sb

EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Mr G Gyimah	**AND**	Santander UK Plc

Heard at: London Central **On**: 14 February 2020

Before: Employment Judge Goodman

Representation
For the Claimant: In person
For the Respondent: Mr T. Poole, counsel

JUDGMENT having been sent to the parties on 18 February 2020, and written reasons having been requested under rule 62(3)`

REASONS

1. This open preliminary hearing was listed to decide:
   (1) whether the Employment Tribunal has jurisdiction to hear the victimisation claim by the Claimant against the Respondent, his former employer. The jurisdiction issue is whether the Claimant presented the claim in time.
   (2) the Respondent's application under rule 37 to strike out the claim as having no reasonable prospect of success
   (3) the Respondent's application under Rule 39 to impose a deposit order as condition of proceeding with the claim, as having little reasonable prospect of success.

2. The response had also suggested that the claim was barred by the rule in Henderson because of a similar claim already decided, but that was not the subject of today's hearing.

3. In order to decide the applications, I have read the claim form and the response and the correspondence on the Employment Tribunal file. I have read a number of emails handed in, or read to me by the Claimant from his telephone. I read the Respondent's skeleton argument.

4. It was necessary in the hearing to clarify the claim, which had not been pleaded in any detail. The Respondent resisted an application to amend the claim by adding this clarification.

Factual Summary

5. The Claimant is black, and worked for Santander the Respondent in Milton Keynes. In April 2018 he was the object of an unpleasant event concerning his colour, involving his work colleagues. Because the claim has been settled I do not describe it in detail.
6. He brought a claim to the Employment Tribunal. That claim was settled through ACAS on a COT3 form on 10 October 2018. One of the outcomes of that settlement was that the Claimant left the Respondent's employment. I infer that he was paid a sum of money. It was also agreed that they would provide a reference to any future employer in agreed terms.
7. The Claimant found another job, and gave Santander as his referee. On or about 16 November the new employer asked for a reference, and, because the facts are not agreed, I will simply say in neutral terms that there was a mix-up and delay getting the reference to the new employer, and the Claimant took one and possibly two days off work to sort it out. The Respondent's explanation for this is that their HR team is so big that the enquiry went to the wrong office, to the team that deals with prospective employees, rather than the team that deals with references for past employees. That is an assertion - there is currently no evidence.

8. The Claimant then presented a further claim to the Employment Tribunal, alleging that there had been a breach of the settlement agreement. He has specified (see below) that it was not a claim for victimisation but a claim in contract for not carrying out the terms of the settlement agreement. He says he received a letter from the Employment Tribunal - I have not seen the claim or the letter, and rely on the Claimant's account - saying that the tribunal had no jurisdiction to enforce settlement agreements. After consulting ACAS, on 8 January 2019the Claimant began proceedings in Milton Keynes County Court to enforce the judgment, though I have not seen the claim form. The claim was contested, and there was hearing of the evidence on 3 September 2019. The Deputy District Judge gave judgment in the Claimant's favour in the sum of £244.27, for debt and costs.

9. On the same day, 3 September 2019, the Claimant went to ACAS for early conciliation, and the next day, 4 September 2019 was issued with a certificate, which meant that he could present a claim to the Employment Tribunal, which he did on 14 September 2019.

10. The claim form he filed starts: "there is an enforceable contract between", and then names the parties. He then in a sequence of numbered paragraphs sets out his account of what happened, and concludes by saying that when he asked the Respondent's solicitors to investigate what had happened on 28 November 2018, they had replied denying any reference had been requested. That is the end of the details given on the claim form.

11. On 4 November 2019, a judge having reviewed the claim form under rule 12, the Employment Tribunal wrote to the parties to say there would be an open preliminary hearing today to decide the jurisdiction issue.

12. On 18 November 2019 the Employment Tribunal sent standard letters to both parties saying that the claim had been accepted; the Respondent had 28 days to respond.

13. The response was filed on 16 December 2019. In summary, it was pleaded that that the claim had already been decided in the county court, so he could not bring it again, having regard to the rule in Henderson; further, that bringing a claim in 2019 for events nearly a year earlier was well out of time. Those issues were then notified to be heard today.

14. On 14 January 2020 the Respondent wrote formally applying to have the claim struck out on the basis that it was an abuse of process, having regard to the County Court proceedings, that it was out of time, and that he had no reasonable prospect of success, on the basis that it did not identify a protected act, and if it did identify that bringing Employment Tribunals was a protected act, there was no evidence of a causal link between that and any failing in connection with the reference.

15. It was copied to the Claimant. and on 7 February he responded to the Employment Tribunal with a copy to the Respondent. His letters says:

> "I can see that the Respondent Santander want this case thrown out due to the fact that they feel like I am out of time and abused the process. When I submitted this claim, it was after Santander was ordered to pay £244.27 by or on 17 September 2019. Santander filed to pay this on time or give me any sort of reassurance that this will be paid, I was ignored for a whole month, I felt a lot of passive aggression from the way they handled the situation. To go through the County Court to chase the payment would have cost me more than the actual payment they owed so I could not do that, the only option was to go down the route of the victimisation route and bring the claim to the Employment Tribunal. All of a sudden, a month later once they received the claim from yourselves Santander are now in funds to pay the £244.27 and I have email evidence of this. Very suspicious. This was the latest victimisation situation that occurred as Santander failed to pay me on time ordered by the Judge which shows they have no respect for my case in the first place. If I did not go through the Employment Tribunal I would not have received any payment, the reason why I also feel victimised is the fact that I previously raised a discrimination case against Santander and they are holding animosity against that by messing up my future with employers. I have seriously lost faith in the system due to all of this, I have gained a mental impairment due to this matter and will like this to be resolved as soon as possible".

In other words, the claim was not about failings in giving a reference in November 2018, but about delay satisfying judgment in September 2019.

16. Later that day he added:

> "just to clarify that the case brought up to the County Court was a breach of contract case and not a victimisation one. I submitted this breach of

> contract case to the Employment Tribunal previously and they wrote back to me saying they do not deal with this at the Tribunal. My alternative decision was then to bring them to County Court for breach of contract which at the time Santander failed to follow the right procedures which then caused me to raise victimisation in the Employment Tribunal which are two different things".

16. Today the Claimant was asked what he had in mind about late payment of the judgment sum when he went to ACAS on 3 September 2019, and presented the claim to the Employment Tribunal on 14 September 2019, as at that date the due date for payment was still in the future. He replied that he "just knew" that they were not going to pay, because of their previous behaviour over the reference, and that due to shortage of time he had not explained but simply cut and pasted his grounds of claim from the County Court proceedings onto the Employment Tribunal form.

17. Explaining the facts of late payment, he said the judgment of the County Court had been that Santander should pay him the money by 17 September, that on 17 September, not having been paid, he sent a chasing email, and when that went unanswered, another chaser on 16 October. There was still no reply, but he was in fact paid on 29 October 2019. He added that he considers that this action was deliberate, and done because he had brought a race discrimination in 2018.

Application to Amend the Claim

18. I deal first with the application to amend the claim. The claimant, a litigant in person, did not formally apply, but I hold that the content of the 7 February emails and today's explanation is so different to what is in the claim form, that it must be considered as an amendment of claim. The amendment itself is what is set out in the Claimant's two emails of 7 February. It is an allegation that the delay in satisfying the Country Court judgment was an act of victimisation.

19. The Respondent opposes the application on a number of grounds: that it is late, only being put on 7 February, nearly 5 months after initial presentation. it could have been brought before, but was not, and that it is weak, as it is improbable that any delay of payment was because he had brought an Employment Tribunal claim.

20. Claims about amendments have to be decided in light of the overriding objective to deal with cases fairly and justly having regard to the different positions of the parties and their resources, putting them on an equal footing, avoiding delay sending expense avoiding unnecessary formality, and dealing with cases in ways which are proportionate to the complexity and importance of the issues. In **Selkent Bus Company v Moore (1996) IC all R 836**, tribunals are given specific guidelines about amendments of claim. The tribunal must consider how extensive the amendment is, whether it is minor merely involving relabelling facts already before the tribunal, or a wholly new claim. It must also consider the effect of the amendment on any time limits, and the timing and manner of the application. Having looked at those factors, they must then weigh up the balance of injustice and hardship between the parties.

21. I look at those in turn. First, it is a set of entirely new facts not mentioned at all on the claim form, where the narrative ends in November 2018. It deals with matters which occurred ten to eleven months later. It does not mention County Court judgment at all, although lodged after it had been given. The new facts require investigation by the Respondent of why there was a six week delay satisfying judgment. Second, the time points. If the Claimant was not paid by 17 September when he should have been, his time (three months from the act complained of) started to run and he should have brought a claim for this by 16 December. Even if it could be argued that time did not start until 29 October (when he was paid) he should have brought a claim, or amended his claim, by 28 January 2020. Yet he did not notify the Respondent until 7 February one week ago. It is out of time.

22. Should he have done this earlier? The Claimant acts in person. He presented his claim in haste, though it was not clear why. I am not sure that I believe him when he says he wanted to present a claim before the judgment debt was due because he "just knew" the respondent was going to pay him late because he had made a tribunal claim in 2018. The letter from the Tribunal in November 2019, about listing a hearing on jurisdiction for today could, and arguably should, have prompted the Claimant to look back at his claim form and look to see what he had told the Tribunal his claim was about. He could, and should, at that point have told the Tribunal that his claim was not just about the reference in 2018, but also about being paid late in 2019. Had he done so it would have been in time. He could also have reviewed his claim when he got the response on 16 December, which spelled out for him what the jurisdiction point was if he had not understood it before. He only did so when the Respondent made their application on 14 January, and then not until 7 February, weeks after seeing the response.

23. If the amendment is allowed, the Respondent now has to investigate what did or did not happen in September or October 2019, and why the claim was paid late. That is not much later- a few weeks - than what would have to have been done if he had notified the claim in time, but adds to the difficulty of investigation, as staff may have left, or simply not remember. It is likely to involve a different team of people (legal department, or finance) to those in HR responsible for the reference. I consider the likelihood of success in the Claimant's claim which is relevant to considering balance of hardship. The Claimant asserts that he would not have been paid but for making this claim to the Employment Tribunal. That cannot be the case because by 29 October, the Respondent was unaware there was a claim. The very earliest they could have known that there was a claim was when they received the 4 November letter from the tribunal, and they get the claim form until 18 November. Although it may appear to the Claimant in hindsight that bringing the Employment Tribunal on 14 September 2019 was what promoted the Respondent to pay on 29 October, that is not what happened.

24. What of the merits of the late payment claim as victimisation? As made clear in **Manchester Police v Bailey (2017) EWCA Civ 425***,* a tribunal does not look at a chain of events starting with the claim being brought, and ending with the treatment complained of ("but for" causation) but at the reason why the

respondent treated the claimant as it did, and what part the discrimination claim played in that. Any tribunal is likely to be aware from its own experience in practice, from media publicity of the woes of small businesses, or from research into whether successful claimants get paid their awards, that regrettably, perhaps scandalously, successful litigants often meet difficulty getting paid, even after a County Court judgment, and that while small businesses may not pay at all, the largest organisations can be the worst offenders paying late. They know that the cost of enforcing a judgment deters prompt or any enforcement in small claims. It is hard to see any valid excuse for the Respondent's delay, but to succeed in the victimisation claim the Claimant has to show not just that the Respondent had no good reason for paying late, but that, by inference if necessary, the *reason* for delay must have been because he had brought and settled an Employment Tribunal claim. This seems improbable. The claimant has not mentioned any reason why he believes the late payment was because he had made a tribunal claim, and in the absence of any evidence other than the fact of delay, a tribunal is more likely to conclude that indifference or inefficiency was the reason, as it is so common. The "reason why" they delayed paying is more than the fact that if he had not made a tribunal claim, and it had not been settled, and if they had provided a reference, he would not have had to start a contract claim, and then not been paid the judgment debt in time, That is a "but for" argument, which is not relevant in finding the "reason why" payment was late.

25. The Respondent argues that because the settlement team, that is those who pay the County Court judgments, are not the same as the HR team, the Claimant is unlikely to show that that was the reason. That is not of course evidence, but even as a proposition, it is still *possible* that the HR team, who presumably were at the hearing to give evidence, or had a report back on the outcome, may have been resentful. However, though possible, it remains improbable that the claimant will establish that making a tribunal claim in 2018 was why judgment was satisfied late. The respondent would point to the fact that they had settled it and paid what they had agreed. The Claimant will have uphill work to prove that the reason for delay was not administrative inefficiency, or cynical disregard for County Court orders, but because he had brought a Tribunal claim.

26. Weighing up the factors to establish the balance of hardship, this was a new claim, none of which is mentioned on the claim form, and I take with a strong pinch of salt the Claimant saying that as of 14 September he could foresee the delay in payment. It was something he could have notified to the Tribunal in time long before 7 February 2020. It was out of time and it could have been brought in time. It is not a strong claim. The Respondent has to defend a claim which is now out of time, involves fresh investigation, and which is entirely new to them. I conclude that the balance favours the respondent. The application to amend by adding the payment delay as an act of victimisation is not allowed.

Jurisdiction to Consider the Claim as Pleaded

27. I move on to consider the Respondent's applications on the claim as it was pleaded, namely that the Respondent victimised the Claimant by failing to provide a reference properly or at all in November 2018.

28. By section 123 of the Equality Act 2010, “proceedings on a complaint.. may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable”.

29. The events pleaded, that is, the failure in November 2018, to give a reference on request, are out of time. The claim should have been brought by about February 2019, a month or so longer after early conciliation. When brought in September the claim was 7-9 months out of time. This was not a course of conduct extending over a period, as the Claimant clearly considered that there had been an actionable breach of something when he first considered an Employment Tribunal claim and then went to the County Court. The question then is whether it is just and equitable to extend time. For this the Tribunal must take into account the factors set out in **British Coal Corporation v Keeble (1997) IRLR 336,** namely, the reason for the delay, whether the Respondent has in any way contributed to that delay, the effect of delay on the cogency of the evidence needed to decide the claim, and then to consider overall the balance of prejudice between the parties, and whether it is still possible to have a fair trial.

30. The fairness point that most concerns a litigant in person is that the claimant started a claim, probably in time, in 2018, only to abandon it when he received the letter from the tribunal. Arguably the Claimant could have started a victimisation claim in the Employment Tribunal around the same time as he began a claim for breach of contract in the County Court, on the basis that they did not overlap as the County Court could only enforce the award, not make a finding of victimisation and award injury to feelings or consequential loss. It is easy to see why a litigant in person might be baffled and not do this when they had already brought some kind of claim in the Employment Tribunal. On the face of it the reason why he is late starting is that, not having legal advice, he understood he must go to the County Court instead. On the other hand, the claim he tried to bring in the employment tribunal was not of victimisation at all. On his own account (the claim form not being available) he just wanted to enforce the award. He was not saying the reference was not provided *because* he had brought a claim. The Claimant did have access to advice through ACAS, who were in fact consulted, and could have told him to present a victimisation claim if that was why he thought the reference had been delayed.

31. I must consider the effect of delay on the cogency of the evidence. The HR department was being asked to investigate what happened with the reference request a year after the event. I asked in the hearing if the person who sent the email to his new employer was in fact involved in the Country Court proceedings; it seems that she did not attend the hearing to give evidence, although two others did. The nature of the claim was different- the claim then concerned whether the Respondent had in fact complied with the settlement agreement, which was contested. Why they acted as they did is another question, and a depends on getting oral evidence from the officers involved, as much as on looking at emails and file notes which would tend to demonstrate why they acted as they did. Getting pral evidence is likely to be difficult. People may have moved; they may also not remember if the question was not asked until a year later.

32. On the merits of the claim, I simply note that the Respondent had already paid a sum of money under the settlement, and there is no obvious reason why out of malice, or resentment that he had brought the Tribunal proceedings they had settled, they should then be awkward about providing a reference, Santander's defence that this was administrative inefficiency in a large department spread over a number of offices may or may not hold water if tested, but on the face of it is not implausible.

33. I consider the balance of hardship. What does the claimant lose if he cannot proceed with the claim? The Claimant did get a reference, and he was awarded compensation for his lost time from the County Court. Today, and this is for the first time he has mentioned it, he says he left his new employer at the time because they thought he was not committed because he had taken two days off to sort out the reference. He has not been able to find a job since, because he does not want to look for work in Milton Keynes in case he meets other employees or former employees of Santander, and that he was not able to cope with travelling to Northampton, where he found other work for a time.

34. I find it unlikely that a Tribunal would find that he has been unable to find any work from November 2018 to February 2020 because of 1-2 days delay providing a reference. If it had been provided promptly, he would still have found travel to Northampton difficult. In any case, a period of unemployment will have been contemplated if his case was settled on the basis that he was to be paid a sum of money for leaving.

35. A successful victimisation claim would carry an award for injury to feelings, even if the claim for loss of earnings was rejected. The value should be discounted to take account of the risk that on a hearing of the evidence (and these cases are often fact sensitive) the respondent's administrative inefficiency was held to be the cause, not the fact that he had brought the claim that was settled. The claimant has to surmount the difficulty of not having facts to establish that the earlier proceedings were the reason for not providing the reference promptly (rather than the occasion of it) and the respondent being able to explain that as they had paid under the settlement they were unlikely to fail to provide a reference when requested so soon after.

36. The prejudice to the respondent is that they start a year late in finding out the evidence to prove what exactly happened, that inefficiency is the reason for what occurred, given that with inefficiency there is unlikely to be a positive paper trail, and may not be any paper trail at all, and asking employees to remember what happened in a routine matter so long after the event is hard.

37. Weighing up the balance of prejudice, that is the length of the delay, the allowance to be made for a litigant in person not considering whether he should bring a tribunal claim for victimisation as well as to enforce the settlement contract, and the value of the claim, I conclude that the balance of prejudice favours the Respondent, which has to investigate a stale claim and is hampered by the delay from being able to defend it. It is not just that they should have to do this. I conclude that the Employment Tribunal has no jurisdiction to consider a

claim which has been brought more than three months after the events complained of.

The Strike Out and Deposit Applications

38. Strictly speaking, I do not need to consider the Respondent's application t strike out the case has having no reasonable prospect of success, but for completeness I do.

39. It cannot be said that this case has no prospect of success. The HR team may have had lingering resentment of the Claimant, making them less cooperative then they should have been over the provision of a reference. Nevertheless, there is little reason why they should, and in a large organisation it is irritating but plausible that there should be confusion and inefficiency in providing a referrnce. They had already agreed terms and had already paid. I would not have ruled that this case should be struck out as having no reasonable prospect of success. On the other hand, I would have considered that it had little reasonable prospect of success, on the basis that administrative inefficiency was likely to be established, and that it is implausible that resentment of bringing a claim was the reason for not providing, or for querying providing, a reference on Santander headed paper. If it had not been struck out because it is out of time I would have ordered the Claimant to pay a deposit of £250 as condition of proceeding with the claim. I made enquiries in the hearing as to his ability to pay. He is not currently employed, nor is he claiming or receiving benefit, and said he was living on the money he had saved from the settlement. Having to pay a deposit would not bar his access to justice.

40. If a deposit had been ordered he would have had to pay that sum of money within a specified time in order to go to a hearing; if he went to the hearing and succeeded, the deposit would be refunded, but if he went to the hearing and did not succeed, then the Respondent would be likely to apply for its costs of the hearing, on the basis that the claim had been found to have little reasonable prospect of success, there would have been a strong probability, if he had not succeeded in the claim, that he would then have been ordered to pay their costs, Paying a deposit would have been a deterrent to bringing what was viewed as a weak claim.

_____

Employment Judge Goodman

Dated: 11th March 2020

Reasons sent to the parties on:

12/3/2020

…….....
For the Tribunal Office