



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr C Gonsalves

AND

Respondent

Dynamatic Hydraulics Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol (By video – CVP)

ON

8 and 9 March 2021

EMPLOYMENT JUDGE GRAY

MEMBERS

DR J MILLER

MRS L SIMMONDS

Representation

For the Claimant:

In person

For the Respondent:

Mr J Wibberley (Counsel)

JUDGMENT

The unanimous judgment of the tribunal is that:

- The Tribunal does not have jurisdiction to hear the Claimant's claim of race discrimination. The claim was not brought within the primary time limit (section 123(1)(a) of the Equality Act 2010) and it would not be just and equitable to extend time to allow the claim to be brought within time (section 123(1)(b) of the Equality Act 2010).
- The claim is dismissed.

JUDGMENT having been delivered orally on the 9 March 2021 (and then having been sent to the parties on the 11 March 2021) and written reasons having been requested by email dated 17 March 2021, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In this case the Claimant claims (by a claim from presented on 2 October 2019) that he was discriminated against because of a protected characteristic, namely race.
2. The claim is for direct discrimination and harassment. The Respondent contends that there was no discrimination.
3. The Claimant notified ACAS of the dispute on 16 August 2019 and a certificate was issued on 30 September 2019. Therefore, a complaint about an act or omission on or after 17 May 2019 would be in time.

Background

4. By way of background there have been three case management preliminary hearings in this matter where the issues to be determined at this final hearing were agreed.
5. The complaints consist of three allegations of harassment and four allegations of direct discrimination. Three of the allegations are the same for both heads of complaint. The first allegation in both heads of complaint is potentially out of time (relating to an alleged period of March to June 2018) so time limit jurisdictional issues are also relevant to this claim. The Claimant had submitted that the allegations were conduct extending over a period, so all are in time by reference to the more recent allegations.
6. A summary of the complaints and the background to this claim are set out by EJ Bax in his case management summary from the hearing on the 22 April 2020.
7. As is noted by EJ Bax, the Claimant identifies as a black male. On the 23 April 2019 the Claimant raised a grievance about racist abuse. He says that he was referred to as Usain Bolt. On the 17 July 2019 the Respondent dismissed the grievance and found that there was not a racist connotation and it was not malicious. The Claimant says that a stereotypical assumption had been made about the kind of behaviour black people should endure and racist behaviour was treated less seriously than other offensive behaviour. The Claimant appealed on the 25 July 2019. His appeal was dismissed on the 4 October 2019.
8. Although the Claimant is now no longer employed by the Respondent, the termination of the Claimant's employment is not an issue for this Tribunal.

9. The issues in this claim have been helpfully set out by EJ Bax in his case management summary from the hearing on the 22 April 2020, as follows:

10. Section 26: Harassment on the grounds of race

- a. Did the Respondent or its employees engage in unwanted conduct as follows:
- i. Between March and June 2018 Angus Silman referred to the Claimant as Usain Bolt and made comments about Indian people as 'dirty filthy people'.
 - ii. On 17 July 2019 dismissed the Claimant's grievance;
 - iii. On 4 October 2019 dismissed the Claimant's grievance appeal.
- b. Was the conduct related to the Claimant's protected characteristic?
- c. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him? If not, did it have the effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him? In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.
- d. If so, did the Respondent take all reasonable steps to prevent its employees from carrying out the acts in the course of their employment?

11. Section 13: Direct discrimination on the grounds of race

- a. Did the Respondent or its employees subject the Claimant to the following treatment falling within section 39 Equality Act, namely:
- i. Between March and June 2018 Angus Silman referred to the Claimant as Usain Bolt and made comments about Indian people as 'dirty filthy people'.
 - ii. On 17 July 2019 dismissed the Claimant's grievance;
 - iii. Failing to conclude the grievance appeal within a reasonable time;

- iv. On 4 October 2019 dismissed the Claimant's grievance appeal.
- b. Did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies upon the following comparators; and/or hypothetical comparators?
- c. If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?
- d. If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?
- e. Did the Respondent take all reasonable steps to prevent its employees from carrying out the acts in the course of their employment?

12. Time/limitation Issues

- a. The claim form was presented on 2 October 2019. Accordingly, any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction.
- b. Can the Claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?
- c. Was any complaint presented within such other period as the employment Tribunal considers just and equitable?

13. Remedies

- a. If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.
- b. There may fall to be, a declaration in respect of any proven unlawful discrimination, and/or compensation for loss of earnings, injury to feelings.

14. The suggested timetable for the final hearing, which was listed for four days, as referred to in the case management summary of EJ Bax, was as follows:

Day 1	2.5 hours	Tribunal reading
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	3 hours	Claimant's evidence
Day 2		Respondent's evidence
Day 3	2 hours	Respondent's evidence
	½ hour each	Closing submissions
		Tribunal deliberations
Day 4		Deliberations, Judgment and remedy, if appropriate

This hearing

15. For our reference at this final hearing we were presented with:

- a. An agreed bundle of 226 pages;
- b. Four witness statements on behalf of the Respondent, from Darren Fisher, Marissa Boulton, Clive Ferris and Ian Harper;
- c. An agreed chronology (save for the Claimant requesting that the history of the Respondent Company's ownership (and change of name) and the date of Mrs Emma Fletcher termination of employment with Respondent be included. The Respondent did not agree that this information was relevant to the claim);
- d. A cast list; and
- e. Respondent's Counsel's skeleton argument.

16. The document that had been submitted by the Claimant as his witness statement was an email dated 2 February 2021 listing 14 bullet points of which only the first ... ***"The Company placed me with a abusive racist trainer which ended up giving me a heart attack from the daily abuse"*** appeared to relate to the issues before us.

17. It was noted that there was nothing else in the witness statement about the allegations or issues we understood we were addressing in this 4-day final hearing.

18. Respondent's Counsel said that the Claimant's submitted witness statement and its lack of content had been the subject of a strike out application by the Respondent. Counsel explained that the application had been determined by EJ Midgley and refused on the 3 March 2021 because it was said a fair hearing was still possible.

19. The Claimant was asked if he still made complaints against the Respondent as set out by EJ Bax. He confirmed that he did.

20. The Claimant was asked in view of the content of his witness statement what evidence he relies upon, other than the first bullet point. He confirmed that it was also page 149 of the bundle. This is a copy of his grievance letter about the conduct of Angus Silman, which he had addressed to MARRISA at the Respondent and is dated 23 April 2019. The Claimant confirmed that he has nothing else to give.
21. The panel then went through what had happened at the previous case management hearings to confirm that the Claimant understood matters as to the complaints being made and the production of witness statements.
22. The relevant details from those case management orders as discussed are summarised below:
23. There have been three previous case management preliminary hearings in this matter:
 - a. Before EJ Bax on the 22 April 2020; this set out the three allegations of harassment and four allegations of direct discrimination. It also gave directions for witness statements and it was agreed the Claimant could have up to 4,000 words for his statement (see paragraph 8.5). Witness statements were ordered to be exchanged on the 30 September 2020.
 - b. Before EJ Livesey on the 31 July 2020; this concerned the Claimant's application to amend to add a complaint of disability discrimination which was refused.
 - c. Before EJ Goraj on the 3 December 2020; this recorded a variation to the issues agreed with EJ Bax by including reference to who the discriminators were. It was confirmed as being Angus Silman for allegation 1, Ian Harper and Darren Fisher for allegation 2 and Darren Fisher for allegations 3 and 4. The date for the exchange of witness statements was also varied to 1 February 2021 (see paragraph 15).
24. The Claimant agreed with the summary. It was confirmed that the Claimant understood the issues and that the allegations being made, as recorded at the case management hearings, were three of harassment and four of direct discrimination on the grounds of race.
25. The panel confirmed that from what the Claimant was submitting we only had evidence from him concerning allegation 1. The parties were informed that we would therefore need the Claimant to confirm if he still intended to pursue the other allegations. However, before the Claimant was asked to

confirm his definitive position, the time limit jurisdictional issue and its implications if only allegation 1 is being pursued, were explained.

26. The Tribunal file shows that the claim was submitted on 2 October 2019, the ACAS early conciliation certificate ran from 16 August 2019 to 30 September 2019. So, acts on or after 17 May 2019 would be in time.
27. If the Claimant only now makes allegation 1 then we can only consider whether it is just and equitable to extend time (as that allegation relates to the March to June 2018 period).
28. The Claimant confirmed that he understood this and he confirmed that he was only claiming allegation 1, only presenting evidence about that and was relying on his medical notes to support why it was just and equitable to extend time (the medical notes he was referring to were identified as being those at pages 203 to 208 of the bundle).
29. Respondent's Counsel then submitted that there was prejudice to the Respondent as Angus Silman is no longer an employee (he had been, Counsel submitted, if the claim had been submitted in time for allegation 1). Counsel also submitted that the Claimant has not previously claimed that the actions of Angus Silman had caused his heart attack. Further, it was submitted that the Claimant has not got evidence to prove why it is just and equitable to extend time, even if what he says is taken at its highest. As a result, the Tribunal could determine to strike out his claim now if we wanted to. Respondent's Counsel confirmed that he was not applying for the claim to be struck out though, just highlighting what processes we can consider.
30. In response the Claimant said that it was not easy and he did not know about the 3-month policy. He was also getting rehab after his heart attack. He also referred to meeting with an employment specialist (he referred to as Lift) and contact with the CAB and ACAS.
31. The panel then adjourned to discuss matters as we needed to decide how to proceed in line with the overriding objective and what was proportionate.
32. Upon resuming it was explained that a primary issue for us, based on the complaint the Claimant confirms he now makes, is the just and equitable extension question. This time limit jurisdictional issue has an impact on what we can consider and determine.
33. The Claimant appears to have started work for the Respondent on the 6 March 2018 (based on the claim form) and his heart attack was on the 2 June 2018 (based on pages 203 and 204), he relies upon his grievance at page 149 about his complaint against Angus Silman which relates to the March to June 2018 period. The claim was submitted on the 2 October 2019

so the allegations about Angus Silman are potentially out of time. We considered it was proportionate therefore to hear facts / evidence under oath from the Claimant as to what he says prevented him from putting his claim in before then (as he has now asserted such matters in reviewing the issues we are to determine).

34. The panel proposed that this was done by oral evidence from the Claimant given under oath and then followed by an adjournment while Respondent's Counsel prepared his cross-examination on what had been heard. Confirmation will also be needed as to what evidence the Respondent intends to submit and call. The panel considered this was proportionate to get the Claimant's evidence on these issues confirmed now. We confirmed that this will mean the Claimant remains under oath over the adjournment period.
35. This process was agreed to by the parties.
36. The Claimant's evidence, including adjournments as needed and cross examination was concluded at just after 4pm.
37. It was then agreed with the parties that the Respondent's representative would email the Claimant and the Tribunal that evening detailing which of the Respondent's witnesses, which paragraphs from their statements, and the page references from the bundle it would be submitting as its evidence. It was agreed we would resume the hearing the next day at 11am to give the Claimant time to read those parts and pages, identify what he challenges and prepare his cross examination.
38. At the commencement of the second day of hearing it was confirmed that the panel had read the material confirmed as being submitted by the Respondent. It was also confirmed that the Claimant had read it all and he was ready to proceed. The material was:
 - a. The witness statement of Ian Harper – paragraphs 6, 10, 12 and 22 to 24
 - b. The witness statement of Marissa Boulton - paragraphs 24, 26 and 31
 - c. Pages from the hearing bundle:
 - i. 166 to 169 – grievance minutes – 18 June 2019
 - ii. 178 to 179 – appeal minutes – 15 August 2019
 - iii. 30 to 32 – return to work record
 - iv. 141 – OH report
 - v. 203 to 208 – medical records.

39. The evidence of Ian Harper and Melisa Boulton then lasted to just before midday.
40. The process for the parties' submissions was then agreed and Respondent's Counsel confirmed that he would be referring to paragraphs 32 to 36 of this skeleton argument.
41. The Tribunal then adjourned until 12:30 to allow the parties to finalise their respective submissions.
42. Submissions were then made until just before 13:10.
43. The panel then adjourned to deliberate and judgment was delivered orally from 15:45.

The Facts

44. By way of background we reminded ourselves that we are required to deal with the preliminary issue of whether it is just and equitable in all the circumstances to extend time.
45. The reason for this is the Claimant confirmed at the start of the final hearing that based on the witness statement he had submitted he was only pursuing the first allegation of discrimination which is:
 - a. "Between March and June 2018 Angus Silman referred to the Claimant as Usain Bolt and made comments about Indian people as 'dirty filthy people'."
46. It is accepted that the claim form was submitted on the 2 October 2019. It is accepted that the ACAS conciliation certificate is dated 16 August 2019 to 30 September 2019. For these reasons a complaint about something that happened on the 17 May 2019 or after would be in time. Complaints about things before that date are potentially out of time. This therefore raises the just and equitable question.
47. The Claimant's written witness statement provided no fact at all as to issues relevant to the just and equitable question so he provided the facts he wanted to give about this by way of oral evidence given under affirmation.
48. From that and the other witnesses who gave evidence (Ian Harper and Marissa Boulton), the documents we were referred to by the parties and after listening to the factual and legal submissions made by and on behalf of the respective parties, we have found the following facts proven on the balance of probabilities:

49. The Claimant started employment on the 6 March 2018. He had a heart attack on 2 June 2018 after he finished at work that day and was admitted to the Royal Infirmary in Bristol (also see pages 203 and 204).
50. He sets out his issues with Angus Silman in his grievance addressed to Marris Boulton dated 23 April 2019 (page 149) as being:
- “The grievance relates to racist abuse, while being trained on the Junker. This involves Angus not Ashley in any form. On starting I was referred to as Usain Bolt constantly in front of other staff members. Who is 6 ft 5 and Jamaican!
- Other members of staff he was singled out when passing the work area, and was made fun of because of their race. This includes mainly Hilario Tjim who was made fun of his appearance when passing the work area. By talking Chinese (when he’s from Portugal) and making fun of his teeth. He also referred to Asians as dirty filthy people when asked if you like Indian food and blamed immigration for his daughter not be able to find work.”
51. This is consistent with the way allegation 1 is recorded in the agreed issues... “Between March and June 2018 Angus Silman referred to the Claimant as Usain Bolt and made comments about Indian people as ‘dirty filthy people’”.
52. The Claimant says he presents a window of complaint about the conduct of Angus Silman as being from the 6 March 2018 to 2 June 2018. On the 2 June 2018 the Claimant unfortunately suffers a heart attack. The Claimant no longer worked with Angus Silman after that date.
53. In cross examination the Claimant confirmed that he did consider at that time (June 2018) that it was Angus Silman’s actions that had caused his heart attack.
54. Later in cross examination the Claimant confirmed when asked, when he first thought he had a complaint against the Company about the Angus Silman matter, that Angus Silman is an employee so he should claim against the Respondent. The Claimant was asked to confirm that there was nothing to stop him seeking advice at that time and he confirmed that he had tried.
55. When the Claimant was asked in cross examination why he did not claim at that time he said that he was too scared to say anything. When asked of whom, the Claimant said of the Company as he did not think they would take it seriously. The Claimant was then asked if he did not consider bringing a claim, he said that he was more interested in getting back to work to start earning again, and that Angus Silman had 18 years’ service so why

- would he (the Claimant) be listened to? He said it was his word against someone with 18 years' service.
56. The Claimant's evidence is that around September 2018 when he returned to work he saw an employment specialist. She told him to call ACAS which they did from her office. ACAS then said the claim was out of date. The Claimant then carried on working. He then went to the CAB about work matters. The CAB helped him write the grievance (at page 149) and when he got the response at (page 172) it was the comments made by Ian Harper that it was banter and unprofessional that he says the CAB told him now regenerate his previous complaint and told him to start a claim and he has got a month to do it.
57. During cross examination the Claimant was asked about bringing an Employment Tribunal claim and he replied that he did not know the 3-month period, the first he heard of it he says, was when he went through the agency and the CAB and they told him three months. The Claimant says that he thought it was a bit tight as if you commit a murder then you can still be held accountable.
58. In replies to cross examination questions the Claimant said that when he first returned to work he was exhausted and bed ridden over the weekend and this was the effect of his medication. It was put to the Claimant that there is no medical evidence presented to say his medication had that effect, and the Claimant confirmed that he didn't think he needed to. The Claimant confirmed that he knew that whether he had brought a claim in time was a relevant issue for this hearing. He also confirmed that whether the medication made him feel unable to bring a claim was relevant. He confirmed that he believes it is, but he accepted there was no evidence in the trial bundle.
59. We have also noted from a letter from the Wiltshire Cardiac Centre dated 26 July 2018 (page 205 of the bundle) about the Claimant which says ... "I am pleased to say that Chris has had no further episodes of chest discomfort and has been attending the cardiac rehab programme but unfortunately due to episodes of hypertension he has been unable to attend the exercise component. He has also reported some feelings of nausea which has been affecting his appetite recently and this may be due to some of his medication."
60. Then in his Return to Work Form dated 9 August 2018 (at pages 30 to 32 of the bundle) it notes that the Claimant stated that ... "the medication he is taking does not effect his ability at work operating machinery" (page 31). We also note from this form that the Claimant returned to work on the 7 August 2018 and it records that there is nothing at work contributing to the cause of the absence (i.e. the heart attack) (page 30).

61. The documents presented to us therefore do not seem to support what the Claimant is asserting about this time period.
62. The Claimant also accepted that he was still able to deal with ACAS and the CAB at that time, albeit over the phone. He also confirmed that there was no reason he could not have sent an email, save that he didn't think of doing so.
63. The Claimant confirmed, when asked in cross examination if the purpose of contacting ACAS was to bring a claim, that initially the person from the employment advisory service "Lift" wanted ACAS to talk to the Company to get it to back off, not to bring a claim, the issue was too much pressure at work.
64. The Claimant agreed that with his first contact with ACAS he was told he was out of date.
65. The Claimant was asked in cross examination whether, when he spoke to the CAB, if he asked why he was not in time. The Claimant confirmed that he knew he was not in time, he thinks they said to him that is the way it is got to be, 3-month period, can't go no further. The Claimant was then asked why he didn't raise it as unfair? The Claimant confirmed that he thinks 3 months is unfair, that is his personal view and that he didn't know about it until ACAS told him about it, and that is just the reality.
66. The Claimant says he joined a union around September 2018. He explained that they had told him every day to write a grievance.
67. In cross examination the Claimant confirmed that he was member of a union from September 2018 to January 2020. Initially though, the Claimant had thought it was until January 2019, but he corrected this when questioned about the chronology of events. He accepted that with the passing of time it was difficult to recall matters, he said because it was 2 years ago he is not going to remember everything.
68. The Claimant confirmed during cross examination that he could have spoken to a trade union about a claim. He later confirmed that he did initially speak to the union about legal support, and confirmed that "initially" was when he had raised his grievance (so around April 2019).
69. The Claimant says he did not submit the grievance before he did because he was struggling with the job. The Claimant explained that he did it when he did because he thinks he was being perceived as a trouble maker and reference was made to him having taken a former employer, Honda, to an

Employment Tribunal, which the Claimant confirmed he had but it had settled.

70. The Claimant confirmed that initially for that claim he had assistance from a union and contact with a union referred solicitor, before concluding matters himself. In cross examination the Claimant confirmed that the claim against Honda was for unfair dismissal and he knew of the time limit for an unfair dismissal claim, but he did not think there were time limits for other types of claim. When asked why he didn't ever seek to check he said that he had never experienced it before so he had no reason to.
71. About the grievance he did submit, the Claimant explained that a Doctor he had seen once, who was treating him for his heart, had told him he needed to put his side down in writing which he then did with the grievance.
72. The Claimant also explained that the CAB had told him to put in a grievance to regenerate the claim, and the reply by Mr Harper made the claim valid again. In reply as to why, the Claimant said it was Ian Harper saying it was just banter. The Claimant confirmed that he is not asking us to decide whether the actions of Ian Harper saying it was just banter were discrimination or not and confirmed there is nothing about this in his witness statement. He did though refer to the grievance outcome reply from Mr Harper dated 17 July 2019 (at page 172 of the bundle) and in particular the quote ... "There appears to have been an element of banter and unprofessional behaviour, though we do not believe this to have been malicious and the comments made were with no racist connotation."
73. The Claimant explained that he did not see anything wrong about the outcome until he went to the CAB, although he didn't think it was banter. He did think it was said though because of his race. When asked why he did think this, he referred to matters prior to the outcome letter being written where he was called in for a meeting with Emma Fletcher and spoken to that Ashley and Angus were two of the worst trainers to find. He was told Angus messes about all the time and Ashley is very shy.
74. The Claimant went on to explain in his evidence that he had been told that the Angus Silman matter was out of time so he regarded Ian Harper's comment of "banter and unprofessional behaviour" in the letter 17 July 2019 as the evidential basis. He was asked to explain why and he confirmed that he was not too sure why, but he would not class what happened as banter it was personal. He confirmed that it is not something he is asking us to look at and there is no evidence apart from what he has told us. He explained he likes Ian Harper and has had good previous experiences. He confirmed that Ian Harper was a good manager his tone was brilliant and it was Ian Harper that had incentivised him to take the job with the Respondent as at that time he had a job offer somewhere else.

75. In cross examination when asked about his relationship with Ian Harper he confirmed he agreed with paragraph 6 of Ian Harper's statement (which relates to the period when the Claimant was working with Angus Silman), save for the contact in the office being once a fortnight. He did not agree it was that often. In his witness statement at paragraph 6 Ian Harper details how the Claimant had approached him to complain about the quality of the training he (the Claimant) was receiving from Angus and Ashley.
76. The Claimant also agreed with paragraph 10 of Ian Harper's statement in that he did speak to Ian Harper about his (the Claimant's) financial worries.
77. When asked about paragraph 12 of Ian Harper's statement, the Claimant confirmed that while he (the Claimant) was off sick he had made a complaint about training, and confirmed that he was asked about it by HR. The Claimant was asked whether while off sick he can raise anything with HR, he said he wouldn't feel comfortable doing so.
78. We accept the evidence of Ian Harper (at paragraph 12) that the Respondent took the Claimant's complaint about the standard of training the Claimant had received seriously, threatening Angus Silman and Ashley with disciplinary action if the standard of training did not improve.
79. We also noted when the Claimant was challenged on his recall about when meetings took place and who they were with, where it was put to him if he agreed that due to the passage of time it was difficult to distinguish the meetings he had, he confirmed that at this current time yes, he would.
80. The Claimant also accepted in cross examination that there is a difference to how he describes the conduct of Angus Silman in his grievance (at page 149) and how he describes it to the Tribunal.
81. The Claimant refers at the case management preliminary hearing before EJ Bax to Angus Silman mimicking voices (as noted at paragraph 4 of the case management summary), but at no point does he say this in his written grievance (page 149).
82. The Claimant when asked that he did not say that elephant noises were directed towards him, he confirmed that he didn't know that. With reference to page 166 of the bundle, the grievance minutes, 18 June 2019, the Claimant agreed that what he says in the interview for his grievance was different to what he had been suggesting to the Tribunal. When asked to confirm which is correct the Claimant stated it was clearly what he had said to the Tribunal. He explained that he didn't go into detail for the grievance as he felt embarrassed and uncomfortable.

83. The only issue evidentially that the Claimant challenged about the grievance investigation minutes (pages 166 to 169) was that he asserted he did not say “stopped eventually” about the conduct of Angus Silman as the notes record, which as the Respondent then asserted suggested it had stopped before the 2 June 2018. The author of the minutes, Marissa Boulton was questioned about this in her evidence and she categorically denied that she would have added to the notes things that had not been said.
84. Our attention was drawn to a report from Occupational Health dated 15 April 2019 (pages 140 to 142). It notes (as at page 141) the Claimant complaining about alleged racist abuse. It says as follows:
- “Unfortunately, Chris reports being unhappy in his current role. He tells me that, in his opinion, he is a victim of racist abuse. He tells me that, he perceives, he is being bullied at work and his property has been vandalised.”
85. We note from this that it separates the Claimant’s reference to being “a victim of racist abuse” to then referring to the Claimant saying, ... “he perceives he is being bullied at work”. The latter is in the present tense so cannot relate to the matters with Angus Silman as they did not continue, as asserted by the Claimant, beyond the 2 June 2018. We also note that the way the Claimant describes matters to Occupational Health is different to the way he sets it out in his grievance dated 23 April 2019 (page 149). There is also no mention in the grievance to his property being vandalised.
86. It is not in dispute between the parties that Angus Silman has now left the Respondent’s employment (this is also confirmed in the agreed parts of the submitted chronology).

The Law

87. This is a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 (“the EqA”). The Claimant complains that the Respondent has contravened a provision of part 5 (work) of the EqA. The Claimant alleges direct discrimination and harassment.
88. The protected characteristic relied upon is race, as set out in sections 4 and 9 of the EqA.
89. As for the claim for direct discrimination, under section 13(1) of the EqA a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

90. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.
91. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
92. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three 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. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.
93. From the 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings. The Claimant's early conciliation certificate applicable to these proceedings runs from 16 August 2019 to the 30 September 2019. The claim was submitted on the 2 October 2019, therefore, a complaint about an act or omission before the 17 May 2019 would be potentially out of time.
94. We have considered the case of **British Coal v Keeble [1997] IRLR 336 EAT**; and have been referred to and considered the cases of **Robertson v Bexley Community Service [2003] IRLR 434 CA**; **London Borough of Southwark v Afolabi [2003] IRLR 220 CA**; and **Hunwicks v Royal Mail Group plc EAT0003/07**.
95. We note the factors from section 33 of the Limitation Act 1980 which are referred to in the **Keeble** decision:
- a. The length of and the 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 parties co-operated with any request for information.
 - d. The promptness with which the claimant acted once he knew the facts giving rise to the cause of action.

- e. The steps taken by the claimant to obtain appropriate professional advice.
96. We note that the Court of Appeal in the **Afolabi** decision confirmed that, while the checklist in section 33 of the Limitation Act provides a useful guide for tribunals, it need not be adhered to slavishly. The checklist in section 33 should not be elevated into a legal requirement but should be used as a guide. The Court suggested that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time and they are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).
97. We also note that any bad advice given must have actually been the reason for the delay. In **Hunwicks** the claimant sought to excuse her late claim on the ground that her trade union representative incorrectly advised her that she had to exhaust the employer's internal grievance procedure before bringing a tribunal claim. However, in that case the adviser's incorrect advice played no role in the tribunal's decision as to whether the claimant's out-of-time discrimination claim should be allowed to proceed. This was because the time limit had already expired before any question of her being misled by the union representative arose. Accordingly, the union representative's mistake had had no causative effect and her claim was dismissed.
98. It is also clear from the comments of Auld LJ in **Robertson** that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard ... "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise 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 discretion is the exception rather than the rule".

The Decision

99. In this case we are looking at section 123(1)(b) of the EqA ... "such other period as the employment tribunal thinks just and equitable."
100. The case authorities we were referred to support that we can consider five factors under the Limitation Act (as set out in **Keeble**), but that they need not be adhered to slavishly. They are a guide, and there are two factors which are almost always relevant when considering the exercise of

any discretion whether to extend time, those being the length of, and reasons for, the delay; and whether the delay has prejudiced the Respondent.

101. So, considering all these factors:

a. The length of and the reasons for the delay:

- i. The delay is about 13 months, from the 1 September 2018 (based on the end of the alleged discrimination period being 2 June 2018) and the date the claim was submitted on the 2 October 2019.
- ii. As to the reasons submitted by the Claimant for the delay these are he says that he did not know of the three-month time limit to bring a race claim and/or he was impaired in some way following his heart attack, for example by his medication.
- iii. As to these reasons we find that the Claimant does not appear to have made any effort to find out about time limits before the time limit expired on a cause of action he was aware of at that time. Further, he has not presented evidence, whereby we could find on the balance of probability, that something prevented him from finding it out or taking action at that time for the following reasons:
 1. The documents presented to us do not support what the Claimant is asserting about this time period. Further, the Claimant did raise with Ian Harper and the Respondent concerns he had, including issues concerning the quality of his training from Angus and Ashley, and that was acted on by the Respondent.
 2. The Claimant had taken a claim to the Employment Tribunal before, initially with union assistance and solicitor contact, albeit for a complaint of unfair dismissal.
 3. The Claimant had access to union advice, was in contact with an employment adviser, was referred to ACAS and then in contact with the CAB.
 4. When he is told he is out of time by ACAS, this would seem to be potentially right (based on the last possible date of an alleged act of discrimination against him by

Angus Silman being on the 2 June 2018) and this information is accepted by the Claimant.

5. The Claimant does not seek to raise the matter with the Employment Tribunal until he is told the content of a grievance outcome letter dated 17 July 2019 regenerates his claim. But this only works to regenerate his claim, if the Claimant claims that the content of that letter is of itself race discrimination and part of conduct extending over a period, which he does not now do.
- b. The extent to which the cogency of the evidence is likely to be affected by the delay:
 - i. The Claimant's account of what he says Angus Silman did is inconsistent. It evolves to a more serious complaint at the case management hearing on the 22 April 2020 before EJ Bax and as he seeks to suggest now, by which time Angus Silman has left the employ of the Respondent.
 - ii. The Claimant accepted in his evidence that the passage of time does hinder recall. We note that the complaint the Claimant makes is wholly reliant upon recall of matters that were said or done back in March to June 2018. There are no contemporaneous documents that would assist. Further, the grievance that was raised about the matters was in April 2019 and was investigated by the Respondent, however the Respondent is now potentially being asked to defend allegations that were never raised then, which would impact on the cogency of the evidence and in our view prejudice the Respondent greatly.
 - c. The extent to which the parties co-operated with any request for information (to the extent that it is relevant, for example the Claimant is not saying that he did not know he had a claim because the Respondent was not giving him relevant disclosure):
 - i. What appears to have happened in this case is that the Respondent did investigate matters when the Claimant raised them, albeit on narrower issues as asserted then, compared to what the Claimant now seeks to assert, so this doesn't suggest an unwillingness on the part of the Respondent to look at what the Claimant alleges.

- d. The promptness with which the Claimant acted once he knew the facts giving rise to the cause of action.
- i. We find that the Claimant did not act promptly. The Claimant says in evidence that he knew he had a claim against the Respondent when Angus Silman did what the Claimant says he did, which as the Claimant now asserts, caused him to have a heart attack on the 2 June 2018.
 - ii. The Claimant returns to work on the 7 August 2018 and is unclear exactly when he gets advice saying that it was around September 2018 when he returned to work he saw an employment specialist.
 - iii. The Claimant accepted the position about time limits as told to him by ACAS, and took no action until after the outcome of the grievance (which he raised at the end of April 2019), in July 2019, when he was told at that stage it regenerated his earlier claim. It might be that this advice was wrong or incomplete, although the Claimant has not asserted this, but with reference to the case authority of ***Hunwicks***, we observe that if there were incorrect advice at that point it played no part as the Claimant's claim was already out of time at that point.
- e. Finally, the steps taken by the Claimant to obtain appropriate professional advice. We find that the Claimant seems to have had access to multiple sources and does not seek to blame any of those advisers for his current position.

102. As noted in the comments of Auld LJ in ***Robertson*** ... "a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule". We do not find that the Claimant has discharged his burden of proof here.

103. We consider that the prejudice to the Respondent based on the facts we have found and the relevant law outweighs that against the Claimant and the claim he now seeks to make.

104. For these reasons we do not consider it would be just and equitable for us to exercise discretion to extend time.

105. Therefore, the Tribunal does not have jurisdiction to hear the Claimant's claim of race discrimination. The claim was not brought within the primary time limit (section 123(1)(a) of the Equality Act 2010) and it would not be just and equitable to extend time to allow the claim to be

brought within time (section 123(1)(b) of the Equality Act 2010). The claim is therefore dismissed.

106. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 12; the findings of fact made in relation to those issues are at paragraphs 49 to 86; a concise identification of the relevant law is at paragraphs 87 to 98; how that law has been applied to those findings in order to decide the issues is at paragraphs 99 to 105.

Employment Judge Gray
Date: 30 March 2021

Reasons sent to Parties: 07 April 2021

FOR THE TRIBUNAL OFFICE