

**EMPLOYMENT TRIBUNALS**



**OPEN PRELIMINARY HEARING**

**BETWEEN**

**Claimant:**  
Mr T Howard

And

**Respondent:**  
Arriva Employment Services Ltd

**Heard by:** Zoom

**On:** 4 November 2021

**Before:** Employment Judge Nicolle

**Representation:**

Claimant: Mr P O' Callaghan of Counsel  
Respondent's: Ms L Badham of Counsel

**JUDGMENT**

1. The Tribunal does not have jurisdiction to hear the claim for unfair dismissal. The Claimant accepts that he was not employed by the 1<sup>st</sup> Respondent and that his claim against the 2<sup>nd</sup> Respondent was presented outside the period provided for by section 111 (2) of the Employment Rights Act 1996 (the ERA). The Tribunal decided that under S 111 (2) (b) that it was reasonably practicable for the complaint to be presented before the end of that period of 3 months.
2. The Tribunal does have jurisdiction to hear the complaints of disability discrimination under the Equality Act 2010 (the EQA). The Claimant accepts he was not employed by the 1<sup>st</sup> Respondent and that his claim against the 2<sup>nd</sup> Respondent was presented outside the period provided for by section 123 (1) (a) of the EQA. The Tribunal decided that it would nevertheless be just and equitable to extend this period pursuant to section 123 (1) (b) of the EQA.

**REASONS**

The Hearing

1. Oral reasons were given to the parties at the hearing but the Claimant subsequently requested written reasons.

2. This was an open preliminary hearing to consider the Respondent's application that the claims for unfair dismissal and disability discrimination should be struck out for want of jurisdiction on the basis that they were presented outside the statutory time periods.
3. It was intended that the hearing took place via CVP, however the Claimant who is currently based in Turkey, was unable to join through this means and it was therefore agreed by both parties that Zoom should be used as an alternative platform.
4. There was a bundle of documents comprising of 118 pages to which for additional documents, the Claimant's contract of employment, were added.
5. The Claimant provided a witness statement and gave witness evidence.
6. Mr O'Callaghan provided a skeleton argument on the Claimant's behalf.

#### The issues

7. At the outset of the hearing I sought to agree what the issues were between the parties with respective Counsel. It was accepted by the Respondent that the claim against those corporate entities named in the first ACAS early conciliation time for the unfair dismissal claim would have been in time but the Respondent says this is irrelevant as they were not the Claimant's employer. The Respondent says that the claim following the first ACAS early conciliation certificate for disability discrimination was out of time given that they say the last date from which time ran was 21 October 2020 and not the date of dismissal of 30 November 2020.
8. The parties both accept the Claimant's employer the Respondent. It is further accepted that the claims against the Respondent were both out of time, and relatively substantially, given the time delay until 21 April 2021 in commencing the process of ACAS early conciliation and the issuing of the second claim on 10 May 2021. The Claimant says that he was labouring under a reasonable and understandable misunderstanding as to the correct identity of his employer.

#### Findings of fact

##### Claimant's redundancy and Tribunal proceedings

9. The Claimant commenced employment with the Respondent on 18 July 2016 and was made redundant on 30 November 2020. The Respondent says that he was notified of his redundancy on 21 October 2020. The Respondent says that this is the date from which time runs for the purposes of the disability discrimination claim because there was no continuing course of conduct between that date and his dismissal.
10. The Claimant commenced ACAS early conciliation on 27 February 2021 and that process concluded on 10 April 2021. He named as the prospective Respondent

three companies, Arriva Financial Advice, Arriva Life Services UK Limited and Arriva Plc. He gave evidence that he considered all were his employer, but he believed his ultimate employer was Arriva Plc.

11. The Claimant says that prior to starting ACAS conciliation he did not check his contract of employment. He subsequently received advice, Mr Carson, a friend on 21 April 2021 following a conversation between Mr Carson and the ACAS conciliation officer. As a result of that communication Mr Howard realised that his correct employer may well have been the Respondent.
12. He commenced a further process of ACAS early conciliation on 21 April 2021 concluding with a certificate issued on 23 April 2021. He issued a claim form on 10 May 2021. He gave the names of the employing entities at 2.1 as Arriva Financial Advice, Arriva Life Services UK Ltd and Arriva Plc and at 2.5 the Second Respondent as Arriva Employment Services Ltd. He gave his job title as Financial Advisor and his period of employment from 18 July 2016 to 30 November 2020.
13. He set out his claims in s.8.2 as allegations that he had been subject to direct disability discrimination, indirect disability discrimination, discrimination arising from disability and a failure to make reasonable adjustments. The Respondent says that there is a distinction between his unfair dismissal claim and the disability discrimination claim in the applicable time periods.

### Background

14. The Claimant, a financial adviser, predominately worked as a home worker. As a result of his suffering from chronic fatigue syndrome he had been off work for approximately 18 months before his redundancy. For the first six months he was on full pay and then received payment pursuant to the Respondent's permanent health insurance policy.

### Employment contracts

15. The Claimant was presented with a series of employment contracts which were provided electronically save for that dated 18 July 2016 which was given to him as a hard copy. The Claimant kept it on file at home. It provides that his terms and conditions of employment were with Arriva Employment Services Ltd. It has the Arriva corporate logo on the front page.
16. The sequence of employment contracts are largely identical save for increases in salary and changes in dates. The next contract was dated 2 August 2016 followed by 1 April 2017, 13 December 2017, 1 April 2018, 1 January 2019 and finally 1 April 2020. These contracts were all kept on the Respondent's Workday portal and therefore accessible to the Claimant. He says that he had no reason to check his contracts of employment albeit he acknowledges that he had access to the Workday. It is not clear as to whether he retained access subsequent to his redundancy.
17. Mr O'Callaghan referred me to the final paragraph of the contracts which provides

that in these terms and conditions of employment the expression Arriva Group, Group or Group Company means Arriva Plc and all its subsidiaries. The Claimant says that his understanding was that it was always intended that he would be employed by Arriva Financial Advice within Arriva Life Services UK. He says that he was recruited initially by Arriva Employment Services Limited pending the establishment of Arriva Financial Advice. He says that at all material times for regulatory, corporate and client purposes he was employed as a financial advisor for Arriva Financial Advice, Arriva Life Services UK Limited and Arriva Plc.

18. In support of that he referred to his business card which appears at page 89 in the bundle. This has the Arriva corporate logo and then gives the Claimant's name, position as financial advisor and against that Arriva financial advice. There is reference to an Arriva website. The reverse side of the business card refers to Arriva Financial Advice and below that a representative of Arriva Life Services UK which is a UK registered company with a registered office in York.

#### Communications between the parties

19. I was referred to various emails to include that dated 1 October 2020 from a Samantha Milhouse to the Claimant where the business name is given as Arriva Financial Advice. Further, an email dated 5 October 2020 from Ray Burn, Area Manager to the Claimant again in the name of Arriva Financial Advice.
20. The letter dated 2 November 2020 notifying the Claimant of his redundancy and the redundancy terms was on a letter head stating Arriva the corporate brand name with no corporate entity specified.
21. I was referred to an email from Mr Burn of 29 October 2020 which in the email footer refers to Arriva as the trading name for the principal subsidiaries of the Arriva Group in the UK and then lists the principal subsidiaries.
22. I was referred to payslips the Claimant had received in the latter part of his employment. This was a time when he was in receipt of PHI and it is not clear as to whether the payslips would have been in identical format when he was receiving his normal salary. Nevertheless, it is relevant that they do not refer to a specific Arriva Group company but refer to Arriva and at the bottom right he is advised that in the event of payslip enquiries he should contact ASK HR with a telephone number and an ASK HR email address.

#### Corporate structure

23. The Respondent says that the Respondent is the employing company of Arriva Plc and all other Group companies. Therefore the Respondent is the correct Respondent and all claims against Arriva Financial Advice, Arriva Life Services UK Limited and Arriva Plc should be struck out.

#### Relevant dates for the filing of claims

24. The Respondent sets out the relevant time periods in its strike out application. For the unfair dismissal claim the Respondent says the limitation period expired

on 3 March 2021 and the claim was not presented until 10 May 2021. In relation to the disability discrimination claim the Respondent says that the limitation period expired on 2 January 2020 and the claim was presented on 10 May 2021.

### The Claimant's position

25. In his witness statement the Claimant referred to the above matters and there is no need for me to provide further detail on them. Mr O'Callaghan says that the position for the Claimant was extremely confusing. He says that where there is any as to the correct identify of the employer the doubt should always be construed in favour of the employee in accordance with contra proferentem principle when it comes to consideration of jurisdiction. He refers to the confusion generated by generic and unspecific corporate branding to include on the Claimant's pay statements.
26. Mr O'Callaghan says that the discovery of new relevant facts can be a ground for extension of time relying on Machine Tool Industry Research Association v Simpson [1988] ICR 558. He also relies on Cambridge and Peterborough Foundation NHS Trust v Crouchman UK EAT/01/08/09 as authority for ignorance of a fact which is fundamental to a claim as making it impractical for a claimant to present that claim. He accepts that ignorance of the fact in question will only make it not reasonably practicable to present the claim if first the ignorance is reasonable and secondly that the change in believe in light of the new knowledge is also reasonable.

### The Respondent's position

27. The Respondent says that it was not reasonable ignorance. They say that all employment contracts were on Workday and as such accessible. They say that considered objectively the Claimant acted unreasonably in not checking the correct employing entity. They say that the Claimant bears the burden of proof and has failed to satisfy it in relation to the unfair dismissal and disability discrimination claims.

### The Law

28. The relevant law is well known. It is accepted that there are different tests for claims of unfair dismissal under the ERA as opposed to those involving discrimination under the EQA.
29. The test under s.111 ERA has two stages:
- first, was it reasonably practicable to present the claim within the primary time limit?
  - secondly, if yes, was the claim presented in such further period as is reasonable?
30. The test under s.123 of the EQA is more generous in that it enables a tribunal to exercise its discretion where it is "just and equitable" to do so.

### Unfair dismissal

31. The onus of proving that presentation in time was not reasonably practicable rests on the Claimant.
32. The prevailing test is that set out by Brandon LJ in Wall's Meat Co Ltd v Khan [1979] ICR 52, 60-61. This test looks to the objective state of mind of the Claimant: is there some impediment which reasonably prevents, or interferes with, or inhibits, presenting the claim on time? Brandon LJ refers to mental impediments as being the state of mind of the claimant "in the form of ignorance of, or mistaken belief with regard to, essential matter." The ignorance or mistaken belief must itself be reasonable.

#### Extension of time for the discrimination claim

33. The approach taken to the just and equitable test under s.123 EQA is different to the approach to s.111 ERA.
34. It is clear from the case law that an employment Tribunal's discretion to extend time in discrimination cases is wider than the discretion available in unfair dismissal cases.
35. The checklist of factors in s.33 of the Limitation Act 1980 is a useful guide of factors likely to be relevant, but a Tribunal will not make an error of law by failing to consider the matters listed in s.33 provided that no materially relevant consideration is left out of account: Neary v Governing Body of St Albans Girls' School [2010] ICR 473. Section 33 requires the court to take into account all the circumstances of the case, and in particular the factors set out at s.33(3). Those factors which are relevant to the Claim are:
- a. the length of, and reasons for, the delay by the claimant;
  - b. the extent to which the cogency of the evidence is likely to be affected by the delay;
  - c. the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action; and
  - d. the steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking action.
36. The Court of Appeal in Southwark London Borough Council v Afolabi 2003 ICR 800, CA, confirmed that, while the checklist in s.33 provides a useful guide for tribunals, it need not be adhered to slavishly.

#### Conclusions

#### Unfair dismissal

37. I find that the claim for unfair dismissal was presented out of time and that it was

reasonably practicable for it to have been presented in time. I reach this finding for the following reasons.

38. Whilst it is accepted that there was some level of confusion and ambiguity in the Respondent Group companies' corporate documentation regarding the correct legal entity it nevertheless was in my view incumbent on the Claimant to check his employer from his contracts of employment. The Claimant is self-evidently an intelligent man who was in a relatively senior and well remunerated position. He was presented with multiple employment contracts generally on receipt of a salary increase. It is not disputed by the Claimant that he had a hard copy of one version of his contract of employment. He also had access during his employment to his contracts on Workday.
39. If he was uncertain as to which company was his employer it would have been reasonable for him to check that from his employment contracts. He failed to do so. Given that the onus is on the Claimant to show that it was not reasonably practicable to present a claim in time I find that relatively high threshold has not been established. Whilst I accept he may have been labouring under a misapprehension as to his employer I do not find it was not reasonably practicable to ascertain the correct employing entity because the contract of employment must always be the sensible starting point in the event that there is any degree of uncertainty as to who someone is employed by.

#### Disability discrimination

40. There is a more generous discretion available to me in respect of discrimination claims under s.123 of the EQA on the basis that it would be just and equitable to extend time. In this instance I find that it would be.
41. I reach this decision given the ambiguity in some of the documentation, the Claimant's misunderstanding of the position, the prospective merits of the claim and the balance of prejudice between the Claimant and the Respondent. Having considered the factors in s.33 of the Limitation Act I do not consider that the delay is going to cause any issue as far as the cogency of the evidence is concerned. The Claimant acted promptly once his earlier misapprehension had been highlighted to him. A delay of 10 days is not sufficient in itself to preclude my exercise of the discretion nor does it in my view give rise to any real additional prejudice to the Respondent.

#### Overall conclusion

42. Therefore, the claim for unfair dismissal is outside the permitted time period and is not able to proceed given the want of jurisdiction and is therefore dismissed. The Tribunal does, however, have jurisdiction to hear the claim for disability discrimination.

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**Employment Judge Nicolle**

**21 November 2021**

**London Central**

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**Date and Place of Order**

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**Date Sent to the Parties**  
**22 Nov. 21**

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**For Tribunal office**