EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr C Khan	**v**	Arri Rental Services UK Ltd (R1) Mr Martyn Cobb (R2) Ms Chetna Mandalia (R3) Ms Dana Harrison (R4)

PRELIMINARY HEARING

Heard at: Watford **On:** 8 September 2017

Before: Employment Judge Tuck

Appearances
For the Claimant: In person
For the Respondent: Ms A Esmail (Solicitor)

JUDGMENT

1. The claim of direct race discrimination was presented out of time.

2. It is just and equitable to extend the time limit as against the first respondent, Arri Rental Services UK Ltd, but not against the second or third respondents, Mr Cobb and Ms Mandalia.

REASONS

1. By an ET1 presented on 28 February 2017, the claimant brought complaints of constructive unfair dismissal, direct discrimination because of marriage, race, religion or belief and disability, detriment due to making a public interest disclosure, and holiday pay.

2. This claim came before Employment Judge Bedeau for a Preliminary Hearing on 24 May 2017, at which the claimant withdrew his claims of discrimination because of race or religion, marriage, holiday pay and public interest disclosure. The issues were recorded in a case management summary which was sent to the parties on 10 September 2017. Paragraph 8 of that summary set out the claim of direct disability discrimination. This relates entirely to the conduct of a meeting between the claimant on the one hand and Ms Chetna Mandalia and Mr Cobb on the other, which took place on 4 September 2016.

3. The issue for the preliminary hearing listed for today is this: Whether them claimant's complaint of direct disability discrimination was presented out of time and if so whether time should be extended on just and equitable grounds.

4. I heard evidence on oath from the claimant and was presented with a bundle of documents by the respondents (which the claimant had input in the preparation of) consisting of 121 pages. I read such documents as I was referred to.

Facts

5. The claimant sustained fractured ribs in August 2016. On 4 October 2016, he had a return to work interview conducted by Martyn Cobb with Chetna Mandalia present as an HR representative. In the course of that interview, it is recorded that the claimant had been advised not to conduct any heavy lifting for a period of three weeks. The claimant claims that the interview was conducted in a hostile manner and that Ms Mandalia did not believe that his sickness absence was genuine and she requested that he produce original fit notes from his doctor. The claimant claims that this constituted less favourable treatment compared to Mr Will Newman. These claims are denied by the respondents.

6. The claimant raised a grievance about the conduct of the 4 October 2016 meeting on 8 October 2016. He was interviewed about that grievance by Ms Dana Harrison on 18 and 21 October 2016. She wrote an outcome letter dismissing his grievance on 17 November 2016, and setting out a right to appeal. The claimant did not appeal; he told me today in evidence that he "could not be bothered to appeal because I thought I would get nowhere". He confirmed that a subsequent grievance which he did raise, did not concern the events of 4 October 2016. The claimant resigned on 13 November 2016 and on that day contacted ACAS beginning a period of early conciliation. An early conciliation certificate against "Arri Rental" was issued on 22 December 2016.

7. In the course of today's hearing, the claimant told me that he had presented a claim to the tribunal which had been rejected. A short adjournment ensued during which enquiries were made. The claimant at that point produced a rejection of claim letter from the Watford Employment Tribunal dated 22 February 2017. His claim had been rejected because there was no early conciliation number for any named respondents, and the ET1 did not have Arri Rental Ltd - for which there was an early conciliation certificate number - as a respondent. I have been provided with a copy of the claim form from the claimant. It was received by the Watford Employment Tribunal on 4 January 2017. The details of complaint in boxes 8.2 and the details provided in box 9 are identical to the current claim which is before the tribunal.

8. Paragraph 1 of that claim form presented on 4 January 2017 set out the claimant's name and date of birth. Under the heading of address, the

claimant did not give his home address but put the name of "Arri Rental" and the address of the respondent. Under box 2 of respondent's details where he is asked to give the name of the employer of the person or organisation against whom he was claiming, he put the names of Donna Harrison, Martyn Cobb and Cheta Mandalia. The claimant accepts - as is apparent from the documents - that he had not entered into any period of early conciliation in relation to those three named individuals. The claimant did not, in this first claim form, give the mandatory information of including his own address. He received the rejection of claim by email on 22 February 2017. He did not seek to review that decision, rather, the claimant on 23 February 2017, commenced an early conciliation process against all four of the current respondents and received a certificate on the same date.

9. Six days later, on 28 February 2017, the claimant presented the current claim form, no 3300404/17. The respondent was unaware of the earlier claim to the tribunal until it was produced in the course of the evidence being given this morning. On behalf of the first respondent I was today told that they would not be running any "statutory defence" in this matter.

Law

10. Section 123 of the Equality Act 2010 provides that the tribunal has jurisdiction to consider a complaint presented within three months of the act of which the complaint is made. It may consider a claim presented outside of that time period if in all the circumstances it is just and equitable to do so.

11. The Employment Appeal Tribunal in British Coal Corporation v Keeble & Others [1997] IRLR 336 stated that tribunals will be assisted by considering the factors listed in section 33 of the Limitation Act 1980 which deals with the exercise of discretion in civil courts in personal injury cases. This calls for consideration of the following; (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the parties sued have co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action. It is well established that the tribunal may also consider the substantial merits of the case when exercising its discretion. It is essentially a matter of looking at the balance of prejudice between the parties and applying the principles.

12. The Court of Appeal in Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 stated that if a claim has been presented out of time "the burden of persuading the tribunal to exercise its discretion to extend time is on the complainant". In Robertson v Bexley Community Centre [2003] IRLR 434, it was held that there is no presumption that tribunals should exercise their discretion to allow claims to proceed

outside of the primary time limit and it is for a claimant to convince the tribunal that it is just and equitable to extend the time limit.

Conclusions on the issues

13. The ET1 was presented on 28 February 2017. The matters complained of in the ET1 were subject to an ACAS early conciliation period between 13 and 22 December 2016. While the claimant does not list that particular early conciliation certificate number on his ET1, solicitor for the respondents helpfully and frankly drew my attention to this ACAS period and accepted that this nine day early conciliation period extended the time as against the first respondent such that in order to be within the primary limitation period as amended by virtue of section 18A of the Employment Tribunals Act 1996, the claimant would have had to present a complaint on or before 22 January 2017. The claim as against the first respondent is therefore out of time by a period of one month and six days. In relation to the second and third respondents against whom, a complaint of direct disability discrimination is raised, the position is different. There was no ACAS early conciliation period against them as named respondents during the primary limitation period which could serve to extend the time limit. The time limit as against them expired on 3 January 2016. The claim as against them is therefore seven and a half weeks out of time.

14. I am not satisfied that the cogency of the evidence will be impacted in any way by the delay in this claim having been presented. The claimant raised a very prompt grievance about the conduct of the meeting of 4 October 2016 and this was subject on the respondent's case to a grievance procedure and consideration which went on until 17 November 2016. The respondent was notified that the claimant remained dissatisfied about the way in which the meeting of 4 October 2016 was conducted when it was contacted in relation to the December early conciliation period.

15. The claimant was informed that his claim form had been rejected on 22 February 2017. As set out above, no review was sought of that rejection and I make no further comment in relation to it. He did act promptly upon receiving that rejection - the next day he contacted ACAS and received four EC certificates against the current respondents. He then presented his ET1 on 28 February 2017. That short delay he told me in evidence was due to having to get together evidence for an application for fee remission. I have considered the balance of prejudice between the parties if this claim goes ahead to a substantive hearing or if it is disposed of today.

16. The tribunal will be considering the events of 4 October 2016 meeting in any event. This is agreed between the parties because if falls squarely as part of the constructive unfair dismissal claim. This would seem to indicate little prejudice to either party because the issue as to what was said and done in that hearing is going to be before the tribunal. I bear in mind however that whether it is before the tribunal as discrimination because of disability or part of a course of conduct which led to a

breakdown of trust and confidence has an impact on the applicable potential level of damages.

17. The allegation of discrimination on 4 October 2016 is the only one of disability discrimination. In order to determine this it will be necessary to consider whether the claimant is disabled within section 6 of the Equality Act; absent this allegation that enquiry would not be necessary. Having seen the entry on the return to work interview form that the claimant was to restrain from heavy lifting for just three weeks on the face of it it seems that the claimant may well have an uphill struggle ahead of him in seeking to establish that as of October 2016 his condition in relation to his ribs was likely to last for a period of 12 months or that the respondent did know, or ought to have known, that it was going to last for a period of at least 12 months. I say this tentatively however not having heard all the evidence not having seen completed documents and I certainly do not seek to make any finding or give an indication which is in any way binding on any subsequent tribunal in relation to this matter. I also bear in mind that as against that in any event a claim can be pursued for direct disability discrimination not only if an individual is disabled but if they say it is perceived that they are disabled whether or not in fact they are.

18. I consider the balance of prejudice to be finely weighed between the two parties. However, (a) given that the first ET1 which the claimant presented on 4 January 2017 would have been within time if the claimant had put the address of the first respondent in the correct box and given his own address under paragraph 1, (b) the prompt action of the claimant when he was informed of the rejection of his first claim form, and (c) the fact that evidence about 4 October 2016 is going to be heard in any event I find that it is just and equitable to extend the time limit as against the first respondent.

19. Different considerations apply however in relation to the second and third respondents. The claim against them is out of time and the claim form that was submitted on 4 January does not assist the claimant in this respect where no early conciliation period had been entered into as against them.

20. Given that the respondent has today confirmed that it is not running the “statutory defence” I see no prejudice to the claimant if the claims as against the second and third respondents as named individuals for direct disability discrimination are disposed of today. The two individuals would however suffer a prejudice in having to defend, personally, a claim which was presented outside the statutory limitation period. I do not find that it would be just and equitable to extend time as against those two individuals. As there is no claim of direct race discrimination against Ms Chetna Mandalia she will now be removed from the proceedings as an individually named respondent.

21. At the conclusion of the hearing I determined an application in relation to documents in the preparation of the bundle for the final hearing. The reasoning for that determination is retained on the employment tribunal

file but is not a matter that need concern the final hearing. The parties sought no further orders for the final hearing.

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Employment Judge Tuck

Date: 3 November 2017……

Sent to the parties on: .....