EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Jawed Shah	**v**	**1. GMB** **2. London Borough of Enfield**

Heard at: Watford **On**: 21 August 2020

Before: Employment Judge Alliott (sitting alone)

Appearances

For the Claimant: Did not attend
For the First Respondent: Mr Darshan Patel (Counsel)
For the Second Respondent: Ms Ludmella Iyavoo (Solicitor)

JUDGMENT

The judgment of the tribunal is that:

Claim number 3300186/2020

1. The claimant's claims of race and disability discrimination against the First Respondent are struck out on the grounds that they have no reasonable prospect of success and/or that they are out of time and it is not just and equitable to extend time.

2. The claim for breach of contract against the Second Respondent is struck out as it has no reasonable prospects of success and/or is out of time and it was reasonably practicable for it to have been brought within time.

3. The race and disability discrimination claims against the Second Respondent are struck out as they are out of time and it is not just and equitable to extend time.

4. For the avoidance of doubt, the claimant's claim is dismissed in its entirety.

5. The claimant is ordered to pay the First Respondent costs in the sum of £3,540.

6. The claimant is ordered to pay the Second Respondent costs in the sum of £2,061.

Claim number 3300388/2019

7. The claimant is ordered to pay the First Respondent costs in the sum of £1,200.

REASONS

The claimant's absence

1. On 29 June 2020 Employment Judge Heal held an open preliminary hearing in these cases. The claimant attended in person.

2. I am told that at the conclusion of that hearing Employment Judge Heal directed that the remaining issues would be determined at an open preliminary hearing listed for 21 August 2020. The claimant was therefore aware, as of 29 June 2020, of this hearing date.

3. Employment Judge Heal signed her reserved judgment on 4 August 2020 and the same was sent to the parties by an email timed at 16:34 on 4 August 2020. That reserved judgment recited that the remaining applications would be heard on 21 August 2020.

4. At 11:34 on 19 August 2020 written notice of this preliminary hearing was sent to the parties by email.

5. However, in an email timed at 08:22 on 19 August 2020 the claimant sent to the tribunal a request to vacate the hearing listed for Friday 21 August 2020 and attached a Notice of Appeal which he characterised as an application for reconsideration of Employment Judge Heal's judgment. The timing indicates that the claimant was well aware of this hearing being listed for 21 August 2020 prior to the notice of hearing being sent out.

6. The file shows that Employment Judge Heal considered the request to postpone the hearing listed for 21 August 2020 on 19 August 2020. She refused the request and directed that it will take place. That refusal was sent to the claimant in an email timed at 9.32 on 20 August 2020.

7. Meanwhile, in the late afternoon of 19 August 2020, the claimant's appeal papers were delivered to the Employment Appeal Tribunal and considered by His Honour Judge Martyn Barklem in chambers. The claimant was seeking a postponement of the hearing listed for 21 August 2020. Unsurprisingly, His Honour Judge Barklem was unaware if the claimant had applied to the Tribunal for a postponement. However, he assumed, as it turns out correctly, that such an application had been made, had been refused and that there was therefore an order susceptible to appeal. The

claimant's appeal against the listing of this hearing was held to be wholly without merit and was rejected.

8. On 20 August 2020 Employment Judge Heal refused the application for reconsideration. That decision was sent by email to the claimant at 10:18 on 20 August 2020.

9. At 11:29 on 20 August 2020 the claimant emailed the tribunal to state:

> "This is to inform you that I will NOT be attending the tribunal on 29 June [sic] 2020 under any circumstances."

His reasons include an allegation of bias and corruption at Watford Employment Tribunal.

10. Whilst that email refers to 29 June 2020, clearly the claimant was referring to today's date, Friday 21 August 2020.

11. At 13:42 on 20 August 2020, the claimant emailed the tribunal stating:

> "To reiterate I will not be attending the hearing tomorrow, and request that an adjournment takes place at least until another judge is appointed…"

12. At 13:57 on 20 August 2020, an email was sent by the administrative staff at the tribunal indicating that, "All correspondence sent to the tribunal today can be discussed with the Judge conducting the case tomorrow."

13. At 14:16 on 20 August 2020, the claimant sent an email to the tribunal and the respondents' representatives (copying in the Prime Minister) stating:

> "I will not be attending tomorrow and suggest you don't attend either.
>
> …
>
> My non-attendance is not to be seen as any intention not to pursue my case. It is in opposition to the bias and corruption at Watford."

14. AT 15:40 on 20 August 2020, the claimant sent a further email to the tribunal stating:

> "Owing to a death in the family I will be unable to attend the hearing listed for 21 August 2020.
>
> Please treat this as a request to adjourn the hearing to the next available date."

15. On 20 August 2020, Regional Employment Judge Foxwell directed that the claimant be written to in the following terms:

> "Regional Employment Judge Foxwell sends his condolences on your sad news but in view of the lateness of this application and its context (your earlier statements that you did not intend to attend) your application is refused.

> This decision may be looked at again by the Judge hearing the case tomorrow (Employment Judge Alliott) and granted if you have provided documentary evidence concerning the date of death of your family member and how they are related to you."

16. A file note indicates that a member of the administrative staff telephoned the claimant at 16:05 on 20 August 2020. She informed the claimant that she wanted to relay the directions of Regional Employment Judge Foxwell and before she could do so the claimant said the line was bad and he hung up. The member of administrative staff called the claimant back and it went to his answerphone. The file note reads:

> "I called back and it went to his answerphone, where I informed him that I had full directions to read out but will not do that, I summarised telling him that his request is refused and he can make an application tomorrow morning. I repeated that the hearing is still going ahead tomorrow and did give my number for him to call back, he didn't."

17. Regional Employment Judge Foxwell's direction was sent by email to the claimant at 16:44 on 20 August 2020.

18. At 16:56 on 20 August 2020, an individual signing himself "Mustafa", using the claimant's email address, emailed the tribunal to express disgust and indicating that "cousin Jawed is extremely distressed and the whole family is consoling him."

19. At 19:46 on 20 August 2020, the claimant sent an email to the tribunal which appears to be a cut and pasted article from a website.

20. At 23:25 on 20 August 2020, the claimant sent an email to the tribunal. This is eight pages long. At least six pages of it appear to be further cut and paste articles from a website. A number of allegations are made. What is singularly lacking is any information concerning the claimant's recent bereavement.

21. This morning the claimant did not attend for a 10am start. At 10:30 the claimant was telephoned by my clerk who informed me that there was no answer. This hearing began at 11am.

22. Pursuant to Rule 47 of the Employment Tribunal's (Constitution and Rules and Procedure) Regulations 2013, I have considered all the information I have and made practicable enquiries about the reasons for the claimant's absence. It is clear to me that prior to any family bereavement the claimant had a clear intention not to attend. Whether or not the claimant has sustained a family bereavement remains unsubstantiated. It has been made clear to the claimant that any application or concerns that he may have, including allegations of corruption and bias at Watford Employment Tribunal or within the judiciary, could be raised before me today. In my judgment the claimant has decided to stay away. In all the circumstances I have decided to proceed in the claimant's absence.

Claim number 3300388/19

23. The claimant was employed by the Second Respondent on 6 June 2018.

24. By a claim form presented on 9 January 2019 the claimant presented claims of discrimination on the grounds of race, disability and sex and claiming other payments.

25. In the body of his claim, at section 8.2, he complains principally about events surrounding a meeting on 10 October 2018 concerning allegations of gross misconduct against himself. He complains about the conduct of various individuals working for the First and Second Respondents and concludes:

> "…The GBM has colluded with my employer, to seek to dismiss me, based on racism."

26. At that time the claimant was still employed by the Second Respondent. The Second Respondent now informs me that the claimant has since resigned with effect on 22 February 2019.

27. On 15 February 2019 in an email timed at 14:48, the claimant stated:

> "Owing to my current state of ill health, as a result of matters over the last few months I have reluctantly decided to withdraw both claims forthwith as the stress is making my condition worse."

28. In an email dated 21 February 2019 the claimant sought to reinstate his tribunal claim on the basis that he had withdrawn his claim in haste.

29. The file came before me, Employment Judge Alliott, and on 26 February 2019 the following direction was issued:

> "1. The claimant informed the tribunal in writing on 15 February 2019 at 14.48 that his claim against both respondents was withdrawn. Consequently, in accordance with Rule 51 of the Employment Tribunal (Constitution and Rules of Procedure) the claim has come to an end.
>
> 2. As the claim has come to an end, there is no need for the respondents to file and serve responses. The tribunal has no jurisdiction to set aside a notice of withdrawal of a claim.
>
> 3. The First and Second Respondents have applied for judgment dismissing the claim pursuant to Rule 52 of the Employment Tribunal Regulations 2013. The tribunal must issue such a judgment unless the tribunal believes that to issue such a judgment would not be in the interests of justice."

30. The claimant was then given an opportunity to inform the respondents and the tribunal whether he objected to judgment dismissing the claims. Thereafter, as it was entitled so to do, the First Respondent made an application for costs.

31. On 21 May 2019 Employment Judge Lewis directed that there should be a preliminary hearing on 16 September 2019 to determine any application for a judgment dismissing the cases and any application for costs.

32. On 16 July 2019, at 23.52, the claimant emailed the tribunal to state:

> "I write to advise and confirm that I wish to withdraw my claim in full against the London Borough of Enfield."

33. On 3 August 2019, the claimant was written to by the tribunal in the following terms:

> "Employment Judge R Lewis asks you to confirm if you wish to pursue your request to reinstate your claim against the GMB? If not, it will be dismissed on withdrawal."

34. On 31 July 2019 at 10:20, the claimant sent an email to the tribunal stating:

> "I have now been able to obtain legal advice from a Law Centre…
> I have been advised to withdraw my claim against the GMB…
> I would ask that the tribunal take note of this, and record that I wish to withdraw my outstanding claim against the GMB. However, I wish to reserve my right to take action in the Civil Courts, as I believe I have a strong claim."

35. On 7 August 2019 the claimant appeared to want to retract the withdrawal of his claim against GMB and it was pointed out by Employment Judge Lewis, in a letter sent to the claimant on 13 August 2019, that he could not do this.

36. On 13 August 2019 Employment Judge Lewis issued a judgment dismissing the proceedings upon withdrawal.

37. The claimant has not made a request for that judgment to be reconsidered. Further, the claimant has not appealed that judgment.

38. Irrespective of the 13 August 2019 judgment, case number 3300388/2019 ended upon withdrawal on 15 February 2019.

39. I cannot go behind the judgment of Employment Judge Lewis.

40. In due course, the First Respondent's costs application came to be heard on 16 September 2019. This was before Employment Judge Henry. The claimant did not attend the hearing until its conclusion. Despite the hearing having been listed since May 2020, Employment Judge Henry was not prepared to deal with the application for costs without giving the claimant an opportunity to respond. He therefore postponed the hearing.

41. In his case summary, Employment Judge Henry records a somewhat odd turn of events. It would appear the hearing started in the absence of the claimant. It would appear that during a short adjournment Employment Judge Henry was informed that the claimant had been in the building but had left in order to attend his car parking meter. The respondent's representatives informed Employment Judge Henry that they were not

aware of the claimant's attendance and had not seen him. The hearing therefore proceeded in the claimant's absence.

42. Having postponed the hearing, and after the departure of the respondents, Employment Judge Henry was informed that the claimant has returned to the tribunal. Employment Judge Henry gave him an audience and he claimed to have been in attendance at the tribunal from 1.30pm ready for the costs hearing at 2pm where he waited until after 3pm when he left to tend his parking meter. Thereafter he returned to the tribunal. I have been shown two parking tickets, presumably from the claimant, which indicate that they were purchased at 13.49 and 15.29.

43. In a follow-up email dated 29 September at 18:27, the claimant states:

> "I arrived in Watford at 1.30pm and then parked at 1.49pm for 2 hours."

44. It would appear that the claimant misled Employment Judge Henry to the effect that he was in attendance at the tribunal from 1.30pm ready for the costs hearing. It is clear to me that the claimant was only parking at 13.49 and in all probability arrived late. He does not appear to have made any attempt to ascertain whether his hearing was going ahead in his absence whilst waiting in the waiting room. The claimant is well aware of the tribunal telephone number and is not reticent about telephoning.

45. The postponed hearing came back before Employment Judge Heal on 29 June 2020, and, as far as action number 3300388/2019 is concerned, the application for costs by the Second Respondent was left over to this hearing.

46. The First Respondent's application for costs is based on the assertion that the claimant's claim had no reasonable prospects of success and/or the bringing and conduct of the proceedings has been unreasonable or abusive.

47. As regards the prospects of success, the claimant primarily relies on the case of Chandhok v Tirkey [2015] ICR527 EAT 20 where Langstaff J suggested that:

> "There is really no more than an assertion of a difference of treatment and a difference of protected characteristic which only indicate a possibility of discrimination".

48. Mr Patel suggests that this is the sort of discrimination claim that would be capable of being struck out as having no reasonable prospects of success.

49. I take into account that the EAT has on repeated occasions indicated that in discrimination claims, due to the generally fact sensitive nature of the allegations, strike out applications will only be appropriate in the clearest cases. I have to take the claimant's claim at its highest in assessing the prospects of success as the evidence has not been tested. It is fair to say that in his claim form the claimant makes a number of complaints about the GMB and concludes with a bare assertion that it was based on racism.

50. The claimant is a litigant in person, albeit that he has, apparently, a law degree. Nevertheless, I take into account that had this claim proceeded, in all probability, at a preliminary hearing the claimant would have been ordered to provide further information about his race discrimination allegations. The dispute as to what went on at and around the meeting on 10 October 2018 is unlikely to be documented and would have been determined upon the oral evidence of the parties. It would have been for a full tribunal to assess the extent to which any party's motivations may have been prompted by issues relating to race. Given the fact sensitive nature of such a dispute, I do not conclude that the claimant had no reasonable prospects of success.

51. I now turn to consider the conduct of the proceedings. In my judgement, having withdrawn his claims in February 2019, the claimant was given the option of making representations as to why there should not be a judgment dismissing his claims. The fact that the claimant was seeking to reactivate his claims was not, in my judgment, unreasonable. In my judgment, it is readily understandable why a litigant in person may be confused by the concept of his claim coming to an end without it being dismissed.

52. Whatever confusion about the interrelation of Rules 51 and 52 of the Employment Tribunal's (Constitution and Rules of Procedure) Regulations, 2013, the claimant can have been in no doubt as from the dismissal of his proceedings on 13 August 2019 that those proceedings were over.

53. Be that as it may, thereafter this claim was concerned solely with the First Respondent's application for costs. In my judgment, it is not unreasonable for a litigant to resist an application for costs in the employment tribunal.

54. I do have very significant concerns about the claimant's conduct at the hearing on 16 September 2019 in front of Employment Judge Henry. In my judgment, he misled Employment Judge Henry as to his attendance at the employment tribunal. I find that he attended late after the parties had gone in for the hearing and made no attempt to make himself known for the hearing. I find that his late attendance at the tribunal and failure to take appropriate steps to gain admission to the hearing led to the postponement. I find that conduct to be unreasonable and, consequently, I will make an order that the claimant should pay the First Respondent's wasted costs of the postponed hearing on 16 September 2019. Mr Patel told me that his brief fee for that hearing was £500 plus VAT. I find that there would undoubtedly have been some wasted solicitor profit costs associated with that postponed hearing in terms of time and preparation for the resumed hearing on 29 June 2020. Doing the best I can, I assess those profit costs in the sum of £500 plus VAT and, accordingly, there will be an order for the claimant to pay the First Respondent's costs of this action in the sum of £1,200.

55. The First Respondent also seeks costs on the grounds that the claimant's conduct of the proceedings has involved numerous abusive statements and comments directed not only at the tribunal staff and judiciary but also

against the First Respondent's instructing solicitor and counsel. Further, that the claimant's conduct has been disruptive procedurally. For example, he made no less than six applications to adjourn the hearing on 16 September 2019. Another example is objecting to the respondent filing a document slightly late, to the point of appealing the matter to the Employment Appeal Tribunal.

56. I have considered whether the claimant's conduct has crossed the line into abusive and/or unreasonable conduct of the proceedings. On the one hand, I have no doubt that the claimant's conduct of these proceedings will have involved the First Respondent in more work than might normally be expected in a tribunal case. On the other hand, litigation is an adversarial process which will often legitimately involve the parties in taking such steps as they believe to be reasonable to advance their cause. Applications for an adjournment are perfectly legitimate. If one party has been late in complying with a tribunal order, however short the period of default, it is legitimate to complain. It is true to say that the claimant has expressed robust views. However, in my judgment, he is entitled to his views and to express them irrespective of whether others agree. I have taken into account the fact that costs in the employment tribunal remain the exception. Taking everything into account I have decided that the claimant's conduct of the proceedings, other than at the hearing on 16 September 2019, does not fall into the category of unreasonable or abusive conduct.

Claim number 3300186/2020

57. Following the decision of Employment Judge Heal on 29 June 2020, all complaints brought by the claimant were dismissed, save that:

> "The complaints of breach of contract against the Second Respondent and of race and disability discrimination against both respondents related to matters arising between 10 January 2019 and the date of termination of the contract of employment are not struck out."

58. The 10th January 2019 was the day after the claimant presented his claim form in case number 3300388/2019. It has been clarified that the claimant's employment ceased on 22 February 2019.

59. On the basis that the claimant's employment terminated on 22 February 2019, so the primary limitation period of 3 months would have expired on 21 May 2019 at the latest. He presented his claim on 9 January 2020, some 7 months and 19 days late. (There is no period of early conciliation to be disregarded)

60. Accordingly, all the claimant's claims are out of time.

61. The breach of contract claim involves me in considering the practicability of bringing it within time and whether it has been brought within such other

time as is reasonable. As regards the discrimination claims, I have a discretion to extend time if it is just and equitable to do so.

62. I have considered the claims made against the First Respondent. There is a six-page typed document attached to the claim form setting out the claimant's claim. As regards the pleaded case against the GMB, this solely concerns events surrounding the meeting on 10 October 2018.

63. In my judgment, there is nothing in this claim against the First Respondent that postdates 9 January 2019. The breach of contract claim against the First Respondent has been dismissed. On the basis that there does not appear to be any claim against the First Respondent that postdates 10 January 2019 in this claim, so I conclude that the claimant has no reasonable prospects of succeeding on his race and/or disability discrimination claims. Accordingly, those claims will be struck out as regards the First Respondent.

64. As regards the Second Respondent, I am told that the claimant lodged no less than three grievances. I am prepared to accept that the claimant's race and disability discrimination claims run up to the date of the termination of his employment. His breach of contract claim will run from the same date.

65. One of the issues I have to deal with is whether the tribunal should have rejected the second claims because the Acas certificates did not relate to the second claim or the respondents now named.

66. From the file that I have it would appear that the claimant filed an amended claim form on 9 January 2020 and that this did in fact name certain individuals from the two respondents. The initial sift accepted the initial claim against GMB and the London Borough of Enfield. A direction was made to serve the amended claim on the respondents and, notwithstanding that named individuals were in the amended claim form, the GMB and the London Borough of Enfield were served. The standard notice of a claim recites that the employment tribunal has accepted a claim against the above respondents.

67. The Acas EC certificate in the second claim is the same as that relied upon in the first claim. Mr Patel makes no issue about the same certificate being used as long as the parties are correct. In my judgment, since the tribunal accepted the second claim against the GMB and the London Borough of Enfield, so they are the correct respondents. Although the rules do not allow a respondent to object to the acceptance of a claim, reconsideration could have been sought, and this did not happen. Accordingly, I do not find that the second claim should be struck out on the basis that it does not have an Acas EC Certificate.

68. As regards the breach of contract claims against the Second Respondent, whilst constructive dismissal is referred to in the claimant's six-page typed document, this case has never been presented as unfair dismissal. His claim merely asserts "I also claim breach of contract against both the GMB and the council." No particulars are given. The claimant resigned. At best

this would be a claim for wrongful dismissal and notice pay. The claimant has not attended to explain his case. There are no details as to the fundamental breach of contract by the Second Respondent that the claimant would have to establish to prove constructive dismissal. The claimant appears to have been subject to disciplinary proceedings at the time of his resignation. I have concluded that his breach of contract claim has no reasonable prospect of success.

69. Both parties take the jurisdiction point based on time.

70. The claim was 7 months and 19 days late.

71. The claimant has not taken the opportunity to attend today to explain why it would be just and equitable to extend time and not practicable to have presented the claim in time.

72. Nevertheless, I have endeavoured to understand why he may say he submitted his claim late.

73. Taking into account the factors I need to, I make the following findings:

    73.1 The length of the delay, in the context of tribunal proceedings, at over seven months, is significant.

    73.2 The claimant asserts that he was given incorrect legal advice concerning a claim against the GMB. I take into account that the claimant himself has a law degree and was at various times studying for an LLM CPC course. He is clearly an articulate and intelligent man with some familiarity with the law. I do not conclude that an allegation that he had been provided with incorrect legal advice gives a good reason for delay. This is especially so given that the claimant can have been in no doubt that his first set of proceedings had been dismissed on 13 August 2019.

    73.3 As regards the cogency of the evidence, I take into account that any delay in proceedings is likely to affect memories, especially where the area of dispute is not well documented and concerns events surrounding a disciplinary hearing on 10 October 2018.

    73.4 The claimant did manage to present his first claim, claim number 3300388/2019 on 9 January 2019, and so had familiarity with the process and how to present a claim.

    73.5 I do not consider the claimant acted promptly following the termination of his employment on 22 February 2019 and the knowledge that his first claims had been dismissed on 13 August 2019. He has had access to legal advice and help from a union member who he had not fallen out with.

    73.6 As far as prejudice is concerned, it is inevitable that both sides will be able to point to the prejudice of being deprived of a claim and/or a

defence. However, I take into account that the respondents have already faced one claim from the claimant which has been withdrawn and, in my judgment, there would be extra prejudice in facing a second claim over essentially the same issues.

74. Taking into account all the factors that I should, in my judgment, it would not be just and equitable to extend time for the claimant's discrimination claims. Further, I find it was reasonably practicable for the claimant to have brought his breach of contract in time, Accordingly, all the claims will be struck out as regards the First and Second Respondents.

75. I now turn to the question of costs. In my judgment, it was unreasonable for the claimant to bring the second claim against the First Respondent as he had no reasonable prospects of success. All of his complaints related to matters that took place prior to 9 January 2019 and they had been dismissed on 13 August 2019. As such, he had no basis in law for bringing his second claim against the First Respondent.

76. As far as the First Respondent is concerned, the whole of the application on 29 June concerned striking out the claim against the First Respondent based on res judicata/cause of action estoppel and/or abuse of process. The First Respondent's brief fee was £500 plus VAT. The solicitor profit costs have been included in a schedule of costs prepared for the first action. There will have been solicitor profit costs associated with the hearing on 29 June 2020 and, doing the best I can, I assess those in the sum of £500 plus VAT.

77. I have a schedule of costs prepared by the First Respondent in relation to their costs of the second action. I allow the attendance on various parties in the sum of £299 plus £851 work on documents, total £1,150. I allow the claimant's brief fee of £800 plus VAT, which gives a total of £2,340.

78. Accordingly, I order the claimant to pay the First Respondent's costs of the second action in the total sum of £3,540.

79. As regards the Second Respondent, I consider that bringing the second claim for breach of contract was unreasonable as it had no reasonable prospects of success. Further, a substantial amount of the second claim was dismissed at the hearing on 29 June 2020 based on res judicata/cause of action estoppel and/or abuse of process. As such, those claims had no reasonable prospect of success and the bringing of them was unreasonable. Accordingly, I award half the Second Respondent's attendance costs of 29 June in the sum of £687. The Second Respondent has attended today to seek to strike out the claimant's claim on the basis that it is out of time. I consider it to be unreasonable conduct of the claimant not to attend today to present reasons why his claim, which is manifestly out of time, should be allowed to proceed. Accordingly, I award the Second Respondent their costs of attendance today in the sum of £1,374.

80. Accordingly, the claimant will be ordered to pay the Second Respondent's costs in the sum of £2,061.

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Employment Judge Alliott

Date: ……17/09/2020……..

Sent to the parties on: .17/09/2020.....

.....S.Kent ….....
For the Tribunal Office