in person and Mrs Mosley-Ford attended on behalf of the Respondents by video link.
14. I had originally indicated in my Notice of Postponement that the original bundle that was before me on 14 July, would be sufficient. Mrs Mosley-Ford pointed out to me at the outset of today's hearing that yesterday, a fresh amended bundle, including documents not in the original bundle together with a skeleton argument, had been forwarded to the Watford Employment Tribunal by her colleague, Ms Royal.
15. I explained that if documents were sent at such a late stage, it was highly unlikely that they would reach the Tribunal Judge in time for the hearing. This obviously proved to be the case as no such documentation had been forwarded to me.
16. Accordingly, I asked Mrs Mosley-Ford to forward those documents to me by email and she did. She confirmed that copies had been sent to the Claimant and the Claimant confirmed that he had received them.
17. I then heard lengthy and detailed submissions from Mrs Mosley-Ford and from the Claimant. I will not seek to repeat those here.
18. One of the orders of Judge Hanning, as set out in his Summary, was that the Claimant write to the Respondent and the Tribunal by 25 April, confirming that the details recorded in EJ Hanning's summary concerning the Claimant's claims are correct, and adding details where they are not correct. The Claimant then complied with that order by producing a document which, on the face of it, considerably expanded the claims set out in EJ Hanning's Order and it will be necessary for me to analyse this document in conjunction with the paragraphs set out in EJ Hanning's Order and the ET1.

19. The task that befalls me then, appears to be as follows:
20. As directed by EJ Hanning, I must attempt to isolate the nature of the Claimant's claims as set out in his letter pursuant to Judge Hanning's Orders which is before me but which is undated. This deals with the five bullet points raised by Judge Hanning and seeks to clarify, and in some cases, considerably expand upon them.
21. I will need to determine whether the claims, as set out by EJ Hanning in his Summary as refined and expanded upon by the Claimant in his letter, are claims originally raised by the Claimant in his ET1 or whether some, all, or any of them, require Leave to Amend to be permitted.
22. Once that determination has been made, in terms of whether leave is required, then I must consider whether to grant Leave to Amend in respect of those claims or not.
23. I must then consider whether any surviving claims are out of time and if they are whether to extend time on the basis of the reasonably practicable test or the just and equitable test whichever is appropriate.
24. If there are claims that then survive I must consider the Respondent's application for Strike out and/or Deposit Order under Rules 37 and 39.
25. It is in that order which I must consider these matters as I am bound to do so by the Order set out by EJ Hanning in his Summary.
26. I therefore shall deal with each in turn.

**Amendment.**

27. Employment Judge Hanning listed the Claimant's claims in 5 paragraphs. He listed these as follows in his paragraph 3:
  - 3.1 When he joined the Respondent the Claimant was told he would start on a middle rate of pay and move to a higher rate after two years. In fact, he has not been moved to the higher rate and this contrasts with a white English driver (described by EJ Hanning as Mr S Norbury, but who we now know was called Rufus Newbury) who was moved to the higher rate of pay within only a few months of joining. The Claimant became aware of this disparity in about November 2019. This is recorded as being a claim for direct discrimination.
  - 3.2 In the early states of the pandemic the Claimant contracted Covid and had to be away from work. He complains that while he could have been furloughed for that absence (and received 80% of his pay) he was instead only paid sick pay. He does not attribute this

to race but says it is a general complaint. This is recorded as being a claim of breach of contract or unlawful deduction from wages.

- 3.3 Between 2019 and as recently as November 2022, after working overtime, he has been only part-paid his entitlement and not all (EJ Hanning believed the difference may lay in the payment for breaks). Again, this is not related to race but is another general complaint. This is recorded as being a claim for breach of contract or unlawful deduction of wages.
- 3.4 He was subjected to racial abuse in October 2020 and January 2021 when he was called names, including “gorilla”. In addition, at the beginning of March 2023 he was called “monkey” in the staff room. This is recorded as being a claim for harassment.
- 3.5 On or about 25 November 2019, in the context of an altercation about his taking a later shuttle than he was supposed to, he was punched in the face by another driver he knows as Stuart. He attributes this to race as he was the only person of African heritage on the shuttle. This is recorded as being a claim of harassment.

28. In respect of the Claimant’s race claims, the Claimant is a black man of African heritage (Ghanaian).
29. The above five bullet points encapsulated are EJ Hanning’s summary of the Claimant’s claims. When the Claimant then complied with EJ Hanning’s order, he expanded upon those claims.
30. However, firstly, I must determine whether those five bullet points exhibit claims which are new claims out with the original confines of the claims set out in the ET1 or whether they constitute clarification or relabelling of existing claims set out in the ET1.
31. That is, I need to determine whether anything in those five bullet points requires leave to amend.
  - 3.1 I consider that this is merely an expansion of the claim which the Claimant advanced in his ET1 and is an explanation of the sentence, “Race treatment for rate of pay in Arriva Milton Keynes”.
32. Whilst we now know that the name of the comparator was mis-described to EJ Hanning, that is a minor amendment required and in respect of this claim, therefore, 5.1 was merely an explanation or fleshing out of a claim already there. There is therefore no requirement for an amendment in respect of the claims identified at 3.1 in EJ Hanning’s summary.
  - 3.2 This is a complaint about the application of the Furlough Scheme set out by the Government during the pandemic. It is an explanation and

expansion of what is in the ET1 under the sentence “Unfair distribution of furlough scheme”. This does not require Leave to Amend.

- 3.3 This relates to overtime. This is a new claim and does not appear in any sense in the ET1. This requires the Tribunal’s Leave to amend.
- 3.4 This deals with the allegation of racial abuse and the use of racial epithets in October 2020, January 2021 and March 2023 (which post-dates the presentation of this claim). In my judgment, this is mentioned in the original ET1 under “uttering many racial names and racial backbiting”, it is not particularised but, in my judgment, as it is merely an expansion and elucidation of that which was in the ET1, it does not require Leave to Amend.
- 3.5 This is the allegation that the Claimant was punched in the face by another driver, Stuart, and that this was racially motivated. In my judgment this is mentioned in the original ET1 under “assaulted because of racial backbiting” and is an expansion of that original claim. No Leave to Amend is required.

**The Claimant’s letter, pursuant to the Judge’s Order requesting confirmation that the bullet points in the Judge’s Summary, constitute the Claimant’s claims.**

33. The Claimant responded to the Judge’s Order by referring to the same numbered paragraphs as the Judge had set out.

Paragraph 3.1

The Claimant expanded upon the allegation that he had been the subject of racial slurs and epithets (albeit that this appears at 3.4 of the Judge’s Summary). He mentioned the word “gorilla” but also alleges that he was called a “black cunt”. He does not specify when these epithets were alleged to have been said or by whom. Under the heading 3.1, he also goes on to say that he would like to add that two Managers, Luke Gilroy and Alan Holmes, tried to move him from the Milton Keynes Depot to Luton. He said that this was because he was complaining of issues of race discrimination, harassment and victimisation. This is a wholly new claim, not mentioned in the ET1 and not mentioned to Judge Hanning.

Therefore, both this and the allegation that he was called a “black cunt” require Leave to Amend.

Paragraph 3.2

In his letter the Claimant refers to his allegation relating to furlough but expands it beyond that which he told Judge Hanning on the basis that the misapplication of the furlough scheme was racially motivated. This is at odds with the record of Judge Hanning. When I asked the Claimant about this he said he was too nervous to mention this to Judge Hanning. In my judgment, this is a fresh claim and requires Leave to Amend.

Paragraph 3.3

In his letter the Claimant once again alleges that all issues relating to pay dispute, including the overtime claim, amount to race discrimination. This is once again at odds with that which he told Judge Hanning. This is a fresh claim and requires Leave to amend.

Paragraph 3.4

Here, the Claimant in his letter, appears to considerably expand his claim and for the first time mentions the payroll officer James Waumsley, who he makes general allegations about harassment, victimisation and race discrimination. There is no particularity about these allegations save for the fact that he seems to suggest that the major perpetrator is James Waumsley. These references to Mr Waumsley are a wholly new claim and require Leave to Amend.

Paragraph 3.5

In his letter, once again, the Claimant refers to Mr James Waumsley and whilst it is not clear what he is trying to say, it appears that he might be suggesting that the assault was carried out by Mr Waumsley. When I questioned him on this, however, at this hearing, he said this was not the case and that the assault was carried out by Stuart but Mr Waumsley was the principal protagonist in a pattern of discrimination against him. None of this is particularised. It is a fresh claim and requires Leave to Amend.

**MY DECISION ON THE APPLICATIONS TO AMEND**

34. With respect to the five bullet points as set out by EJ Hanning. As detailed above, only one claim, as set out by EJ Hanning constitutes a fresh claim, not simply a relabelling or explanation of a claim already raised in the ET1 and that is at paragraph 3.3 of Judge Hanning's Summary.
35. I questioned the Claimant about this claim and was very unclear as to precisely what claim he was seeking to pursue. When I questioned him about overtime, he seemed to be arguing that it was not overtime but it was his rate of pay which was wrong. A quick glance at his Schedule of Loss seems to confirm that his complaint appears to be about his rate of pay. When I asked him about this he said that ultimately it had been about a rate of pay and not overtime albeit that some overtime was included. There was no real clarity in this claim and it appears to have been advanced to EJ Hanning during the course of his discussion with him.

The Law on amendment .

36. The law relating to applications and leave to amend in the Employment Tribunal is settled. The Tribunal has to have mind to the relevant authorities, including Cocking v Sandhurst (Stationers) Ltd and another [1974] ICR650. Here Sir John Donaldson laid down a general procedure for tribunals to follow

when deciding whether to allow amendments to claim forms involving changing the basis of the claim or adding or substituting Respondents. The key principle is that in exercising their discretion, tribunals must have regard to all the circumstances, and in particular, to any injustice or hardship which could result from the amendment or a refusal to amend. This test, known as the “Cocking test” was approved in subsequent cases and particularly was restated by the EAT in the case of Selkent Bus Company Ltd v Moore [1996] ICR836. This was further endorsed in the Court of Appeal in Ali v The Office of National Statistics [2005] IRLR201. It is a careful balancing exercise which the Tribunal must engage in, considering all relevant factors, having regard to the interest of justice and the relative hardship that would be caused to the parties by granting or refusing the amendment. In Selkent, the then President of the EAT, Mr Justice Mummery, explained that the relevant factors would include;

1. Nature of the amendment.
2. Applicability of time limits.
3. Timing and manner of the application.

This was not intended to be an exhaustive list. There are other relevant factors to consider. In Vaughan v Modality Partnership [2021] ICR535, the Employment Appeal Tribunal gave detailed guidance on applications to amend Tribunal pleadings. They confirmed that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. The parties must therefore make submissions on the specific practical consequences of allowing or refusing the amendments.

37. The hardship and injustice test is a careful balancing exercise. Any decision is going to cause some hardship to the losing party.

**The amendments which are before me.**

38. As I have set out above, the five bullet points set out by EJ Hanning in his Case Management Summary, only one of those, in my judgment, constitutes a fresh claim and requires leave to amend, that is bullet point 3.3.
39. I questioned the Claimant closely about this and he was very unclear as to the nature of the claim he was seeking to pursue. When I questioned him about overtime, it seemed that he was arguing that it was not overtime but it was a complaint about his rate of pay. Looking at his Schedule of Loss, seems to confirm that his complaint appears to be about his rate of pay and not overtime. When pressed on this he confirmed that it is in fact was about rate of pay and not overtime. It appears that him being questioned by Judge Hanning, he advanced a claim about overtime which does not in fact form part of his claim. It appears that this is more a re-stating of his claim set out under paragraph 3.1 of Judge Hanning’s summary. This is rather confirmed by the Claimant’s undated letter sent to the Tribunal in accordance with EJ Hanning’s order. When referring to 3.3 in this letter, he does not in any way mention overtime and it constitutes a more general chiding of those he worked with at



the Respondents. It is framed as a race discrimination claim at paragraph 3.3. in the letter which is entirely at variance with EJ Hanning's paragraph 3.3.

40. Today the Claimant has told me that 3.3 does not relate to overtime. However, applying the principles set out in the authorities above, the Claimant was unable to articulate the nature of this amendment, that is the nature of the claim he wishes to pursue. It was a general complaint against the treatment he perceives he has suffered over the years at the hands of the Respondent and its employee. He was not able to particularise that. Accordingly, applying the principles, I cannot identify the nature of the amendment. Any such amendment would be considerably out of time and as to the timing and the manner of the application it rather follows something of a pattern. Whilst I was questioning the Claimant on this aspect of his claim, he appeared to be volunteering yet further claims, which bore no relation to the claims in the ET1, the claims he had outlined to EJ Hanning or indeed the claims further ventilated in his letter pursuant to the Order of EJ Hanning.
41. For those reasons it is not possible to identify the proper nature of 3.3 and the Claimant is therefore denied leave to amend.

**The further amendments advanced in the Claimant's letter sent pursuant to the Order of EJ Hanning.**

- 3.1 The allegation that the Claimant was called a "black cunt" and the allegation that two managers, Luke Gilroy and Alan Holmes, tried to move him from the Milton Keynes Depot to Luton and that this was an act of discrimination, are entirely fresh claims, not appearing in the ET1 and not mentioned to EJ Hanning. They are volunteered as fresh claims in the Claimant's letter, undated but sent pursuant to EJ Hanning's Order that he write to the Tribunal by 25 April 2023. These are fresh claims and until April 2023 had not been ventilated previously despite the fact that the Claimant had been asked to expand upon his claims by EJ Hanning. Admittedly they were advanced pursuant to compliance with the Order of EJ Hanning, asking whether EJ Hanning's summary encapsulated all of the Claimant's claims. Therefore, the Claimant was only complying with that which he was asked to do. However, they still represent fresh claims not appearing previously in the Claimant's claim which was lodged on 7 October 2022.
- 3.2 The allegation that he was called a "black cunt" is unparticularised but is attached and highlighted as being an allegation allied to his original allegation in his ET1 that he was called a "gorilla" which, as I have already said, appears at 3.4 of EJ Hanning's summary. The allegation that he was called a "gorilla" dates back to January 2021 at the latest and may have been earlier. The Claimant was not able to clarify further when he was called a "black cunt" but suggested it was at the same time. He could not articulate who he says called him that.

### **The “black cunt” allegation**

42. This is a new allegation, not raised until April 2023. It is difficult to be clear, having questioned the Claimant about the nature of the allegation, although it appears to be allied with the allegation that he was called “a gorilla” in either October 2020 or January 2021 which appears at 3.4 of EJ Hanning’s summary.
43. The claim is related to an incident that is manifestly out of time on its face, being some two years plus before it was first raised. There has been a considerable delay in making such an allegation. Moreover, it falls into the category which is common with the Claimant which is that, when questioned, he finds fresh claims to allege and struggles to understand that it is necessary to crystallise and define his claims so that they can be dealt with properly. I understand entirely that the Claimant is unrepresented but equally there must be certainty in this process and certainty as to the issues to be before any Tribunal. The Respondents must also have certainty and a constant changing and adding of claims of does not sit well with the principles of how employment tribunals are conducted, bearing in mind not only the overriding objective but the principles of natural justice.

Therefore, I do not allow the Claimant to amend his claim to include the allegation that he was called a “black cunt”.

### **The allegation that Luke Gilroy and Alan Holmes tried to move him from the Milton Keynes depot to Luton.**

- 3.1 This is part of the fresh claim advanced by the Claimant in his letter sent to the Tribunal on or around 23 April 2023 in compliance with EJ Hanning’s Order. Very much the same analysis applies as above. This is an entirely fresh claim and, when questioned, he was unable to articulate the precise timing of when this is alleged to have happened. Once again, therefore, there is a lack of clarity as to precisely what he is claiming. It would appear to be manifestly out of time and weighing carefully the balance of prejudice, prejudice clearly sits heavily in favour of the Respondent. I therefore disallow this amendment for the reasons set out.

#### **The Furlough Claim**

- 3.2 This relates to the Claimant’s allegation relating to furlough. The Claimant appears to have shifted his position here, having explained to EJ Hanning that this was not a discrimination complaint but a complaint for unlawful deduction of wages. It could not, of course be a claim arising out of a breach of contract as the Claimant remains employed. To relabel it as discriminatory now, or rather in his letter sent on 23 April 2023, constitutes a fresh claim. This requires leave to amend. It is clearly manifestly out of time and once again, it is not wholly clear how the details of this claim at 3.2 could constitute discrimination. Applying the factors in the authority set out above and most particularly relying on the balance of hardship test, I conclude that I will not allow this amendment.

**Additional claims under 3.4.**

44. These have been advanced in the Claimant's letter sent on or about 23 April 2023. They represent a considerable expansion upon the ET1 and what was said to EJ Hanning. There is an entirely fresh claim citing James Waumsley, who is the Respondent's payroll officer. The narrative in the letter is confusing and so I questioned the Claimant about this at this hearing. It seemed initially as if he was suggesting that the original allegation of assault set out at 3.5, had been introduced as a fresh allegation against James Waumsley. He said this was not the case but that he had complaints against James Waumsley in respect of general allegations about harassment, victimisation and race discrimination. There is no particularity about these general allegations. They are clearly entirely new. They are wholly out of time and wholly unidentified. For the reasons set out above I do not grant leave to allow them to be added as an amendment to the Claimant's claim.

**3.5**

45. This is extensively amended in the letter sent in April 2023. It seems to suggest that the assault was carried out by Mr Waumsley. However, when I questioned the Claimant about this, he said this was not the case and the assault was carried out by someone he knows as Stuart/Stewart? Therefore, nothing is added to the 3.5 claim set out by EJ Hanning and it remains as he has set it out.

**Claims that survive the amendment scrutiny.**

46. Therefore, to be clear, the claims set out by EJ Hanning at 3.1, 3.2, 3.4 and 3.5 all survive.

**Whether any of the Claimant's claims are out of time.**

**The Law**

47. With respect to the Claimant's remaining claims:  
3.1 – is a direct race discrimination claim.  
3.2 - is an unlawful deduction of wages claim.  
3.4 and 3.5 – are harassment claims on the protected characteristic of race.
48. All are subject to time limits. Discrimination claims are subject to the time limits set out in section 123 of the Equality Act 2010.

This is as follows:

Time limits

(1) Proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

49. The time limit for bringing an unlawful deduction of wages claim is set out at paragraph 23 of the Employment Rights Act 1996.

This states as follows:

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(2) Subject to subsection (4), an [employment tribunal] shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(4) 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.

### **3.1**

50. This claim relates to events that took place when the Claimant joined the Respondents in October 2019. He said he was promised a move to a higher rate but was never so moved and that a white English driver, who is his actual comparator, Rufus Newbury, was given such a rise.

51. It became clear during this hearing that Mr Newbury did start as a driver in July 2019 but in October 2019 Mr Newbury was seconded to an operations manager role. This was a promotion and a substantially different role to that of the Claimant, meaning that any pay comparison could no longer apply from the start of that secondment. This was something which the Claimant accepted.

52. That means that any claim in discrimination would, under section 123, would need to have been brought within three months of the act or omissions complained of. Thus, to be in time a claim would have had to have been presented in or about the end of January 2020. No such claim was presented until these proceedings were presented on 7 October 2022, some two years 8 months later. The Respondents point out to me that if that claim is being considered as an unlawful deductions claim, which it is not, it would also similarly be out of time.

53. Whilst I questioned the Claimant and, of course the Claimant is unrepresented and does not understand the law, he could give no explanation as to why he waited so long to raise this claim.
54. It is manifestly out of time. I have to consider whether to exercise my discretion to extend time on the just and equitable principle.
55. The discretion for tribunals to hear out of time claims within whatever period they consider to be just and equitable, is broader than the discretion to allow late claims to proceed where the test is the “not reasonably practicable test”.
56. Following the authority of Chief Constable of Lincolnshire Police v Caston [2010] IRLR327, the question must be asked is whether there was material on which the Tribunal can properly exercise its discretion. The Claimant has put nothing before me to assist me in making this judgment in his favour. Whilst employment tribunals have a wide discretion to allow an extension of time under the just and equitable test, it does not necessarily follow as a matter of course that the exercise of the discretion is a foregone conclusion. In Robertson v Bexley Community Centre, trading as Leisurelink, [2003] IRLR434 states, that a Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so that the exercise of the discretion is the exception rather than the rule. The onus is on the Claimant to convince the Tribunal that it is just and equitable to extend the time limit. I have questioned the Claimant during the course of this hearing and he has told me nothing that would convince me that it was appropriate for me to exercise that discretion in this case. He gave no cogent explanation as to why he waited over two and a half years to lodge the claim. In the circumstances, therefore, I do not exercise my discretion and the claim under 3.1 is out of time. The Tribunal has no jurisdiction to hear it. It is dismissed.

### **3.2**

57. This is the claim for unlawful deduction of wages on the basis that the Claimant should have been furloughed when he was instead on sick pay. It is not a discrimination claim. This relates to a period of two weeks in 2020. This is the week ending 25 April and the week ending 2 May 2020. Thereafter, the Claimant volunteered for, and accepted a period of furlough going forward. His claim can therefore only relate to the two weeks period specified.
58. The claim not lodged until 7 October 2022 means that a claim relating to these two weeks is out of time. the claim should have been lodged within three months of the beginning of May 2020. The claim is two and a half years out of time.
59. The Claimant suggests that raising the issues of financial losses for furlough within his schedule of loss, sufficient to circumvent the time limit rule. He produced his schedule of loss as part of these proceedings on 13 March 2023. That is not an argument with which I find any favour. The Claimant also appears to believe that time limits do not apply because he continues to suffer “racial unfairness” in relation to his pay. I have already dealt with that above

and the furlough related claim is entirely separate and is, in fact, not a race related claim.

60.3.2 is therefore considerably out of time and I have heard nothing from the Claimant to convince me to exercise my discretion under the “reasonably practicable test”. That test is, in any event, a harder test for the Claimant to succeed on than the just and equitable test. There would have to have been a good reason why the Claimant could not have lodged his claim in time. It is two and a half years out of time and he has advanced no such reason. The claim is out of time. The Tribunal has no jurisdiction to hear it. The claim is dismissed.

### **3.4**

61. This is the claim set out in EJ Hanning’s paragraph at 3.4. This is the claim relating to racial abuse to which the Claimant alleges he was subjected in October 2020 and January 2021, when he was called names, including “gorilla”. In addition, at the beginning of March 2023, he was called “monkey” in the staff room.

62. With respect to the “monkey” allegation, I shall deal with this later. This is an allegation which post-dates the presentation of these proceedings.

Dealing with the claims relating to alleged abuse in October 2020 and January 2021.

63. There is a lack of clarity in the Claimant’s claim here. Questioning the Claimant has not produced any further clarity. The Claimant is unsure precisely when he says he suffered the abuse albeit it appears to have been in or around 2020 and/or January 2021. The Respondents, in their submissions and in the bundle, refer to the Case Management Hearing before EJ Hanning and the fact that the Claimant referenced being called a “gorilla” in October 2020 and/or January 2021 but then referred to documentation where they say the Claimant complained about an employee called Mr Stephen Larkin making such a comment in April 2020. They say in fact, during a grievance hearing in 2022, the Claimant stated that Stephen Larkin had made this comment during Lindsay Frosdick’s tenure as manager at Milton Keynes. That tenure came to an end in February 2020 and the Claimant acknowledged at the grievance meeting in 2022, that it happened “three years ago” and at some point in 2019. There is no record, as far as the Respondent is aware, and none that the Claimant has brought to anyone’s attention that the Claimant highlighted any other incidents when the term was used.

64. I therefore accept the Respondent’s submissions, having had those documents in front of me, that this claim is based on an isolated incident some time between 2019 and January 2021. It is clearly, therefore, manifestly out of time.

65. It is difficult to clearly isolate from the Claimant any other clear incidents where he can specify other racial slurs, although he refers to racial slurs in his correspondence.
66. He gives no reasonable explanation as to why he waited so long to present his claim.
67. Once again, he has produced no evidence to persuade me that I should exercise my discretion on the just and equitable principle. Applying the authorities above and the test I have already outlined, I do not exercise that discretion.
68. The claim under 3.4, relating to incidents in October 2020 and/or January 2021 is out of time. The Tribunal has no jurisdiction to hear it. It is dismissed.
69. I deal with the allegation that the Claimant was called a “monkey” in March 2023 below.

### **3.5**

70. This relates specifically to an altercation between the Claimant and another driver he knows only as Stewart or Stuart. He attributes this to race. He said that this altercation occurred on or about 25 November 2019 in the context of an altercation about his taking a later shuttle than he was supposed to. He said that the altercation must be about race because he was the only person of African heritage on the shuttle. This is recorded as being a claim of harassment.
71. This is clearly a one-off incident that took place between the Claimant and Stuart in November 2019. The Claimant did not present his claim until October 2022. This claim is therefore nearly three years out of time.
72. Whilst there was some confusion pursuant to the Claimant’s letter of April 2022, whether he still pursued this claim against someone called Stuart, he confirmed that he did. It is clear, however, that it is manifestly out of time. He has not put forward anything to me that suggests to me that I should exercise my discretion on the just and equitable principle.
73. The length of time of the delay is significant. The prejudice suffered by the Respondents in having to deal with an allegation some three years prior to presentation of the claim about someone who is only identified as Stuart, weighs heavily in the Respondent’s favour. The cogency of any evidence would be significantly affected. The Claimant has not, in any way, indicated to me why he waited so long. He has given no explanation. There is no suggestion that the Claimant reacted promptly, in fact, all indications are the opposite.
74. I have therefore taken all factors into account and do not consider that I should exercise my discretion in respect of 3.5. It is out of time. The Tribunal has no jurisdiction to hear it. It is dismissed.

### 3.4

75. The allegation that the Claimant was called a “monkey” in March 2023.
76. This was a claim volunteered to EJ Hanning during the Preliminary Hearing on 14 July 2023. He recorded it at 3.4. As I have already indicated, this relates to a single incident in March 2023 which post-dates these proceedings. It is part of 3.4 where the Claimant relies on incidents of racial abuse. I have already dismissed the other aspects of the claims raised in 3.4 as being out of time and I have not exercised by discretion to extend time to validate them.
77. In essence, this is the only part of the Claimant’s claims in these proceedings which remains. Like much of the Claimant’s claims, the Claimant has had difficulty in identifying and clarifying the claims he is relying upon. It appears that he raised this claim before EJ Hanning. EJ Hanning noted it at 3.4. It does not appear in the Claimant’s ET1 and no mention of it is made in the Claimant’s letter pursuant to the order of Judge E J Hanning in April 2023. There is no clarity within the comments made to EJ Hanning as to who is alleged to have made this claim.
78. In any event, for it to be included in this claim, it requires leave to amend as the event relates to a period of time which post-dates the presentation of this claim.
79. The term “monkey” does appear in the Claimant’s witness statement produced on 4 July 2023 in readiness for this hearing. However, it is wholly unparticularised and is part of what the Claimant says was a general name calling culture. He has not particularised when or who is alleged to have said it.

### **Leave to amend to include allegation that he was called a “monkey”.**

80. Applying the Cocking and Selken principles, it seems to me that there would need to be some detail and certainty about this claim. It appears to be added to earlier claims some years before. No one is identified as the perpetrator. It falls out with the scope of this claim.
81. It has been introduced by the Claimant during this claim and appears to have been mentioned to EJ Hanning and included in his summary.
82. The Claimant would be entitled to issue fresh proceedings in respect of this claim although it is likely that he would now be out of time.
83. I have to weigh the balance of prejudice in deciding whether to allow this claim to survive by giving leave to amend. The fact that the claim is not identified properly and the Claimant has had ample opportunity to identify it, weighs heavily in favour of the balance of prejudice being in favour of the Respondents. It is currently not possible for the Respondents to deal with that claim. It seems to me that it would not be right for me to allow that claim to proceed as part of these proceedings. If the Claimant wishes to pursue a



claim based on that alleged slur, then he must produce fresh proceedings and would seek, no doubt, to have any time issues dealt with by virtue of the Tribunal's ability to extend time on the just and equitable principle.

84. On the balance of prejudice I consider that no such amendment should be allowed. I do not allow it.

**SUMMARY**

85. For the reasons I have set out in detail above, all of the Claimant's claims are dismissed.

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Employment Judge K J Palmer

Date: 7 December 2023

Sent to the parties on:  
15 December 2023

For the Tribunal Office