Case No: 2200134/20

EMPLOYMENT TRIBUNALS

Claimant: **Mr J. Bracegirdle**
Respondent: **Quinn Infrastructure Services Ltd**

London Central remote hearing by CVP **On: 18 August 2020**
Before: **Employment Judge Goodman**

Representation
Claimant: **Mr. I. Winrow, solicitor**
Respondent: **Mr. J. Jenkins, counsel**

PRELIMINARY HEARING

JUDGMENT

It is just and equitable to extend time for presentation of claim.

REASONS

1. This hearing was to decide whether the claimant should be allowed to proceed with his claim for race harassment against his former employer when it was presented out of time.

2. The time limit for race harassment claims is set out in section 123 of the Equality Act 2010. A claim "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."

3. As a result of changes made in 2013, claimants are now required in almost all cases to contact ACAS, by completing an online form, or making a telephone call, to initiate the process of early conciliation, before they can submit a valid claim to an employment tribunal. After a period, usually one month, ACAS then issue a certificate. To avoid the claimants being disadvantaged by interrupting the time they have to present a claim to an employment tribunal, the time for bringing a claim is frozen between the date a claimant contacts ACAS (called day A), and the date of the certificate.(day B). After the issue of the certificate a claimant has another month (more if there is unexpired time from his three months) to present a claim. The statutes, the regulations made thereunder, and the Employment Tribunal Rules of Procedure, make it clear that the process is mandatory, and if there is no ACAS certificate number on the form, or valid explanation why not, the claim is rejected and must be re-presented after an early conciliation certificate has been issued. By then,

as in this case, it may be out of time.

4. The claimant resigned his job on 31 July 2019. He presented a claim to the tribunal on 30 October 2019, but it was rejected because he had not engaged with ACAS for early conciliation. He then started the early conciliation process and presented a further claim on 14 January 2020.

5. The respondent denied liability. If the claimant succeeds today on the time point the case is listed for final hearing from 24 September to 2 October 2020.

Conduct of the Hearing

6. The hearing was by remote technology. It was advertised on the online hearing lists on Courtserve as a public hearing, but no members of the public sought access. Both parties were represented. I had been provided with a small bundle of documents containing the pleadings and orders, the first ineffective claim form, and some doctor's letters and hospital appointment letters. The claimant gave evidence in accordance with a written statement and was questioned by the respondent and the tribunal. Each representative made a closing submission.

Relevant Facts

7. The respondent is a building contractor providing infrastructure services to the UK rail industry. The claimants was employed from 8 November 2017 as Network Rail HSEQ adviser, responsible for health and safety in the respondent's operations in the rail network, and he managed a team of advisers. From February 2018 he continued in this role, but as a contractor in the name of his own company, invoicing weekly but being paid monthly. There is disagreement between the parties as to why this change took place, but it is common ground that he was a worker, such that the Equality Act applies.

8. The claimant is a Welsh speaking Welshman. His case, as set out in the claim form is that throughout the time that he worked for the respondent he was the object of increasingly hostile racist banter, which he characterised as "staple insults heard more on a building site than in an office environment", such as "Taffy bastard", "Welsh cunt," and references to shagging sheep, said also to include naming a mannequin to display personal protective equipment "Baa-bera" in July 2018, and enquiries as to whether he had been given Wellington boots for Christmas, the banter being that sheep shaggers would restrain a sheep for the purpose by inserting its hind legs into their boots. The banter was said to have intensified when he had to make telephone calls in Welsh at workto family members following his sister's sudden death; the claimant says he was told that Welsh speech "sounds like you are spewing in a bucket". The respondent denies these insults and references. It is also suggested in their ET3 response that he condoned or encouraged such banter, as when answering a colleague's message of good wishes for St David's Day by saying there was "not a sign of a willing sheep anywhere", a reference to the sheep shagging stereotype. I set out what each side says. These factual issues have to be determined after hearing evidence.

9. The claimant's sister, to whom he was close, died very suddenly in April 2019 of an aortic aneurysm. He found the sudden bereavement stressful. A letter from his GP, Dr Barnor of Menai Bridge dated June 2020, describes a referral to a cardiologist on 29 June 2019, that problems at work were reported to be causing stress, the effect of bereavement, and a number of physical symptoms, including difficulty swallowing, leading to an endoscopy investigation on 21 July 2019 which showed a stricture in the lower oesophagus, for which a further appointment was arranged in September. There were also blood tests, a chest X-ray, and then a cardiogram on 21 October 2019 to see if he too had an aneurysm. He received the result of this a week later, which will have been shortly before the three month time limit expired.. The claimant describes how throughout this period he became very worried about his health,

alarmed at the intimations of mortality. He was 60. His sister had appeared healthy. He had rarely been to the doctor, and when he did start to attend, he was, he said, taken seriously. He became a recluse, and tuned out of social conversations.

10. On 31 July 2019, soon after the endoscopy examination, the claimant resigned. On the claimant's account he did so because he was increasingly unable to cope with hostile banter. On the respondent's account, he responded angrily to criticism that his monthly safety report duplicated the one submitted the previous month. It is disputed whether he was told to "fuck off you Welsh twat". On the way out the claimant said to another manager that he would not be seeing him again, and his IT access was disconnected immediately. In the letter that followed he said that he had informed Network Rail that he was no longer the respondent's approved competent person for safety. He submitted an invoice for work to date which was "final".

11. On the first claim form submitted the claimant stated the date of termination was 31 July. On second claim form, by which time there was a time problem if 31 July was the relevant date for calculating when time was to run, he said it was 24 August. The respondent on ET3 gives the termination date as 31 July. A few days after resigning the claimant was asked for help finding some earlier reports, and he replied offering to cover until they had made a new appointment, but the respondent declined the offer. The claimant attended the workplace on 24 August. It is not however necessary to determine now the effective date of termination, because the claimant is clear that he does not allege any further banter or any other racist treatment after 31 July. That is the date on which the course of conduct complained of ended, and so the relevant date for calculating time.

12. As well as concerns about his health, the claimant was concerned that in their tender documents the respondent continued to hold him out as their health and safety officer, and he corresponded with the respondent about GDPR and the data protection breaches involved in using his name in this way (these emails were not in the bundle). The claimant said this was a straightforward matter for him, being very familiar with the legislation and having drafted the respondent's own GDPR policy.

13. Later he began to be concerned about money. He consulted a local solicitor about bringing a small claim in the County Court for money owed to him by the respondent. In the course of consultation, he was asked why he had left, and when he explained the background, he was referred on to his present solicitor for specialist advice about an employment tribunal claim. This took time. The claimant describes how he received a telephone call from his present solicitor while he was staying overnight with a friend in South Wales, then driving home 155 miles so that he could use his computer to take action. On 30 October 2019, the last day to present a claim, counting three months from 31 July, he completed and submitted online the ET1 claim form. In answer to the question on the form whether he had an ACAS certificate number, he replied "no". In answer to the next question "if no, why don't you have an early conciliation certificate", he ticked a box saying: "ACAS doesn't have the power to conciliate on some or all of my claim".

14. The claimant's evidence was that he did know, because he was told so in the telephone call, about contacting ACAS for early conciliation and that it was mandatory, but that in the rush to drive home, and in completing the form late at night, and in his generally stressed state of mind, he was confused by the process. He had been told he had to "fill in the forms", and, presumably given the rush, also told about the urgency of doing so as the time was about to expire. He said he "tried to remember" the advice, got confused, was not functioning well, his mind was "wooly", and he forgot or was confused about the early conciliation process. He did not have time to research it for himself. He ran through the forms quickly and thought that there was no prospect of successful conciliation on a matter that was "pretty well closed because I had resigned". He thought the process was to try to negotiate, and he did not see how that would succeed. That was why he ticked the box saying

ACAS “doesn’t have the power” to conciliate.

15. On 12 November 2019 the employment tribunal wrote rejecting the claim because he had not obtained an early conciliation certificate. He consulted a solicitor asking what to do, and on 17 November 2019 contacted ACAS. This is day A on the certificate. Day B, the expiry of the certificate, is 17 December 2019. He received the certificate on 19 December 2019. He then wanted advice on completing the form, given the error made in the first attempt, and was not, he said in a strong state of mind. It was the first time in 60 years he would spend Christmas without his sister, relationships with his wife and 6-year-old child were difficult, he felt unable to provide for his family, and he was very short of money due to difficulty claiming Universal Credit, and he had to visit a food bank.

16. He saw a solicitor after Christmas, and got a draft ET1 from him on 13 January 2020. His presented his valid claim on 14 January 2020.

17. Since then his mental health has improved. He is no longer troubled by physical symptoms, he has been reassured there is no hidden problem, and the calm of lockdown has helped his recovery from mental stress.

Relevant Law

18. There is guidance for employment tribunals from the higher courts on how to exercise discretion on what is just and equitable. By **Hutchinson v Westward Television Ltd (1977) IRLR 69,** the tribunal can take into account any factor that seems relevant. In **British Coal Corporation the Keble (1997) IRLR 336**, the tribunal was directed to assess and then weigh up the factors that would be relevant to extending the limitation period in a personal injury claim for the Limitation Act, such as, the length of the delay and the reasons for it, whether the respondent concealed any relevant matter, and the effect of delay on the cogency of the evidence, and then to weigh up the balance of prejudice between claimant and respondent. In **DPP v Marshall (1998) IRLR 494** it was held essential to consider whether there could be a fair hearing given the delay. The burden of showing that it is just and equitable to extend time is on the claimant, and tribunals must be clear that extensions are the exception and not the rule.

Discussion and conclusion

19. In this case the claimant relies very much on his worries about his health, and the effect on his state of mind in the relevant period, in arguing that it is just and equitable to extend time. The respondent argues that he knew in fact that he had to go to early conciliation first, but chose not to do so; his worries are not an important factor when he was capable of dealing with other matters such as consulting a solicitor about money, and corresponding with the respondent about data protection.

20. The reason for the delay is that the claimant did not go to ACAS for early conciliation before 31 October, the expiry of the primary limitation period. Otherwise his claim would have been in time. After that, once informed of the problem by the tribunal, he was prompt in going to ACAS, and then, given the intervention of Christmas with its shutdowns and attendant stress, prompt in submitting his valid claim, a few days before his extra month expired.

21. The effect of the delay has been to postpone the putative hearing of his claim by 4 to 6 weeks,. This is less than the 10 weeks gap from the first presentation to the second, because there was a short delay before the tribunal reviewed the first claim and decided to reject it, whereas on second presentation it was promptly sent to respondent. An unexpected result of the coronavirus lockdown has been that if it had been validly presented at the end of October, it is likely to have been given a final hearing date in July or August 2020, which because of the closure of the building would have resulted in a postponement of the final hearing to March or April 2021.

As it turns out, presentation in January resulted in a final hearing date in September 2020, which remains effective. Paradoxically therefore, the effect of delay has been to bring forward the hearing date, so live evidence will be fresher in the minds of the witnesses. There is however still some effect of delay on the cogency of the evidence, in that the respondent was not aware of a complaint about banter until mid- January, whereas had the claimant sought early conciliation at the end of October, he is likely to have presented his claim by the end of the year, and so the respondent would have been able to ask their witnesses about it 2 to 3 weeks earlier. The respondent however made no point about how delay had affected the strength of the evidence, and in answer to a specific question, stated they did not maintain there was prejudice to the respondent by delay.

22. Returning to the reason for delay, the claimant state of mind in the relevant period must be considered. His concern about his health was real. He was out of work and short of money. Until late in October he was genuinely worried that like his sister he might have an asymptomatic aortic aneurysm leading to sudden death at any moment. These are matters which tend to affect concentration. He was not incapacitated, because he was able to consult a solicitor about the debt and write to the respondent about data protection, but his mental capacity, normally adequate to reading documents carefully, which is essential for a health and safety adviser, was impaired when understanding the effect of early conciliation on the time limit, which can take some time to assimilate. He did not have written advice on the point, he had to rely on his recollection of the telephone advice, he had no time to research it himself, for example by reading the ACAS website as suggested on the ET1 claim form, and when he was flustered by the long drive to reach a computer and the imminent expiry of the time limit. Generally, he was conscientious with regard to time limits, as shown by his later conduct, he was not neglectful, and this was an exception. The respondent is right to point out the extent to which this was deliberate in that he had been told about early conciliation, but in the particular circumstances it is understandable that he should think conciliation could be dispensed with because "ACAS did not have the power" to conciliate, when there was no time to read online material and understand that in effect he must go to ACAS first..
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23. The purpose of the early conciliation rules should be considered. They were designed to encourage parties to engage in negotiation without having to go to an employment tribunal, but as the employment appeal tribunal has ruled in an earlier case, it is but a "structured opportunity". There is no requirement to do more than notify a claim. When he did notify a claim, in November, there is no sign that the respondent then initiated any settlement process. That is not to say that claimants should not bother with early conciliation, but it is a matter of relevance in the overall weighting of what is just.

24. The prejudice to the claimant is that he has lost the opportunity of redress for what, if he establishes the facts alleged in his claim form, was significant and sustained race harassment. The prejudice to the respondent is that they have to defend a claim brought out of time, although the respondent does not claim prejudice. In practical terms, the delay of 3 to 4 weeks in being able to investigate with witnesses events of many months earlier is of little weight. Significantly, it is not only still possible to have a fair trial at this stage, it may in fact be fairer because it will be held so much earlier than would have been the case.

25. Weighing the prejudice to each side, the tribunal concludes that it is just and equitable to allow the claim to proceed.

Case No: 2200134/20

Employment Judge Goodman

Date 18th August 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

18/08/2020

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FOR THE TRIBUNAL OFFICE