EMPLOYMENT TRIBUNALS

Claimant: **Mr J Lancaster**

Respondent: **HAL Maritime Ltd**

Heard at: **Southampton** **On:** **12 July 2019**

Before: **Employment Judge Dawson**

Representation
Claimant: Mr McHugh, counsel
Respondent: Mr Moore, consultant

JUDGMENT having been sent to the parties on 12 August 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction and Issues

1. The case was listed before me for a trial of a preliminary issue as to whether the tribunal had jurisdiction to determine the claimant's claims of unfair dismissal and age discrimination (being direct discrimination on the grounds of age and harassment related to age).

2. The issue is in two parts, firstly it is asserted that the claimant presented his claims outside the relevant time limits within the Employment Rights Act 1996 and the Equality Act 2010. Secondly, it is asserted that the tribunal lacks jurisdiction to hear the claim because the claimant's base of employment was outside Great Britain and this is a case to which the Equality Act 2010 (Work on Ships and Hovercraft) Regulations 2011 apply; in particular, because of the claimant's place of work and the application of those regulations, it is submitted that part 5 of the Equality Act 2010 did not apply to the claimant at the time of the alleged discrimination.

3. The claimant worked as a sea-borne security officer for the respondent.

4. The Grounds of Complaint plead that the claimant was the subject of discrimination during his time on board his "last ship" being the Zuiderdam. They state that matters came to a head on 8 February 2017 when, according to the Grounds of Complaint, the claimant was told that he was too old for the job. It is pleaded that as a consequence that claimant resigned and claims that he was constructively dismissed.

5. In respect of the issue of time, the claimant accepts that he issued his claim out of time but asserts that it was not reasonably practicable to present his claim within 3 months because he had been misled by his employer as to the correct country which had jurisdiction to try his claim (being told by the respondent that it was the USA) and because he could not afford to pay the fees required to present a claim in the employment tribunal in England at the time when he would have needed to present his claim. He relies upon the same points to argue that the tribunal should find that he has presented his complaint within a period that the tribunal thinks just and equitable for the purposes of the Equality Act 2010.

6. In respect of the geographical argument, at this hearing the claimant did not pursue an earlier argument based on contract law (that is to say based on the venue where the contract of employment could be litigated) but instead sought to argue that the principles set down in *Serco v Lawson* [2006] ICR 250 should be applied both to the unfair dismissal claim and to the discrimination claim and if those principles were applied, the English employment tribunal has jurisdiction.

7. The respondent opposed those arguments and, in addition, argued that the provisions of the Equality Act 2010 (Work on Ships and Hovercraft) Regulations 2011 mean that the tribunal does not have jurisdiction in relation to the claims under the Equality Act 2010.

8. I heard from Mr Lancaster and read a statement from Mr Howell on the behalf of the respondent but he did not attend for cross examination and I have not given his witness statement any weight.

Findings of Fact

9. In setting out these findings of fact, I record that much evidence which might have been expected to have been given in this case has not been. That was exemplified by the fact that counsel for the claimant was forced to try and introduce new evidence in his closing submissions as to whether the claimant flew from the UK to the point where he boarded his ships, both in respect of his time on the Zuiderdam and before then. The respondent properly objected to such evidence being introduced at that point (and even then only by being asserted by counsel for the claimant) but there is something of a vacuum of evidence as I highlight below.

10. The claimant began working for the respondent on various cruise ships in the ownership of the Holland America Cruise Lines organisation from January 2010. However the way his employment worked was that he was assigned to a ship for a four-month period and then returned to shore for

around 2 months during which time he would be offered an assignment on another ship for 4 months which he could accept or reject. Obviously, it was in his interest not to reject assignments since it was possible that they may not be offered again, but he was under no obligation to accept assignments. I was presented with no evidence that the respondent was obliged to offer assignments and find that it was not so obliged. The claimant received no payment between assignments but whilst on ship was paid a daily rate.

11. The claimant's contract in respect of his assignments on ship contains a statement that "Any disputes… shall be governed exclusively by the laws specified in the applicable Collective Bargaining agreement or government mandated contract. In the absence of any such Agreement or specification, such dispute shall be governed in all respects by the laws of the British Virgin Islands. You hereby agree… that any disputes shall be arbitrated, if at all, exclusively according to the terms are specified in any applicable Collective Bargaining Agreement or government mandated contract. In the absence of any such Agreement, terms or contract, all such disputes no matter how described, pleaded or styled, shall be resolved by binding arbitration pursuant to the United Nation's Convention… exclusively in your country of citizenship."

12. I do not know where the claimant lived between assignments or where he travelled to and from in order to board the ships on which he was serving.

13. In paragraph 30 of the respondent's skeleton argument, an argument is made that although the claimant "makes reference to odd occasions in the past when his ship was in Dover. That was… under previous contracts. Employment arrangements with the respondent are by way of discrete assignments. Employment obligations only applied during assignments". It is stated that what might or might not have happened under previous assignments is an irrelevance.

14. That argument appears to contradict paragraph 2 of the Grounds of Response which states that the claimant had "worked for the respondent from 17 January 2010 until he resigned, effective 15th February 2017".That paragraph goes on "during that time he worked on various vessels in the Holland America fleet…"

15. No application was made to amend the Grounds of Resistance and I take those as setting out the respondent's case.

16. The claimant received payment equating to an average of £5000 gross per month. He paid no tax in respect of that money.

17. The ships on which the claimant worked were all registered with a Netherlands flag and the respondent is a company incorporated and headquartered in the British Virgin Islands.

18. The claimant worked on the Zuiderdam from 21 December 2016 to 19 April 2017. He joined and left it in Fort Lauderdale. It cruised the Caribbean.

19. I was given little information as to the earlier vessels on which the claimant had served. His statement states "between 2010 and 2016 at least 2 of my contracts were working in the UK itself and within EU maritime waters and … my ship MV Ryndam was based in Dover. On one occasion I joined the ship in Dover and another in Amsterdam. On both occasions I left the ship in Dover. During this period I was also the subject of, and can evidence, harassment and age discrimination all of which finally led to my resignation."

20. I note, again, that the only claim before the tribunal is in respect of discrimination on the Zuiderdam.

21. Doing the best I can, noting that assignments were of around 4 months, it is apparent that the two contracts working in the UK or within EU maritime waters would be a significant minority of the period spent at sea between 2010 and 2016. In essence taking account of the pattern of 4 months on and 2 months off, if the contracts took place next to each other, less than 1 of the 6 years would have been spent working in UK or EU waters.

22. The claimant gave 7 days' notice of resignation on 9 February 2017 and went ashore on either the 14th or 15th of February 2017 at Fort Lauderdale. His evidence was that he had written to Mr Howell (an HR manager for the respondent) on 8 March 2017 requesting an appeal hearing and on 10 April 2017 requesting a copy of his contract. Neither of those documents was within the bundle and in cross examination Mr Lancaster's explanation was unsatisfactory in that respect. He stated that he had given the documents to his solicitor but they had not placed them in the bundle. However, on 11 November 2018 the respondent had specifically asked the claimant's solicitor for his list of documents, to be given the reply that there were no other documents apart from those which had been disclosed by the respondent.

23. The claimant's case that he was actively misled by the respondent as to the country with jurisdiction to determine his claim is difficult to understand. At paragraph 24 of his statement he stated that he telephoned the respondent's human resource department in Seattle but "Drew Howell refused my calls and I got no response from the company". However, in the subsequent paragraph he states "during these calls I asked which law governed employment disputes. I was informed again that employment disputes were governed by US law." Those 2 contentions contradict each other.

24. Moreover the date of those calls is placed in mid-to-late April 2017. However, page 9 of the claimant's witness statement makes clear that he was contacting US lawyers as early as 16 March 2017, which would suggest that he had made a decision by then as to which country he wished to pursue the respondent in.

25. The respondent's representative asked the claimant about paragraph 30 of his statement that "I also believe that the Respondents willfully withheld a copy of my contract and gave me false information to circumvent any legal recourse to which I might have been entitled in the UK". It was put to him that he had no basis for that statement. In reply the claimant stated

that when he had been a security officer for the respondent he would deal with dismissed crew. He stated that he would "phone up" human resources and they would say to him that if a crew member was from Indonesia then he should tell them that jurisdiction in the United States and "if they make a fuss we will take away their sponsorship"; he apparently regarded what he was being told to say as inaccurate. If that evidence is accurate it is difficult to see why he would be seeking any advice from the respondent as to where he should bring his claim.

26. There is also, in the bundle, a text message sent to another security officer on 3 May 2017 by the claimant. That states "I want to contest it [his resignation] as it's contrary to the HAL age policy so I need to know what legal jurisdiction our Sea Contracts are written under. Is it US law?" If the claimant's evidence as to what he had been told by the respondent's human resources department was true then it is difficult to see why he would be seeking information from a fellow security officer of that nature.

27. The only written request from the claimant to the respondent as to the legal jurisdiction is dated 20 April 2017 and on everyone's evidence, that request went unanswered.

28. I reject the claimant's evidence that he was misled by the respondent as to the correct country for jurisdiction in respect of his employment tribunal claim.

29. In respect of the claimant's assertion that he was unable to afford the fees for the employment tribunal when he considered bringing a claim in the employment tribunal I make the following findings.

30. Paragraph 22 of the claimant's witness statement states that on 16 March 2017 he investigated making an application to the UK employment tribunal. Leaving aside any potential contradiction between that evidence and his other evidence as to having being reassured by the respondent as to the correct forum in which to bring his claim, he states that he found the costs of an application were prohibitive.

31. The claimant has not brought any bank statements to show what his financial position was in March 2017 and whilst I accept that he had lost his job, he had, up to that time, been paid £5000 per month with no deductions for tax. Moreover, the letter in which the claimant asked for confirmation as to the correct jurisdiction (20th of April 2017) is signed off "enjoying retirement. Skiing in California. LOL."

32. On 16 March 2017 the claimant had written to the respondent stating that he would like to visit Mr Howell and stated "perhaps you could let me know and I will fly to Seattle."

33. When the claimant was asked about the reference to flying to Seattle and skiing in California (in the context of his impecuniousity) he stated that he was not in the UK at that time but in San Francisco with his girlfriend and he could afford the flight because he was not paying any rent or expenses. I asked him about how long that period lasted and he stated from February when he had left the ship to the end of April.

34. The claimant also sent an email on 8 October 2017 to an American lawyer stating "… I have to ask for any ongoing fee to be accepted on a contingency basis… Although of course I could pay for expenses, filing fees and incidentals in the interim."

35. Asked about that the claimant stated "yes so there you go. I would have been able to pay a filing fee, my daughter and son were backing me financially." When I asked him about the period when his son and daughter were backing him financially, he said it was from the end of April 2017 onwards.

36. Thus it appears that there was not a period when the claimant was particularly impecunious, until April 2017 he lived with his girlfriend and had no rent or expenses, he could fly to Seattle and ski; from April 2017 he was supported by his children and could offer to pay expenses, filing fees and incidentals in the US legal system. I am not persuaded that the claimant could not afford to pay the employment tribunal fees.

37. The claimant's statement states

> **"30th November 2017** – Carrie Copping Carter wrote to me stating that my claim under para 9 is contractually subject to the laws of the British Virgin Islands, and must be arbitrated in the UK (country of citizenship) because the UK is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
>
> **…**
>
> **28th December 2017** – I looked up UK Employment Law and found that all claims for a UK Employment Tribunal have to be submitted within 3 months. However I noted that I might be able to apply for a late submission (see above) and contacted Adrian Barnes of Premier Legal LLP at the earliest opportunity on 2nd January 2018".

38. That evidence was not challenged and I accept it.

39. The effective date of termination in this case was 15 February 2017, the claimant notified ACAS of his claim on 14 February 2018 the date of the certificate from ACAS is 1 March 2018 and proceedings were issued on 29 March 2018.

The law on Time Limits in respect of Presentation of Claims

40. Paragraph 5 of the Case Management Order of the President (Number 2) – "In the matter of claims and applications brought to the Employment Tribunal in England and Wales in reliance upon the decision of the Supreme Court in R (on the application of Unison) v Lord Chancellor" (18 August 2017) provides "All other claims or applications brought to the Employment Tribunal in England and Wales in reliance upon the decision of the Supreme Court in *R (on the application of Unison) v Lord Chancellor [2017] UKSC 51* (26 July 2017) shall proceed to be considered judicially in accordance with the appropriate legal and procedural principles in the usual way".

41. In respect of a claim for unfair dismissal, section 111 provides

> (2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—
>
> > (a) before the end of the period of three months beginning with the effective date of termination, or
> >
> > (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

42. The leading authority is the decision of the Court of Appeal in *Palmer and Saunders v Southend-on-Sea Borough Council [1984] 1 All ER 945*, *[1984] IRLR 119*, *[1984] ICR 372, CA*. In that case, May LJ stated

> "[W]e think that one can say that to construe the words “reasonably practicable” as the equivalent of “reasonable” is to take a view that is too favourable to the employee. On the other hand, “reasonably practicable” means more than merely what is reasonably capable physically of being done—different, for instance, from its construction in the context of the legislation relating to factories: compare *Marshall v Gotham Co Ltd [1954] AC 360, HL*. In the context in which the words are used in the 1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word “practicable” as the equivalent of “feasible” as Sir John Brightman did in [*Singh v Post Office [1973] ICR 437, NIRC*] and to ask colloquially and untrammelled by too much legal logic—“was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?”—is the best approach to the correct application of the relevant subsection."

43. In respect of the Equality Act 2010 section 123 provides

> (1) [Subject to [sections 140A and 140B],] 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

44. In *Abertawe Bro Morang University Local Health Board v Morgan UKEAT/0305/13 (18 February 2014, unreported)*, the EAT stated “Though there is no principle of law which dictates how sparingly or generously the power to enlarge time is to be exercised (see *Chief Constable of Lincolnshire Police v Caston* [2009] EWCA Civ 1298 at para 25, [2010] IRLR 327, per Sedley LJ) a tribunal cannot hear a complaint unless the

applicant convinces it that it is just and equitable to do so, and the exercise of discretion is therefore the exception rather than the rule (per Auld LJ in *Robertson v Bexley Community Centre* [2003] EWCA Civ 576, [2003] IRLR 434 (CA)). A litigant can hardly hope to satisfy this burden unless he provides an answer to two questions, as part of the entirety of the circumstances which the tribunal must consider. The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is reason why after the expiry of the primary time limit the claim was not brought sooner than it was." (para 52).

Conclusions in Respect of Time

45. I have found that the claimant was not misled by the respondent as to the jurisdiction in which the claim should be bought nor was he unable to afford the fees. No other explanation for failing to submit the claim in time has been provided. It follows that I must conclude that there is no satisfactory evidence before me as to either why was not reasonably practicable for the claimant in 3 months or as to why the primary time limit in respect of the discrimination claims of 3 months was not met.

46. Moreover, it is clear that by 20 December 2017, the latest, the claimant was aware that if he was to present a claim in the English employment tribunal he needed to do so within the relevant 3-month time limit. However, despite being aware of that and taking legal advice on 2 January 2018, the claimant did not contact ACAS until 14 February 2018 and proceedings were not issued until 29 March 2018. Thus, even if I had considered there was an acceptable reason for being unable to present a claim until 20 December 2017, the delay thereafter in presenting proceedings, until 29 March 2018, is such that it could not be said the unfair dismissal claim was presented within a reasonable period after the primary 3 month time limit had expired. Likewise, there was no good reason for failing to present a discrimination claim between 20th of December 2017 and 29th of March 2018.

47. Although it has not been suggested by the respondent that it will be prejudiced by any delay, Parliament has laid down a deliberately a short time periods for both unfair dismissal and discrimination cases. In these circumstances, where the claimant has failed to advance any acceptable reason for the delay and where the length of delay is considerable, I do not consider just and equitable to extend the time for presentation of the claim form.

48. Thus in respect of the claim of unfair dismissal, I find the tribunal lacks jurisdiction to consider the same because it was not presented before the end of the period of 3 months beginning with the effective date of termination and I am satisfied that it was reasonably practicable for the complaint to be presented before the end of that period.

49. In respect of the claim of discrimination, I find the tribunal lacks jurisdiction to consider the same because it was not presented within 3 months of the acts complained of and I do not consider it just and equitable to extend that period.

50. In those circumstances both claims must be dismissed on the grounds that the tribunal lacks jurisdiction to deal with them.

Conclusions on Geographical Jurisdiction

51. Strictly speaking it is not necessary for me to deal with this point and I will do so only briefly.

52. I accept the respondent's submission, set out in its skeleton argument that "EqA §81 provides that Part 5 Work applies in relation to work on ships 'only in such circumstances as are prescribed'."

53. The prescribed circumstances are those set down in Equality Act 2010 (Work on Ships and Hovercraft) Regulations 2011 regulations 3 and 4 namely

> **3 Application of Part 5 of the Act to seafarers working wholly or partly in Great Britain and adjacent waters**
>
> (1) Part 5 of the Act applies to a seafarer who works wholly or partly within Great Britain (including United Kingdom waters adjacent to Great Britain) if the seafarer is on—
>
> (a) a United Kingdom ship and the ship's entry in the register maintained under section 8 of the Merchant Shipping Act 1995 specifies a port in Great Britain as the ship's port of choice, or
>
> (b) a hovercraft registered in the United Kingdom and operated by a person whose principal place of business, or ordinary residence, is in Great Britain.
>
> (2) Part 5 of the Act, except in relation to the protected characteristic of marriage and civil partnership, also applies to a seafarer who works wholly or partly within Great Britain (including United Kingdom waters adjacent to Great Britain) and who is on—
>
> (a) a ship registered in or entitled to fly the flag of an EEA State other than the United Kingdom, or
>
> (b) a hovercraft registered in an EEA State other than the United Kingdom,
>
> if paragraph (3) applies.
>
> (3) This paragraph applies if—
>
> (a) the ship or hovercraft is in United Kingdom waters adjacent to Great Britain,

(b) the seafarer is a British citizen, or a national of an EEA State other than the United Kingdom or of a designated state, and

(c) the legal relationship of the seafarer's employment is located within Great Britain or retains a sufficiently close link with Great Britain.

4 Application of Part 5 of the Act to seafarers working wholly outside Great Britain and adjacent waters

(1) Part 5 of the Act applies to a seafarer who works wholly outside Great Britain and United Kingdom waters adjacent to Great Britain if the seafarer is on—

(a) a United Kingdom ship and the ship's entry in the register maintained under section 8 of the Merchant Shipping Act 1995 specifies a port in Great Britain as the ship's port of choice, or

(b) a hovercraft registered in the United Kingdom and operated by a person whose principal place of business, or ordinary residence, is in Great Britain,

and paragraph (2) applies.

(2) This paragraph applies if—

(a) the seafarer is a British citizen, or a national of an EEA State *other than the United Kingdom* or of a designated state, and

(b) the legal relationship of the seafarer's employment is located within Great Britain or retains a sufficiently close link with Great Britain.

54. Regulation 3(1) is not applicable in this case because the claimant was not working wholly or partly on a United Kingdom ship.

55. Regulation 3(2) is potentially applicable since it is arguable the claimant did work partly within Great Britain and the ship he was on was entitled to fly the flag of an EEA state (being Holland). However, for subparagraph 2 to apply, subparagraph 3 must also apply which requires that “the ship or Hovercraft is in United Kingdom waters adjacent to Great Britain…” In my judgment that means that the ship is in waters adjacent to Great Britain at the time of the act of discrimination complained about. That was not the case here.

56. It was not suggested by the claimant that regulation 4 applies, but even if it had been suggested, again, the ship which the claimant was on was not a United Kingdom ship.

57. Thus, I accept the respondent's argument in this respect and I do not consider that the claimant can take advantage of the provisions of the Equality Act 2010 in respect of the act pleaded.

58. The correct law in respect of a claim of unfair dismissal is helpfully summarised in the case of *British Council v Jeffrey* (16th of October 2018) and in particular paragraph 2 thereof.

59. In paragraph 41 of *Jeffrey* the Court of Appeal stated "in my view the correct starting point must be Lord Hope's judgment in *Ravat*, and in particular paragraph 29… since it contains an explicit and authoritative statement of the correct characterisation of the relevant issues."

60. In paragraph 29 of *Ravat v Halliburton Manufacturing & Services* ***Ltd*** [2012] UKSC 1 the Supreme Court stated "the question of fact is whether the connection between the circumstances of the employment and Great Britain and with British employment law was sufficiently strong to enable it to be said that it would be appropriate for the employee to have a claim for unfair dismissal in Great Britain."

61. In support of his argument that the claimant's circumstances were sufficiently strong to enable it to be said that it would be appropriate for the claimant to have a claim for unfair dismissal in Great Britain, counsel for the claimant relied upon the following factors

    - the claimant received all letters of assignment from Seattle,
    - the claimant lives in Essex and the tribunal should assume that he flies from the south east to his assignments
    - the act of discrimination was a continuing act because there had been age discrimination on other ships
    - the letters of assignment were sent to the UK
    - the claimant did not see the terms and conditions which appear at p36 of the bundle
    - the claimant is a British citizen
    - the claimant travelled from Essex to Venice to board one of his ships
    - the claimant was paid in US dollars, his pension is US dollars and the claimant pays the sums into a UK bank and converts them to pounds.
    - the claimant was not an expatriate employee.

62. I regret that I do not consider any of those matters help the claimant sufficiently for me to find that the circumstances were sufficiently strong to enable him to bring a claim in Great Britain:

a. I do not understand how it can be said that the fact that letters were sent from Seattle would suggest a connection with Great Britain.

b. I am not willing to assume that the claimant travelled from either Essex or more broadly, the UK to start his service on ships given that there was no evidence to that effect and, further, given my concerns as to his credibility as set out above.

c. Whilst the claimant may (although it was not pleaded) have experienced discrimination on other ships, in terms of time spent, in less than one out of 6 years of his employment was the claimant in UK territorial waters.

d. I do not know where claimant was when he received his letters of assignment and although I anticipate the claimant may not have seen the contract at page 36 of the bundle of documents, it is clear that he was able to obtain a copy from the Internet when he wanted to do so.

e. I accept that the claimant is a British citizen but the case law makes clear that that, alone, is not sufficient.

f. I am not willing to accept, on the basis of the claimant's counsel's assertion, that the claimant travelled from Essex to Venice on the occasions when he was working in Europe. I did not hear any evidence of the claimant working in Europe, apart from that referred to around Dover

g. The fact that the claimant was paid in dollars seems to me to militate against an argument that there is any substantial connection with Great Britain and it was the claimant's choice to then pay the money into UK bank account and converted into sterling.

h. Whilst I accept the claimant might not be considered an expatriate (although I note he paid no tax in the United Kingdom) that, in my judgment, is not sufficient to satisfy the test in *Ravat*.

63. In those circumstances I would have concluded that, in any event, the tribunal lacked geographical jurisdiction to determine the claimant's claim of unfair dismissal.

Application for Costs

64. After I had delivered my judgment orally Mr Moore made an application for costs on behalf of the respondent. He makes the application under Rule 76 of the Employment Tribunals Constitution and Rules of Procedure Regulations 2013 on both the basis that the claimant has behaved unreasonably (and in that respect he refers to what he says is the robustness of my findings against the claimant) and on the basis that the claim had no reasonable prospect of success at the time it was presented.

Legal Principles

65. The Employment Tribunal Rules of Procedure provide as follows in respect of costs.

> **When a costs order or a preparation time order may or shall be made**
>
> **76.**—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
>
> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
>
> (b) any claim or response had no reasonable prospect of success.

66. It was held in *Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255*, *[2012] IRLR 78 that "*The ET's power to order costs is more sparingly exercised and is more circumscribed by the ET's rules than that of the ordinary courts. There the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the ET costs orders are the exception rather than the rule. In most cases the ET does not make any order for costs."

67. Harvey on Industrial Relations summarises the position in relation to the general approach to costs as follows: "there is an initial two-stage process involved in making a costs order: (a) there must be a finding that the statutory threshold under r 76(1)(a) or (b) has been met, and (b) if it has, the tribunal must then consider whether it is appropriate to make an order in all the circumstances, ie in the exercise of its discretion (see *Ayoola v St Christopher's Fellowship UKEAT/0508/13 (6 June 2014, unreported) at paras 17–18*; *Robinson v Hall Gregory Recruitment Ltd [2014] IRLR 761, EAT, at para 15*). It is only when these two stages have been completed that the tribunal may proceed to the third stage, which is to consider the amount of the award payable under SI 2013/1237 Sch 1 r 78 (see *Haydar v Pennine Acute NHS Trust UKEAT/0141/17 (12 December 2017, unreported)*, at para 25). What is not permissible is for the tribunal to proceed from the first stage to the third without considering the second; that is, it must not assume that, because there are grounds for making an award, a costs order must therefore be made".

68. In *Daleside Nursing Home Ltd v Mathew UKEAT/0519/08*, Wilkie J stated that 'in a case such as this, where there is such a clear-cut finding that the central allegation of racial abuse was a lie, it is perverse for the tribunal to fail to conclude that the making of such a false allegation at the heart of the claim does not constitute a person acting unreasonably' (para 20).

69. In *Arrowsmith v Nottingham Trent University*, *[2012] ICR 159, at para 33*, Rimer LJ, endorsed the statement of Cox J in *HCA International Ltd v May-Bheemul UKEAT/0477/10* that neither *Daleside* nor any other case established a point of principle of general application that lying, even in respect of a central allegation in the case, must inevitably result in an award of costs, and that 'it will always be necessary for the tribunal to

examine the context, and to look at the nature, gravity and effect of the lie in determining the unreasonableness of the alleged conduct'

70. In *Nicholson Highlandwear Ltd v Nicolson* [2010] IRLR 859, Lady Smith noted "the rejection of a witness' evidence does not of itself imply a finding that a witness has lied. Evidence may be rejected as unreliable or lacking in credibility for various reasons and in the case of only one such possible reason would the conclusion be that the witness lied on oath ie committed perjury. The rejection of evidence does not, of itself, infer dishonesty on the part of the witness".

71. Sir Hugh Griffiths stated in *E T Marler v Robertson [1974] ICR 72, NIRC*: 'Ordinary experience of life frequently teaches us that which is plain for all to see once the dust of battle has subsided was far from clear to the combatants once they took up arms'

72. in respect of an application for costs on the basis that a claim had no reasonable prospect of success, Harvey comments as follows: "When considering whether to award costs in respect of a party's conduct in bringing or pursuing a case that is subsequently held to have lacked merit, the type of conduct that will be considered unreasonable by a tribunal will obviously depend on the facts of the individual case, and there can be no hard-and-fast principle applicable to every situation".

Decision on Costs

73. In terms of the application based on unreasonable behaviour, the application is put, as I have said, on the basis of the robustness of my findings of fact against the claimant.

74. My reasons do set out that I found the claimant to be an unsatisfactory witness, but I have fallen short of making a finding that he was dishonest. In my view the position was more that the claimant could not really remember, in a satisfactory manner, precisely what had gone on, rather than he had set out deliberately to mislead the tribunal. In those circumstances, while I rejected his evidence as not being true, in the sense that it did not conform to reality, I did not go as far as to find his evidence was dishonest.

75. Applying the two-stage test set out above I do not consider that the threshold for unreasonable conduct has been met.

76. In respect of whether the case had no reasonable prospect of success, given the complexities of the question of geographical jurisdiction, and the fact there is an email in the bundle from an American solicitor to Mr Lancaster stating that he would need to obtain legal counsel in the United Kingdom to address his claim here, as that is where his employment contract says any disputes must be addressed, I am not satisfied that the claim had no reasonable prospect of success in respect of geographical jurisdiction. I am also very far from satisfied that any lack of prospects in this respect would, or should, have been obvious to the claimant.

77. That leaves the question of whether the claim had no reasonable prospect of success because the claims were out of time.

78. In relation to a claim of discrimination, the tribunal does have the power to extend time on the basis that it is just and equitable to do so. It is not generally considered unreasonable for a claimant who has presented his claim out of time to come before the tribunal and ask it to exercise its discretion. That is what Mr Lancaster has done here and although I have refused to do so I am not persuaded that there was no reasonable prospect that any tribunal would have extended time. Again, therefore, I do not find that the threshold has been reached in this respect.

79. Whilst the claim in respect of unfair dismissal was weaker because of the stricter time limit, even if that claim had no reasonable prospect of success, it did not add materially to the length of the hearing today and did not increase the costs of it, or the proceedings generally and, therefore, I do not consider it appropriate to order the claimant to pay costs in this respect.

80. I decline, therefore, to order Mr Lancaster to pay the costs or any part of the respondent's costs of this claim.

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Employment Judge Dawson

Date: 28th August 2019