



EMPLOYMENT TRIBUNALS

Claimant

Mr J Armitage

v

Respondent

Virgin Atlantic Airways Limited

OPEN PRELIMINARY HEARING

Heard at: Croydon Employment Tribunal (by video)

On: 22 January 2021

Before: Employment Judge C H O'Rourke

Appearances

For the Claimant: In person

For the Respondent: Ms C Lord – Counsel

JUDGMENT

1. The Respondent's application for strike out of the Claimant's claim, for want of jurisdiction, as being out of time, is refused.
2. The Claimant's applications to amend his claim and for a document disclosure order are refused.
3. The matter will proceed to hearing, as per case management orders of the same date.

REASONS

Issues

1. Following a Tribunal order of 23 September 2020, this Open Preliminary Hearing was listed to determine the following matters:
 - 1.1. Whether the alleged conduct upon which the Claimant seeks to rely ('the conduct'), has been brought within time, either in whole or part and if so;
 - 1.1.1. Which sections of the conduct are out of time?

- 1.1.2. Does any such conduct form part of a continuing act (s.123(3)(a) Equality Act 2010 ('the Act'))?
 - 1.1.3. Whether the Tribunal should exercise its discretion, subject to s.123(1)(b) of the Equality Act 2010, to extend time, on the basis that it would be 'just and equitable' to do so?
 - 1.2. Whether the Claimant should be permitted to amend his claim, to include claims of victimisation, as per his application to the Tribunal of 4 December 2020;
 - 1.3. To make directions, as appropriate.
2. The Claimant has also applied for a third party disclosure order against the social networking app Grindr, for disclosure by that service of details of one of their user's profiles, to include confirmation of the user's full name, telephone number and email address (against information already held by the Claimant). The Claimant seeks to allege that a former colleague, who he states was involved in the incident(s) that lead to this claim, has a profile on this service which may indicate that that person is racist and is also being dishonest, on the basis that they apparently previously denied having such a profile. The Claimant has two profile screenshots of this person's account, clearly showing the user's face. On that basis, therefore, I queried why, if he already had such detail, he would need any more, as he could simply provide such documents to the Tribunal, for them to compare to this person, who would be giving evidence in Tribunal? He was unable to explain the necessity for such further disclosure and I did not consider it proportionate or in the interests of justice to make such an order, particularly bearing in mind the unnecessary intrusion into this person's private life. I therefore refused the application.

The Law

3. Section 123(1) of the Equality Act 2010 states that:
- (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.
4. The case of **British Coal Corporation v Keeble [1997] IRLR 336 UKEAT** which indicated that the factors set out in s.33(3) of the Limitation Act 1980 may be useful when considering time limitation points. These are:
- (a) the length of, and the reasons for, the delay on the part of the plaintiff;
 - (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed ...

(c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

(d) the ...;

(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

5. However, the very recent case of **Adedeji v University Hospitals Birmingham NHS Trust [2021] EWCA Civ 23** cautioned, at paragraph 37 that:

'...rigid adherence to a checklist (with reference to s.33 Limitation Act) can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language (as occurred in the present case – see para. 31 above). The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking.'

6. The case of **Robertson v Bexley Community Centre [2003] IRLR 434 EWCA** which stated, in the context of the exercise of discretion as to a time limit in discrimination cases that *'there is no presumption that they (tribunals) should do so, unless they can justify failure to justify the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule.'*

7. **Selkent Bus Company Ltd v Moore [1996] ICR 836 UKEAT**, in which the relevant factors as to granting leave to amend a claim would include:

- The nature of the amendment sought – effectively whether it is merely a re-labelling of an existing claim, or adds a new cause of action.
- The applicability of time limits. Whether the claims are out of time.
- The timing and manner of the application. Delay is not decisive as to refusal of an application, but it is relevant to consider why it was made when it was.

8. The Presidential Guidance, emphasising **Selkent**, states that:

"Tribunals must balance injustice and hardship of allowing the amendment against the injustice of hardship of refusing it"

9. Rule 2 of the Employment Tribunal's Rules of Procedure states:

Overriding Objective

2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

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

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

Submissions

10. I heard submissions from the Claimant, who also provided a witness statement and from Ms Lord, who also provided a skeleton argument.

11. Chronology. The undisputed chronology in this matter is as follows:

11.1. 9 October 2018 – an incident in a bar in Orlando, Florida, leading to allegations of direct race discrimination and harassment, involving a Mr Slaughter, a colleague.

11.2. 10&11 October 2018 – further alleged acts of discrimination and harassment by Mr Slaughter and another.

11.3. 14 October 2018 – a manager informs the Claimant that he would be conducting a disciplinary investigation, resulting in a further allegation of harassment by the Claimant.

11.4. 31 October 2018 – having raised a complaint about the Orlando incident, the Claimant subsequently alleges that failure to deal with it in a reasonable time was harassment.

11.5. 21 February 2019 – the Claimant is advised that following the conclusion of the disciplinary investigation, there is a disciplinary case for him to answer.

11.6. 20 March 2019 – the Claimant commences ACAS Early Conciliation (EC).

11.7. 27 March 2019 – he is sent a copy of the investigation report and supporting statements.

- 11.8. 13 April 2019 – the Claimant raises a grievance against Mr Slaughter (the alleged protected act).
- 11.9. 20 April 2019 - EC Certificate issued.
- 11.10. 20 May 2019 – ET1 presented.
- 11.11. 11 July 2019 – Claimant alleges victimisation (as per his amendment application), in relation to a flight roster. (The Respondent contends that as the Claimant's subsequent application was not presented until 4 December 2020, over thirteen months have elapsed since the notional time limit (for this incident) of 10 October 2019).
- 11.12. 20 August 2019 – a further alleged act of victimisation, in relation to alleged racial profiling (again, as per amendment application). (Again, the Respondent contends that over twelve months have elapsed since the notional time limit of 19 November 2019).
- 11.13. 19 September 2019 – following a preliminary hearing (PH), a final hearing is listed for October 2020. The Respondent made the application which is one of the subjects of this hearing today and the Claimant was first ordered to make his amendment application (the one being heard today), by 22 November 2019. A further PH was listed for 13 December 2019 to determine such applications.
- 11.14. 25 November 2019, it was agreed by the Tribunal and the parties that the deadline for the Claimant to submit his amendment application would be varied to a date within three weeks of his receipt of the disciplinary and/or grievance outcome. The PH listed for December was adjourned.
- 11.15. 6 March 2020 – while the disciplinary outcome had been provided in October of the previous year, the grievance outcome was not provided until this date. The Claimant alleges discrimination in respect of this process, as per his application for amendment. (Again, the Respondent contends that over six months have elapsed since the notional time limit of 5 June 2020.)
- 11.16. 27 March 2020 – the agreed deadline for the Claimant to present his application for amendment, which was not complied with by the Claimant.
- 11.17. 22 September 2020 – a PH, at which, as the Claimant had still not provided his application, he was again ordered to do so, by 20 November 2020. The final hearing listed for October 2020 is vacated and today's PH is listed.
- 11.18. 10 November 2020 – the Tribunal extends time for presentation of the application, to 4 December 2020, with which the Claimant complied.
12. Respondent's application to strike out Claim. This application is refused, on the basis that I consider it just and equitable to extend time, to permit the Claimant's ET1, presented on 20 May 2019, to be within time, for the following reasons:

- 12.1. The Claimant was informed on 21 February 2019 that he was to be the subject of disciplinary proceedings, in relation to the incidents of mid-October 2018. His evidence on this issue, which I had no reason to doubt, was that, to that point, he believed that the dispute between him and those involved in the incidents would be resolved by way of internal mediation, having been informed so by the Respondent, thus obviating any need for Tribunal proceedings and allowing all concerned to put the matter behind them. However, when he discovered that he was, instead, to be the subject of disciplinary proceedings, he realised that his allegations of discrimination were not going to be resolved and that therefore the only option open to him was to pursue these proceedings. I consider, therefore, applying **Keeble** that the Claimant was effectively awaiting further information from the Respondent, before he could take the step of Tribunal proceedings, with the no-doubt potential risk to relations between him and the Respondent (as he continued in their employment) at the forefront of his mind. It is not, I consider, an unreasonable step for a continuing employee to seek to resolve a dispute amicably, if at all possible, before taking the matter to a tribunal.
- 12.2. The delay in doing so is not excessive (on the Respondent's assessment approximately four months) and was exacerbated, in any event, by the Respondent taking all of four months to even decide whether or not they would be taking disciplinary action against the Claimant. I don't consider that that delay (in the context of all the subsequent delay in the progressing of this matter, will have any contributory effect on the cogency of the evidence).
- 12.3. I consider that the balance of prejudice falls in the Claimant's favour as, without such extension, he will be debarred from his claim of discrimination, whereas the Respondent has always known they faced such a claim.
13. Claimant's Application to Amend his Claim. Applying **Selkent**, this application is refused, for the following reasons:
- 13.1. The claim sought to be added contains an entirely new cause of action, a claim of victimisation by a person completely unrelated to the original claim. It is therefore a major amendment.
- 13.2. The incidents relied upon range from thirteen to six months outside the normal time limit, with inevitable consequences for cogency of the evidence, hugely contributed to by the Claimant's failure to comply with Tribunal orders.
- 13.3. The Claimant has provided no satisfactory reason, whatsoever, as to why he has failed to make this application within any reasonable timeframe. He has had advice from his trade union throughout much of this time and having already brought his original claim, it should have been apparent to him what was required to submit his application.

13.4. He has failed to comply with two tribunal orders in this respect and only just met the most recent deadline, when time was extended for him to do so.

13.5. In respect of considering the balance of prejudice to the parties, the balance falls in the Respondents' favour, for the following reasons:

- 13.5.1. The effect on the cogency of the Respondent's evidence;
- 13.5.2. The Claimant can continue with his original claim;
- 13.5.3. He is principally at fault for the delay in the progress of this matter to final hearing and it is in the interests of justice for this matter to be heard as promptly and as economically as possible, bearing in mind the resources (including that of the Tribunal) that have already been spent upon it (Rule 2 – the Overriding Objective).

Employment Judge O'Rourke
Dated 1 February 2021