



EMPLOYMENT TRIBUNALS

Claimant: Mr I. Maheshe

Respondent: West Midlands Travel Limited
T/A National Express West Midlands

Heard at: Birmingham

On: 3 June 2020

Before: Employment Judge Dean

Representation

Claimant: in person

Respondent: Ms. S. Smith, solicitor

JUDGMENT

The judgement of the Tribunal on the Preliminary Hearing is:

1. The complaint was not presented with the time limits of s123 Equality Act 2010.
2. The Tribunal does not have jurisdiction to entertain the claimant's complaint of unlawful discrimination because of the protected characteristic of his race which is dismissed.

REASONS

1. The Claimant is employed by the Respondent as a PCV Driver having begun employment with them since 25 November 2015. He remains

employed by the Respondent, based at the Respondent's Pensnett Garage. The Respondent business operates passenger carrying vehicles ("PCV") in the West Midlands area. Following a period of ACAS conciliation commencing and ending on the 19 February 2019, by a claim form presented on 21 February 2019, the Claimant brought complaints of both direct race discrimination and harassment on the grounds of race. The protected characteristic upon which Claimant relies is that of colour. The claim arises out of an incident that occurred on the 18 September 2018 on a staff bus during which the Claimant maintains that he was discriminated against by his co-worker, the driver of the bus and that he was unjustifiably asked to leave the staff bus, assaulted and not supported by the Respondent's management when he raised the matter on the day. The Respondent defends the complaints, denies the acts complained of and discrimination and/or harassment in respect of any of the acts of omissions that are established.

2. At a Preliminary Hearing, the Case Management before Employment Judge Algazy QC on the 1 November 2019 the Claimant indicated he wished to rely upon the Respondent's subsequent conduct in respect of handling his grievances as complaints of discrimination. The Respondent objects to the additional complaint in respect of the grievance raised by the Claimant on the 2 November 2018 and requires the Claimant to make a formal application to amend his complaint. The Claimant maintains that his original complaint form ET1 and the subsequent clarification provided under cover of an email dated 9 May 2019, already raised the issue and that the application to amend his claim form was not required.
3. Subsequently, the Claimant wrote to the Tribunal on the 8 November making a formal application to amend his claim appending to his application, a copy of the 13-page document which he sent to the Respondents and copied to the Employment Tribunal on the 9 May 2019 [44-56].

4. This Preliminary Hearing has been convened over a Cloud Video Platform ('CVP') which has enabled the hearing to be conducted in public as it has not been possible to make use of the Tribunal Hearing rooms and conduct the hearing in person in light of the social distancing arrangements that are presently in hand in the management of the courts response to the management of COVID-19.

The Issues

5. Time Limits/Limitation Issues

Were all the Claimant's complaints presented within the time limit set out in Sections 123(1)(a) and (b) of the Equality Act 2010. Dealing with this issue may involve consideration of subsidiary issues including whether time should be extended on a "just and equitable" basis.

6. Amendment Application

Whether the Claimant required permission to amend his claim to advance an allegation of discrimination to include a complaint about the Respondent discriminating against the Claimant because of his race in respect of the manner in which his grievance and in relation to the Respondent's handling of the incident which occurred on the 18 September 2018 was handled.

The Law

7. The law to which I have had regard in consideration of the claimant's application to amend requires me in exercising my general case management powers I have had regard to the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 ("the Rules") and the Guidance Note 1 of the Presidential Guidance on General Case Management.
8. The guidance given by Mummery J in the case of Selkent Bus Company v Moore [1996] ICR 836 sets out the non-exhaustive list of factors relevant to the exercise of discretion when considering amendment applications to consider that I should have regard to :
 - a. The nature of the amendment
 - b. The applicability of time limits
 - c. The timing and manner of the application.

The overarching principle is stated to be :

“Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship around the amendment against the injustice and hardship of refusing it.” [para4@843]

9. In exercising my discretion I have had regard to the overriding objective under the Rules to enable me to deal with a case fairly and justly which includes as far as practicable-

- a. Ensuring that the parties are on an equal footing;
- b. dealing with cases in ways that are proportionate to the complexity and importance of the issues
- c. avoiding unnecessary formality in seeking flexibility proceedings
- d. avoiding delay, so far as compatible with proper consideration of the issues and
- e. saving expense.

10. To the extent that I consider in determining the timing of the application and the issue of the tribunals exercise of judicial discretion in relation to complaints that may be presented out of time having regard to s123 of the Equality Act 2010 I have regard to the guidance provided by the statute and authorities.

11. Section 123 of the EA10 concerns time limits. It provides:

“(1) 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.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

- (a) *when P does an act inconsistent with doing it, or*
- (b) *if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.”*

12. The law provides that in respect of discrimination claims and detriment claims, if there is a continuing course of conduct it is to be treated as an act extending over a period. Time runs from the end of that period. The focus of the Tribunal's enquiry must be on the substance of the complaint that the respondent was responsible for an ongoing state of affairs in which the claimant was less favourably treated. The burden of proof is on the claimant to prove, either by direct evidence or by inference from primary facts, that the alleged acts of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs see Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA.

13. If any of the complaints were not in time, the Employment Tribunal must consider whether there is nevertheless jurisdiction to hear them. In discrimination cases the test is whether it is just and equitable to allow the claims to be brought.

14. When deciding whether it is just and equitable for a claim to be brought, the Employment Tribunal's discretion is wide and any factor that appears to be relevant can be considered. However, time limits should be exercised strictly and the Tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable to do so. The exercise of discretion is therefore the exception rather than the rule Robertson v Bexley Community Centre [2003] IRLR 434. The material judgment reads:

“An Employment Tribunal has a very wide discretion in deciding whether or not it is just and equitable to extend time. It is entitled to consider anything that it considers relevant. However, time limits are exercised strictly in employment cases. When tribunals consider their discretion to consider a claim out of time of just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise discretion. On the contrary, tribunal

cannot hear a complaint unless the claimant convinces it that it is just and equitable to extend time. The exercise of this discretion is thus the exception rather than the rule.”

15. Case law provides that consideration of the factors set out in section 33 of the Limitation Act 1980 is of assistance. The Employment Tribunal should have regard to all the circumstances of the case, and in particular to the following:

- a. the length 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 cooperated with any requests for information;
- d. the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and
- e. the steps taken by the claimant to obtain professional advice once he or she knew of the possibility of taking action.

16. In addition, when deciding whether to exercise its just and equitable discretion, the Employment Tribunal must consider the prejudice which each party would suffer as a result of the decision to be made (sometimes referred to as the balance of hardship test) British Coal Corporation v Keeble [1997] IRLR 336 EAT.

17. Failure to adopt a “checklist” approach carries the risk that a significant factor will be overlooked London Borough of Southwark v Afolabi [2003] IRLR 220 CA.

Submissions

18. In readiness for the Preliminary Hearing, the parties have agreed an indexed bundle of documents extending over 99-pages together with an additional 114-pages of legal submissions and case law provided by both parties.

19. By way of background, the Claimant began a period of early conciliation on the 19 February 2019 and was issued with an ACAS Certificate on the same day [1]. On the 21 February 2019, the Claimant presented to the Employment Tribunal his complaint of race discrimination [2-16]. In response to the Respondent's request for clarification of the Claimant's complaints as articulated by the Respondent in their response of the 1 April 2019 [17-27]. The Claimant provided Further and Better Particulars of his complaint in a 13-page document [43-56].
20. At a Preliminary Hearing before Employment Judge Algazy QC on the 1 November 2019 [31-36], the claims were identified to be that the Claimant had brought complaints of race discrimination and harassment and the Claimant suggested for the first time that his claim included complaints about the Respondent's handling of his grievance, a further complaint of race discrimination. The Claimant was given permission to apply by the 15 November 2019 to make an application to amend his claims to include the Respondent's handling of his grievance as a further complaint of race discrimination [34].
21. On the 8 November 2019 by email, the Claimant filed an application for his claim to be amended to include a claim in respect of "grievance handling in relation to the incident which occurred on the 18 September 2018" [37].
22. A substantive Preliminary Hearing was scheduled to take place on the 27 April 2020 before Employment Judge Woffenden. It was not possible to consider the substantive preliminary issues because of the intervention in events of the Tribunal's response to Covid 19 which converted the Hearing to a Private Telephone Hearing at which further directions were given to enable the parties to prepare for a subsequent Hearing listed on the 3 June 2020 which comes before me.
23. In her Case Management Summary, Employment Judge Woffenden explained to the Claimant the issues to be considered in determining whether or not it was necessary to make an application to amend a

claim. In particular, the note of the Case Management Summary confirms:

“I told the Claimant that Tribunals are told that the claim is contained in the claim form (Chandhok -v- Tirkey UK EAT/0190/14KN Paragraph 16) and if the terms of the claim require changing, that is an amendment. It is the Claimant’s primary contention that no application to amend is necessary. He referred me to the “additional information section of his claim form. I told him I had read it, but it lacked details of what was done or not done, when and by whom and attributed the reason for the Respondent’s treatment of his grievance to his wish to ensure his claim was made too late and not because of his race”. [65-66].

24. The Claimant was referred in particular to paragraph 5 of the relevant Presidential Guidance on Case Management and he was ordered to prepare a witness statement to contain all of the evidence upon which he wished to rely in relation to his amendment application. In response to the directions of Employment Judge Woffenden, the Claimant sent to the Respondent a witness statement limited to the amendment applications [69-73] in response to which the Respondent’s raised objections to the Claimant’s statement. The Respondent’s raised further objections suggesting that the statement raised not one but two new causes of action; that which had been raised by the Claimant at the Hearing before Employment Judge Algazy QC that the Respondent’s handling of the grievance was discriminatory and in addition, a complaint about the Respondent’s handling of the investigation into the bus incident on the 18 September 2018.

25. In considering the application to amend and the consideration whether the claims or any of them were presented out-of-time, if the amendment application is to be allowed, I have considered the pleadings and Case Management Summaries of preceding Hearings together with the legal submissions of the parties. I have heard from the Claimant to explain the circumstances of his late applications. The Claimant has presented statements in respect of his application to amend the original complaint form ET1 [69-73] as supplemented by 13-page further particulars of the

12 April 2019 [44-56] and in his statement in respect of an application as to why if his complaints were not presented within time as provided by Section 123 of the Equality Act, it would be just and equitable to allow complaints that are out-of-time to be considered [83-85] application.

26. To supplement the statements provided by him the Claimant gave his account to confirm that he represents himself and is not a Solicitor, but explained that he had sought advice from the CAB as he had not been able to afford the expense of instructing a Solicitor.

Amendment Application

27. The Claimant in his statement to amend the original claim, acknowledges that the amendment application that was originally put to the Respondents, as articulated by him in the Case Management discussion before Employment Judge Algazy QC, acknowledged that the claim that he wished to make by amendment raised new factual allegations in addition to those set out in the original claim. The claimant acknowledges that his original complaint referred only to the Respondent's treatment of him in respect of the incident that occurred on the 18 September 2018 and the Respondent's delay in dealing with his complaint about his co-workers treatment of him on the 18 September, which the Claimant identifies as being "the company systematically delayed the entire process of this case in order for me to be out-of-date in submitting my Tribunal claim". [13]

28. In the narrative of his complaint, at 8.2 [8] and [15] save for the generalised assertion of discrimination on the grounds of race at 8.1 [7] and 9.2 [9] in relation to his assertion that "*I am being treated less favourably because I am a black person, as I believe that if I was a "white driver" the circumstances would have been different*" the Claimant attributes the Respondent's treatment of him to be their wish to ensure that his claim to the Employment Tribunal was made too late.

29. The Claimant has acknowledged in evidence to the Tribunal that his original claim form does not make any reference to the Respondent's

treatment of his grievance being discriminatory conduct, nor does the Claimant identify how the treatment of his grievance was linked to the grounds of complaints set out in his form ET1.

30. The Claimant has suggested that he provided Further & Better Particulars to the Respondent in an email [44-56] sent on the 12 April 2019. The narrative included the contents of Claimant's grievance sent to the Respondent's HR Department on the 2 November 2018 [51-53] which referred to a "*favouritism prejudice system*" and asserted that "*I believe I am being discriminated due to the colour of my skin. I am being treated less favourably because I am a black person, as I believe if I was a "white driver" the circumstances would have been different.*" The circumstances to which the Claimant refers was the incident that occurred on the 18 September 2018. The narrative which refers to the Respondent's grievance procedure and the handling of the Claimant's grievance makes no assertion that the handling of the grievance procedure was an act of discrimination.
31. Although the Claimant did not instruct Solicitors to provide him with advice he was, throughout the investigation into the incident of the 18 September and in his subsequent Grievance Hearings, represented by his Trade Union Representative, the Claimant is a member of Unite the Union.
32. At the Preliminary Hearing, the Claimant asserted that although accompanied to the meetings by his Trade Union Representative, he had not been supported by his Trade Union Representative in the meeting and suggested that he was fighting a system of racial discrimination against him by the Respondent and by the Trade Union. The Claimant makes no assertion in his narrative [page 56] that the Grievance Officer Mr Greenaway took the decision that he did because of the Claimant's race or that the Investigation Manager Mr F. Smith conducted the investigation in the way that he did which caused the Claimant to be treated less favourably because of his race.

33. In the Claimant's application to amend, as presented on the 8 November 2019 [37-62] as expanded upon further in the Claimant's statement to support the application [69-73], the Claimant seeks to introduce allegations of race discrimination in relation to (1) the Respondent's handling of the investigation into the first incident which occurred on the 18 September 2018 and (2) the handling of his grievance presented on the 2 November 2018.

34. On close examination of the original claim as set out in the form ET1, neither of the allegations of race discrimination in relation to the handling of the investigation into the first incident or the handling of his grievance presented on 2 November are referred to, a fact acknowledged by the Claimant at the Hearing. The factual matrix introduced by the new allegations extend significantly beyond the existing complaint which relates to a single incident that occurred on the 18 September 2018. In his original complaint, the Claimant asserts that the process of the case, namely his complaint about the Respondent's treatment of him on 18 September was delayed in order to leave the Claimant to present his complaint out-of-time.

35. The Claimant asserts that the Appeals Manager Mr Greenaway, was *"very biased in the way he dealt with the grievance and said his decision was based on what he had been told"*. The Claimant does not assert at any stage that Mr Greenaway's decision not to uphold the Claimant was biased because of the Claimant's race. In considering whether to allow the Claimant's application to amend the claim.

36. I am drawn to the guidance provided by Mummery LJ in Selkent Bus Company -v Moore 1996 IRLR661 and also the Presidential Guidance on General Case Management (2018).

37. In considering the relevant circumstances, although there is no exhaustive list of what is relevant, Mummery LJ gave the following guidance in Selkent Bus Company v Moore paragraphs 4 and 5 a-c

" (4) Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice

and hardship of allowing the amendment against the injustice and hardship of refusing it.

(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:

(a) The nature of the amendment

Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) The applicability of time limits

If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions eg, in the case of unfair dismissal, S.67 of the 1978 Act.

(c) The timing and manner of the application

An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time - before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

Nature of the Amendment

38. The Claimant seeks to bring entirely new allegations of race discrimination in relation to the handling of the investigation and of his grievance.

39. The applications are not additional factual details of an existing allegation or the substitution or addition of labels for facts that are already pleaded. The new allegations are entirely new factual allegations which change and considerably extend the basis of the existing claim. The original claim related to the single incident on the 18

September 2018 and the additional complaint in relation to the handling of his grievance relates to the grievance presented on the 2 November which was investigated on the 3 January and determined on the 14 February 2019. In relation to the subsequent allegation that there was discrimination in relation to the handling of the investigation into the bus incident, that investigation took place on the 1 November 2018 and was subsequently reconvened on the 27 November 2018 and all of those facts were known to the Claimant when he presented his original complaint that were not referred to in his original complaint other than to suggest that the company systematically delayed the entire process of the case in order for the Claimant to be out-of-date in submitting his Tribunal complaint.

40. The new allegation in respect of handling the grievance would require an additional witness, Mr Dwain Greenaway to give evidence as the alleged perpetrator of the discrimination in the way in which he handled the grievance. Mr Greenaway is not referred to the original complaint. Had the Claimant brought complaints in relation to the grievance process, or in relation to the investigation, the outcome of which were communicated to the Claimant on the 14 February 2019 and on the 27 November 2018 respectively within his original complaint form, the complaints would have been in time and the Claimant would have known that to be the case. On the contrary however, complaints were not presented and raised in the original claim form which the Claimant acknowledged was presented out-of-time in respect of the one complaint that the claim form raised namely, the Respondent's treatment of him on the 18 September 2019. The proposed amendment is a substantial alteration pleading a new cause of action.

Applicability of Time Limits

41. In determining whether the new course of action raised by the Claimant in his new allegations is out-of-time, it must be considered from the date of the Claimant's application to amend. The allegations in relation to the grievance process relate to the latest date, being the outcome of the grievance on the 14 February 2019, that complaint in respect of matters

aggrieved, would have had to be presented by the 13 May 2019 at the latest and in respect of his allegation in relation to the investigation which was communicated to him on the 27 November 2018 by 26 February 2019. In the event the application to amend the complaint in respect of the grievance was made under cover of the Claimant's communication to the Tribunal on the 8 November 2019 and in respect of the allegations that the investigation into the events of the 18 September was discriminatory, that allegation was raised as an application to amend on the 4 May 2020 some 11- months and 21-days out-of-time, the Claimant has sought to include an amendment to introduce complaints both about the grievance handling previously raised on the 8 November 2019 and an additional amendment in relation to the investigation handling raised as an amendment application on the 4 May 2020. The amendment to add a complaint about the handling of the investigation was not contained in the earlier amendment application raised before Employment Judge Algazy QC. The present amendment applications are out-of-time, even if the Claimant's original formal application to amend his claim was made on the 8 November 2019, it was made 5-months and 26-days out-of-time.

42. In dealing with this application to amend his claim form, the Claimant has explained that he did not seek legal advice before completing the form ET1 and that he assumed the details included on the form would be sufficient [69]. The Claimant states in his claim form that he complained of race discrimination and when that claim form was presented on the 21 February 2019, all the facts upon which the Claimant now seeks to make an amendment were within the Claimant's possession. The Claimant had access to advice from his Trade Union who had accompanied him to one investigation and grievance meetings. At the end of the grievance hearing on the 14 February 2019, the Claimant had stated that he would be "contacting my legal representative" [page 99], and although the Claimant has stated that he did not in fact obtain legal advice, that was his personal decision.

43. The Claimant has accepted that he was aware of the 3-month time-limit which was acknowledged in his original claim form to the Tribunal in

respect of the incident of the 18 September 2018. I conclude that the Claimant was aware of any legal rights not to be discriminated against because of his race, was aware that the forum to which complaints about discrimination should be brought to the Employment Tribunal and he was aware of the time-limits for presenting a complaint to an Employment Tribunal. The Claimant confirmed in his evidence to me that when he went to ACAS for conciliation in February 2019 he was aware of the 3-month time-limit and suggested that in his case, he understood that because he considered the Respondent's treatment of him was a continuing act throughout the process of the investigation and grievance, he considered it was a continuing act up until the 14 February 2019. That being the case, the Claimant was aware that, if he wished to present a complaint in respect of the conduct of the investigation into the events of the 18 September, or the handling of his grievance which concluded on the 14 February 2019, that complaints in respect of those allegations ought to have been presented within his original claim form, or at least, been presented within a period not later than the 13 May 2019, which it was not. In respect of complaints about the handling of the investigation, which was concluded on the 27 November 2018, the primary limitation expired on the 26 February 2019. The complaint was not articulated in the original claim form, nor in the Further Particulars presented to the Respondent in May 2019.

Timing and manner of application

44. The Claimant has not provided an explanation for why his application to add the new complaints were not made sooner than they were [69-73] save that the Claimant asks that the Tribunal extend the time limit on the grounds it would be just and equitable to do so. The Claimant simply asks that the Tribunal extend the time limit, all evidence having been exchanged with the Respondents in respect the new allegations and referring to the case of Pontoon v Shinh UKEAT/0094/18/LA in which Tribunals are reminded of the need to consider all of the circumstances of the case when deciding whether to permit an amendment to a claim form and that the so called Selkent factors are not exhausted. Even within the Claimant's further particulars provided to the Respondent on

the 9 May 2019 [43-56] and is provided with a chronology of events the claimant does not provide the Respondent with information that would lead the Respondents to consider that the Claimant asserted that the Respondents handling of their grievance procedure was an act of race discrimination or that the Respondent's investigation into the events of the 18 September, was a further act of race discrimination.

45. The nature of the Claimant's amendment application refers to the often repeated narrative the 13 page Further & Better Particulars document appended to the last amendment application of the 4 May 2020 [69]. However, the Claimant has not set out the basis upon which he asserts that the Respondent's handling of his grievance application was an act of discrimination because of his race, or that the handling of the investigation into the events of the 18 September 2018 were motivated because of the Claimant's race. The Claimant acknowledges that the Respondent concluded on the evidence before them did not support any assault having taken place during the bus incident on 18 September 2018.

Balance of hardship and injustice

46. I have concluded that the Claimant was aware of the existence of Employment Tribunals and was aware of the entirety of the factual matrix concerning the events of the 18 September 2018, the investigation into those events and the respondent's treatment of the Claimant's subsequent grievance. All of the matters about which the Claimant complains were known by him at the time and he did not bring complaints at the relevant time. The single matter in respect of which the Claimant's original complaint was brought, related to a single incident that occurred on the 18 September 2018 and the Claimant does not suggest that that incident formed part of the continuing course of conduct continuing with the grievance decision communicated on the 14 February 2019, or the outcome of the investigation into the incident of the 18 September 2018 that was determined on the 27 November 2018.

47. The allegations in respect of which the amendment applications are made are matters that were not made evident to the Respondent before the date of the applications, the allegation all relate to matters about which the claimant knew when presenting his original complaint to the Employment Tribunal and he choose not to raise a timely complaint when the claim was presented. The amendment applications have been made substantially out-of-time and to defend those additional applications would engage the Respondent in significant hardship and injustice in calling additional evidence at an Employment Tribunal. The respondent has in responding to the claimants original application acted in a timely manner and has dealt with the claimants concerns when raised by him in their employment. I considered that the balance of hardship and injustice weighs more substantially against the Respondent, than the Claimant. For these reasons, I concluded that the Claimant's amendment application should be refused.

Original Claim

48. Finally I turn to consider whether or not the Tribunal has jurisdiction to entertain the original complaint which the claimant accepts was a claim which is presented out-of-time.

49. The Claimant does not dispute that his original complaint is presented not within time and makes an application if the Tribunal does not have jurisdiction to entertain a complaint that is presented outside the time limits set out at s123 of the Equality Act to consider whether it is just and equitable to extend time to allow the complaint to be heard.

50. The complaint in respect of which the Claimant's application to the Tribunal presented on the 21 February 2019 was presented was in respect of an act which occurred on the 18 September 2018. The Claimant made a reference to ACAS to commence early conciliation on the 19 February 2019, the same day on which the period of early conciliation expired. The early conciliation commenced outside of the period of the primary 3-month limitation period provided by Section 123 of the Equality Act 2010. The claim form was presented to the Tribunal

on the 21 February 2019 a period of 66 days after 17 December 2018, the date by which a claim ought to have been presented or by which a reference to early conciliation through the offices of ACAS ought to have begun. The claimant was aware on presentation of his complaint that it was presented out of time. The Claimant's witness statement in relation to the reason why his complaint was presented to the Tribunal out-of-time was contained in the statement directed by Employment Judge Woffenden and is contained in the bundle [83-85]. In essence, the Claimant states:

"I was trying to solve a problem with my employer and missed the time limits. This is due to the fact that West Midlands Travel systematically delayed everything, in an attempt to protect their own kind."

51. The Claimant's complaint relates to an incident that occurred on the 18 September 2018. Following an initial fact-finding investigation into the incident, the Claimant, unhappy with the Respondents conclusions, submitted a grievance through his Trade Union to the Human Resources Department on the 2 November 2018 and in his statement, [84] the Claimant acknowledges that when he received a letter from Mr Richard Smith, the Respondent on the 9 November 2018, proposing a reconvened fact-finding interview on the 27 November 2018, it is the Claimant's account that he:

"Realised that they were all part of the prejudice system which is determined to suppress the truth and waste as much time as possible until 3-months had gone past once she had communicated with Richard Smith, she completely disregarded everything we had discussed and wrote me the following email"

52. The Claimant evidently was aware of an employee's right not to be discriminated against in breach of the Equality Act and of the jurisdiction of an Employment Tribunal to consider complaints of discrimination and the time limits within which complaints had to be brought. The Claimant was advised throughout by his Trade Union Representative. Unison, the Union, who had the ability to provide legal advice to him. When the Claimant presented his complaint to the Tribunal on the 22 February

2019, the Claimant did so, aware of the fact that the claim was presented outside the primary time limit of 3-months from the date of the acts about which a complaint was raised. The claimant expressly alleged that:

“ The company systematically delayed the entire process of this case in order for me to be out of date in submitting my tribunal claim.”

53. The Claimant in his grievance letter of the 2 November 2018 [53] confirmed that:

“I believe I am being discriminated due to the colour of my skin. I am being treated less favourably because I am a black person, as I believe if I was a ‘white driver’ the circumstances would have been different. Fairness at work is a vital part of a successful business.”

54. The grievance lodged by the Claimant focuses on his allegation of discrimination. The Claimant’s grievance, he is replicated in his narrative to his claim form.

55. The Claimant makes a serious allegation of discrimination of the incident that occurred on the 18 September 2018 and provides no explanation for his delay in presenting a complaint in respect of that act of discrimination, other than to suggest it would be just and equitable to extend time to allow his claim to be heard and has not explained why he considers that to be the case.

56. In an Employment Tribunal, time limits are included in the Equality Act 2010 at s123 and are there to be adhered to. S123(1)(1)(b) provides that a claim cannot be heard unless presented within three months of the act to which the complaint relates or *“such other period as the employment tribunal thinks is just and equitable”*. To extend time because it is just and equitable to do so, is the exception rather than the rule in the exercise of an Employment Judge’s discretion.

57. There is no suggestion in this case that the Claimant was misdirected by the Respondent to defer bringing in the Tribunal claim, until the outcome of his grievance. The Claimant was clearly aware of the time within which a complaint to an Employment Tribunal ought to be presented and indeed his claim form contains information that is

identical to the information contained in rather greater detail in his grievance of the 2 November 2018 [53] in which the Claimant had cited race discrimination and the Equality Act 2010. As a consequence I am led to conclude that as early as November 2018, the Claimant was aware of his rights not to be unlawfully discriminated against because of his race in breach of the Equality Act 2010.

58. In his statement prepared to support his application for his complaint to be considered, albeit out-of-time, the Claimant has described circumstances in which, having raised a complaint about the incident on the 18 September 2018, the incident was investigated. The circumstances in respect of which the Claimant complained that he had been the victim of an assault on the 18 September, which complaint was not upheld in the investigation on the 1 November and subsequently at a reconvened investigation meeting on the 27 November 2018, and the investigation concluded that no further action was to be taken against Mr Caswell, the alleged assailant.

59. The Claimant has not described to me any obstacle that prevented him lodging his claim within the time, on or before 17 December 2018, by which time he ought to have commenced early conciliation through the office of ACAS. The legislation requires claims to be presented promptly and in the absence of an obstacle preventing the timely presentation of the claim the strict time limit should be enforced and there is no presumption that the discretion should be exercised unless the tribunal can justify failure to do so, in the contrary the Employment Tribunal cannot entertain a complaint that is out of time unless the claimant convinces it that it is just and equitable to do so.

60. I have considered the length of the delay in presenting the complaint in relation to the alleged discrimination that occurred on 18 September 2018. The claimant was aware of his rights under the Equality Act as early as November 2018 and at that time he was being advised by his trade union Unite. The matters complained of were a single discrete act of alleged discrimination and the claimant delayed presenting his complaint by a period of some 67 days notwithstanding that within the

same time he presented an internal grievance to the company about their handing of his complaint.

61. The respondent dealt with the claimant’s complaint about the alleged act of discrimination on 18 September 2018 in a timely manner and the claimant did not make a timely complaint to the employment tribunal.

62. The respondent who continued to employ the claimant subsequently dealt with eh claimants grievances against them and to the extent that the claims are brought outside the tribunal time limits the cogency of evidence in relation to the events of 18 September 2018 was inevitably likely to be affected by the delay.

63. The claimant has provided no reason why it should be just and equitable to extend time other than the fact that he has a matter about which he wishes to complain, there is no reason why I might be persuaded to exercise my discretion. I conclude that the Claimant’s complaint in respect of the incident on the 18 September 2018 was not presented to the Tribunal in time and the Tribunal does not have jurisdiction to entertain his complaint which is hereby dismissed.

Employment Judge Dean
13 October 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE