EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Mandicourt	**v**	**Snacks International Development UK Limited**

Heard at: Watford **On:** 19 November 2019

Before: Employment Judge McNeill QC

Appearances:

For the Claimant: In person
For the Respondent: Mr J Green Counsel

JUDGMENT having been sent to the parties on 19 November 2019 and reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This case was listed for an open preliminary hearing. The issues to be determined were whether the Claimant's claims to the Tribunal were presented in time and, if not, whether time should be extended so that the claims, or any of them, could proceed.

2. The Claimant's claims were for (1) unfair (constructive) dismissal; (2) discrimination because of sexual orientation; and (3) victimisation. Although the word "blacklisting" was used in the claim form, the Claimant helpfully clarified at the start of the hearing that there was no trade union element to his claim and no separate "blacklisting" claim within the meaning of the legislation. He used the word "blacklisting" only to provide some of the context for his discrimination claims.

3. The Claimant did not have the requisite two years' qualifying service to bring a claim for unfair dismissal (which includes constructive unfair dismissal) and did not contend that his claim for unfair dismissal fell into one of the exceptional categories to which the two-year qualifying period does not apply. Although there was no jurisdictional issue relating to the Claimant's length of service in the notice of preliminary hearing, the Claimant did not seek to advance any basis on which this claim could succeed, given his length of service.

Relevant Facts

4. The Claimant was employed by the Respondent from 30 October 2017 to 15 April 2018. He was employed as a Group Controller and was paid just over £72,000 per year. The termination of his employment was by a letter of resignation which he signed on 11 January 2018, in circumstances which he alleged constituted constructive dismissal.

5. On the same day, the Claimant made his first data subject access request (SAR) to the Respondent. On 24 January 2018, the Respondent responded to that request and provided some data.

6. In January 2018, the Claimant sought advice from employment law solicitors but was not successful in finding a solicitor who could give him the advice that he sought. The Claimant was already by that time aware of the three-month limitation period for bringing unfair dismissal and discrimination claims because he had spoken to ACAS about claims, or potential claims, against a previous employer in about August 2017.

7. On 2 February 2018, the Claimant sent a cheque to the Respondent with a further SAR, following which, on 12 February 2018, disclosure from the Respondent was made. I was told that that disclosure did not include a list of exemptions.

8. On 7 September 2018, nearly seven months after the disclosure had been made, the Claimant wrote to the Respondent complaining that the SAR had not been adequately complied with.

9. The Claimant raised his concerns with the Information Commissioner's Office (ICO). The ICO responded on 7 November 2018. The response stated that, on the basis of all the information provided by the Claimant and the Respondent, the ICO was of the view that the Respondent had complied with its data protection obligations. Although the wording in the Respondent's original response was somewhat unclear, the Respondent did not mean that they withheld personal information on the basis of confidentiality.

10. It was stated in the letter that the Respondent had since run a second search for personal information relating to the Claimant. The ICO said as follows:

> "from the information we have received, it does not appear that any personal information was withheld from you. The ICO is therefore satisfied that [the Respondent] responded to the SAR in full"

11. The Claimant instructed two solicitors to pursue matters further in December 2018. He told the Tribunal that the SARs made have not actually yielded up any documents that assist his case. He continues to suspect or believe that full disclosure has not been given and feels that his requests have not been properly dealt with. He made a further SAR in November 2019, shortly before the Tribunal hearing.

12. The Claimant presented his claim to the Tribunal on 10 February 2019. The

last act of discrimination or victimisation relied on occurred in January 2018. The primary limitation period for the Claimant to bring claims for direct discrimination and victimisation expired in mid-July 2018. His claims were therefore brought nearly seven months after the expiry of the primary limitation period.

Analysis

13. The Claimant did not prepare a witness statement on his own behalf for this preliminary hearing in accordance with directions from the Tribunal. The only witness statement before the Tribunal was from the Claimant's partner or former partner, Mr Tracas. The Tribunal nevertheless permitted the Claimant to give oral evidence and he was cross-examined. Mr Tracas did not attend to give evidence.

14. While there appeared to be no arguable claim for unfair dismissal, given the Claimant's lack of qualifying service, the Claimant's claims for direct discrimination and victimisation were serious claims in which the only jurisdictional issues related to time limits. The Claimant relied on his dismissal as an act of discrimination or victimisation. Such claim was subject to the same time limit arguments as the other discrimination and victimisation claims.

15. The claims were not brought within the primary three month time limits set out in the Equality Act 2010 (EqA) and the Employment Rights Act 1996 (ERA) as the Claimant very properly and fairly accepted.

16. I considered the discrimination claims first. Where a claim is not brought within the primary 3 months limitation period set out in s123(1)(a) of the EqA, it may be brought in "such other period as the employment tribunal thinks just and equitable": s123(1)(b).

17. I was referred by the Respondent to **Robertson v Bexley Community Centre** [2003] IRLR 434, where the Court of Appeal referred to the Tribunal's broad discretion in determining whether time should be extended but stated that the exercise of discretion to extend time is the exception rather than the rule. It is for a claimant to convince the Tribunal that it is just and equitable to extend time.

18. In **British Coal Corporation v Keeble** [1997] IRLR 336, the Employment Appeal Tribunal gave guidance that Tribunals, in considering whether to extend time in discrimination cases, should consider the prejudice which each party would suffer as a result of the decision to be made and have regard to all the circumstances of the case in particular:

    (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 party sued had cooperated with any requests for information;
    (d) The promptness which [the claimant] acted once he or she knew of the facts giving rise to the cause of action;
    (e) The steps taken by [the claimant] to obtain appropriate professional

advice once he or she knew of the possibility of taking action.

19. In terms of prejudice, if time were not extended, the Claimant would lose the benefit of a reasonable and potentially meritorious claim. If time were extended, the Respondent would lose the benefit of the limitation defence provided by statute and might face prejudice in defending the claim for evidential reasons.

20. The Claimant was clear in his submissions that the primary reason for his asking the Tribunal to extend time related to his SAR. He wanted, he said, to present a solid case to the Tribunal and in order to do so, he wanted to obtain relevant documentation from the Respondent by means of his SAR. He thought it was important first to pursue documentation which he thought would assist in his claim and believed, although this was not a belief based on any legal advice, that he should pursue matters before the ICO, before bringing a claim to the Tribunal.

21. The Claimant also relied, as secondary matters, on (1) a lack of financial resources at the relevant time which would enable him to instruct a solicitor and put his case together and (2) his partner's undoubted poor state of health at the time (medical records were provided in support of this contention).

22. In looking at all the circumstances of the case, I took into account that the delay was a long delay of nearly seven months: just over twice the primary limitation period.

23. I accepted the Claimant's evidence that the primary reason for the delay was that he wished to obtain evidence that he believed would enable him to bring a more solid case, based on documentation. However, he did not commence proceedings even after November 2018 when the ICO stated that the Respondent had complied with his request or when he had solicitors acting for him, by December 2018 at the latest.

24. Making a SAR did not prevent the Claimant from bringing a claim. The short time limits in the EqA are there to be complied with and the Claimant had been aware of them since about August 2017. Even if the Claimant felt he could not afford legal advice, the Claimant could access online information, which could be found, for example, on the Employment Tribunals and ACAS websites.

25. In terms of the Claimant's partner's health, I did not doubt that his partner had serious illnesses which would be extremely distressing also for the Claimant but I did not consider that this could explain the delay. The Claimant was working from April to September 2018 for Lucozade Ribena Santori and could have brought a claim at any time over that period.

26. Further, I did not accept that financial constraints (on which the Claimant places little weight) prevented the Claimant from commencing his claim. Proceedings could have been commenced at no cost to the Claimant.

27. In terms of cogency of evidence in this case, part of the Claimant's claim, which relates to his request to an investigation which the Respondent then

treated as a grievance, is likely to be well-documented. However, there are also allegations in relation to homophobic abuse which will depend primarily on oral evidence. The Claimant gave one particular example. Where allegations depend on oral evidence, the passage of time inevitably has an impact on people's memories and I accepted the Respondent's submission that the cogency of evidence in relation to those matters was likely to be affected by the passage of time.

28. In relation more broadly to the Respondent's alleged failure to provide information, on the basis of the documents to which I was taken by the parties during the hearing, I noted that there was a period of seven months between the Respondent's provision of information in February 2018 and the claimant's complaint or concern raised on 7 September that the respondent had not properly complied with his SAR. I took into account that the ICO formed the opinion and told the Claimant that the Respondent did comply with its obligations.

29. The Claimant delayed in obtaining professional advice in relation to his employment-related claims after his initial attempts, in around January 2018. However, he did not need professional advice in order to know about the limitation periods because he knew about those from his previous claims and indeed could have obtained advice from ACAS or indeed other free sources of advice over that period. The Claimant was in no different a position from the many individuals who bring claims to the Tribunal without legal representation.

30. If the Claimant believed that raising a SAR or raising a concern with the ICO might lead to an extension of the time for bringing a claim, he could have contacted a solicitor or ACAS or indeed any other source of advice to confirm whether his belief was correct and it would have been reasonable to do so.

31. In considering whether to exercise my discretion to extend time, I took into account that if I did not extend time, the Claimant would not be able to pursue complaints which might have real merit. On the other hand, extension of time is the exception not the rule: if I allowed this claim to proceed, the Respondent would loses the benefit of the limitation defence and might find it difficult to defend parts of the claim on which oral evidence was relevant.

Conclusion

32. In conclusion, I concluded, taking all factors into account, including the length of the delay and the reasons for that delay, that it was not just and equitable to extend time. It followed that the discrimination and victimisation claims would not proceed to a full hearing and would be dismissed.

33. While it seemed unnecessary to determine issue of reasonably practicability in relation to the unfair dismissal claim, given that the Claimant did not have the requisite qualifying service, given that it had been raised in the notice of the preliminary hearing, I did consider it.

34. For the reasons given in relation to the discrimination and victimisation

claims, I was not satisfied that it was not reasonably practicable for the Claimant to bring the claim within the three-month limitation period. In any event, the period of some seven months after the initial period expired, was sufficiently long that I would not have considered it reasonable to extend time for that period, even if the "not reasonably practicable" test had been satisfied by the Claimant. The unfair dismissal claim is therefore also dismissed.

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Employment Judge McNeill QC

Date: 30 December 2019

Judgment sent to the parties on

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For the Tribunal office