EMPLOYMENT TRIBUNALS

Claimant: Mr H Allen

Respondent: Kin and Carta Create Europe Limited

Heard at: by CVP **On:** 23 April 2021

Before: Employment Judge N Walker **(**sitting alone)

Representation
Claimant: in person
Respondent: Mr K Wilson of Counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

(1) the Claimant's claim for unfair dismissal is dismissed as the Claimant does not have the requisite qualifying service;

(2) the Claimant's claims for discrimination are dismissed as the Tribunal does not have jurisdiction to consider them.

REASONS

The Claim

1 The Claimant brought claims of unfair dismissal under the Employment Rights Act 1996. The Claimant had been sent a letter by the Tribunal asking him to give reasons why his claim for unfair dismissal should not be struck out as he did not have the requisite period of qualifying service. According to the record of the Telephone Preliminary Hearing on 22 January 2021, the Claimant had not had legal advice and in the circumstances Employment Judge Joffe did not strike out this claim at that time. However, the Claimant has had some legal assistance now and does not make any further representations indicating that there are any special circumstances or reasons why his unfair dismissal claim should proceed.

Accordingly, I strike it out on the basis that the Tribunal does not have jurisdiction to consider it.

2 The hearing today focused on the Claimant's claim for discrimination under the Equality Act, where the protected characteristic is his race. This claim is, on its face, out of time. The application that the Claimant has made is for an extension of time on the basis that this would be just and equitable.

The Evidence

3 The Tribunal heard evidence from the Claimant. There was a bundle of documents containing some contemporaneous documentation and I was invited to view some videos in which the Claimant performed a monologue, and which he had posted online.

4 The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way and in accordance with Rule 46, the Tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended. The parties were able to hear what the tribunal heard. There was only one witness being the Claimant. There were no technical difficulties. The participants were told that it was an offence to record the proceedings.

Facts

5 The Claimant has a degree. He took a role with the Respondent as a strategist and has worked as a strategy and operations business analyst and in strategic communications as an account executive, amongst other roles.

6 The Claimant joined the Respondent on 6 January 2020 and on 14 February 2020 he was asked to attend a probation review meeting on Monday 17 February 2020. At that meeting on 17 February 2020, he was informed that his probation was being ended early. He was given pay in lieu of notice, and his employment ended immediately. The proceedings he has brought relate to the ending of his role.

7 EJ Joffe identified the following direct discrimination claims in the Claimant's ET1.

(1) failing to provide the Claimant with feedback prior to his dismissal including refusing to arrange a meeting requested by the Claimant,
(2) describing the Claimant's behaviour as aggressive,
(3) dismissing the Claimant.
(4) not providing the Claimant with a positive reference through a line manager.

8 I discussed with the Claimant what he meant by not providing him with a positive reference. His ET1 states;

> "Due to the short time of employment, it has been incredibly difficult to find work without a positive referral & the company refuses to address my concerns."
> He also repeats this again in the ET1, saying:

> "It has been incredibly difficult to find work without a positive referral and I've tried multiple times to discuss this matter further with my former employer to no avail".

9 The Claimant confirmed that the date of the failure to provide him with a positive referral which he was complaining about in his ET1, was not receiving a written reference at the time he was dismissed and was the same date as the date of the termination of his employment on 17 February 2020. Accordingly, as that was the date of the last event complained of, time for bringing a claim ran from that date.

10 The Claimant wrote an email to the Respondent soon after the termination of his employment on 23 February 2020 referring to the decision to terminate him during his probationary period. He made an oblique reference to his treatment being different to that of persons not of his 'color".

11 On 25 February the Respondent replied, thanking the Claimant for his perceptions of the process and indicating they would discuss the points he had raised, but declining to comment further about the position to the Claimant.

12 The first lockdown was announced on 23 March 2020. On 10 May 2020 people who could not work from home were told to return to work by the government and on 15 June 2020 non-essential shops re-opened.

13 The Claimant produced medical records showing that he had for some time been treated for General Anxiety Disorder, OCD and Depression. He explained that he had been on a programme of medication for anxiety and depression since December 2019 and had for some time undergone some "in person" therapy. His therapy had ended due to the programme limits in February 2020, i.e., before his employment had ended. It was expected that he would be transferred to a longer term therapy programme. In March 2020, the Claimant had made an effort to follow up on this and indeed he inquired about the position on a few occasions but in May 2020 he was told that new referrals were being declined due to the global pandemic.

14 In his witness statement prepared for this hearing, the Claimant set out key dates in a timeline of events which had occurred since he had commenced the "in person therapy" in July 2019. The timeline after his employment ended included three tragic deaths in the USA of African Americans which have been reported around the world. These events were: on 23 February 2020 the death of Ahmaud Arbury; on 30 March 2020 the death of Breonna Taylor; and on 25th May 2020, the death of George Floyd. The Claimant also set out in his witness statement an explanation about the black community facing a PTSD like health challenge, classified as racial trauma and said that the three deaths and resulting social upheaval and unrest had a detrimental impact on his mental health and how he processed the emotional turmoil and what he termed "racial discrimination experienced" at the Respondent. He also referred to research which indicated that the COVID-19 pandemic disproportionately impacted on BAME communities, but it is also decreased the amount of mental health support available to those suffering. The Claimant asserts that racial trauma and lack of mental health support exacerbated his existing mental health challenges, making it harder to process the events of the dismissal and to find the strength and resolve to raise these issues.

15 In response to questions the Claimant said for a long period during 2020, he only went out to shop in a shop which was virtually below his flat and that his contact with others was on social media and that he might ask them to send him a book. While the Claimant says he did not go out of his flat much, he was active on social media and was researching racism.

16 The Claimant asserted that he was ignorant of the law. He was not born in the United Kingdom and he says that he was only exposed to American law via television and movies. He said his knowledge of UK employment law was very limited. He complained that his employment rights were not identified in his employment contract and that he was not put through a disciplinary process such as that recommended by the ACAS code of practice on disciplinary and grievance procedures, so that he had no signpost either to the possibility of appeal or to his right to bring a claim in the employment tribunal. The Claimant sought to emphasise the level of his ignorance about processes and rights in the UK by explaining that he had had a period of unemployment the previous year (2019) and had been unaware of his right to claim Universal Credit. He said that he had only made a claim for Universal Credit in 2020 when a friend who was one of his social media contacts told him about Universal Credit.

17 The Respondent had produced documentation about an organisation called the Anti-Racist Social Club. In the bundle there were copies of the Claimant's LinkedIn description in which he referred to himself as the Founder and Executive Director of the Anti-Racist Social Club from June 2020 to the present, at that time being 7 months. There are also tweets in the bundle from the Claimant on 11 September 2020 that he had "created a website over the last three months" which suggested that he had been working on it from about June 2020. The website went live in September 2020 and includes links to four videos in which the Claimant is featured personally speaking a monologue about certain topics, all to do with racism. The videos were originally posted on another forum on 8 August 2020. The videos show the Claimant speaking for several minutes and he appears calm and logical.

18 The Claimant's explanation about the Anti-Racist Social Club was that while he may have been involved, there were others very much involved in the project and he believed this was not indicative of his ability to bring a claim. The videos, he said, were made quickly and simply using his smartphone and did not require any lengthy preparation. The Claimant said there were no extensive drafting times or periods when he and others were working on preparing the content of videos and that he knew how to do a monologue.

19 I asked the Claimant what access he had to computer equipment and he told me that for a while he only had a smartphone and that the computer he was using at this hearing was a work computer.

20 The Claimant's witness statement included an explanation about how quickly he had acted to commence proceedings. He explained that he had made a post on social media which alleged racial discrimination at a previous employer. On 7 September 2020 he was contacted by one of the Respondent's employees about that post. On 14 September he met virtually with that person and another individual at the Respondent to discuss the experience and the assertions he was making with regard to racial discrimination and unfair dismissal. On 21 September the Respondent's employee concerned informed him that he had investigated and concluded that the decision made, whereby the Claimant was not successful in

passing his probation was carried out in accordance with correct process and in line with company policy. The Claimant was told that as he was no longer the Respondent's business, they could not share any details of the investigation with him.

21 After the conversation on 21 September 2020, the Claimant immediately sought legal advice and he said he spoke with a discrimination law case worker on 22 September. At that point he was made aware there was a three month time limit and he then contacted ACAS that same day. The ACAS certificate states receipt of the notification was on 22 September and date of issue of the certificate was 23 September. The Claimant then filed his ET1 on 23 September.

Submissions

The Claimant's submissions

22 The Claimant submitted that he had suffered both as a result of the COVID-19 pandemic and as a result of his mental health problems and the lack of mental health support. He referred to a number of publications which he argued confirmed the psychological consequences amongst black Americans after the deaths of three African Americans, Ahmaud Arbury, Breonna Taylor and George Floyd. The Claimant said the fact that he was able to create content and advocate for anti-racism in society is not proof that he should have been able to make a claim within three months. He argued that following his dismissal, he did not have to be isolated from the world or invisible to be still be suffering from severe mental health challenges.

23 The Claimant argued that a lot of the content in the Anti-Racist Society Club was created by volunteers including researchers, videographer's designers and more. Despite the content being pushed out on his personal social media platforms he did not necessarily create the content and other people had access to his personal professional accounts for this reason. He argued that his involvement in the project varied throughout the summer in line with his mental health ebbs and flows. The Claimant said although his LinkedIn profile said he held the position of Founder and Executive director, it was not possible to hold that position because there was no legal entity at the time. He said that as a result of the dismissal and lack of positive reference, gaps in his CV made it difficult to find work and he chose to display his involvement in the non-legal organisation as a way to show potential employers he was keeping busy and that was in practice posturing.

24 The Claimant also explained that he had not known about UK law, referring to the cases of Northamptonshire County Council v Entwhistle UKEAT/ 0540/09/ZT, Dedman v British Building and Engineering Appliances Limited [1974] ICR EWCA and Cambridge and Peterborough Foundation NHS Trust v Crouchman UKEAT/0108/09, John Lewis Partnership v Charman UKEAT/0079/11/ZT and Northumberland County Council v Thompson UKEAT/ 0209/0. All those cases address ignorance of the law or time limits for bringing claims in the employment tribunal. The Claimant cites from all of them, but the approach is largely the same. By way of example, the Claimant cites the following from the John Lewis case:

> *"It has repeatedly been held that, when deciding whether it was reasonably practicable for an employee to make a complaint to an Employment Tribunal, regard should be had to what, if anything, the employee knew*

about the right to complain to the employment tribunal and of the time limit for making such a complaint. Ignorance of either does not necessarily render it not reasonably practicable to bring a complaint in time. It is necessary to consider not merely what the employee knew, but what knowledge the employee should have had... he or she acted reasonably in all the circumstances."

The Respondent's Submissions

25 The Respondent submitted that the relevant legal principles are set out in section 123 of the Equality Act 2010 and that is that the primary time limitation period is 3 months from the date of the act complained of, but time can be extended on a just and equitable basis.

26 The Respondent referred to the cases of Bexley Community Centre v Robertson [2003] IRLR 434 and Bowers v National Institute for Health and Clinical Excellence [2014] UKEAT/1073/14/JOJ. The Respondent argued that the onus is on the party seeking the extension to persuade the tribunal to grant it and that it is incumbent upon the party seeking the exercise of discretion in his favour to provide a full and acceptable explanation for his delay. A failure to provide a good explanation for the delay may well lead to the discretion being exercised against the Claimant, absent compelling reasons why that should not be the case.

27 In relation to these specific assertions raised by the Claimant, the Respondent argued that the medical condition did not mean that the Claimant should be entitled to the extension as a matter of course and referred to the case of Department of Constitutional Affairs v Hones [2008] IRLR 128.

28 The Respondent referred to the Claimant's assertion that he had been ignorant of his rights and noted that this may be a relevant factor, but Lord Scarman in the case of Dedman v British Building and Engineering Appliances Limited [1974] ICR 53 had said the total of ignorance of rights did not inevitably mean that it was impracticable for a Claimant to present his complaint in time. That case explained it would be necessary to pay regard to his circumstances and the course of events.

29 The Respondent argued that the case law shows that ignorance as to time limits is unlikely to justify an extension of time because where employees are on notice as to their rights, there is an obligation upon the Claimant to seek information about the enforcement of those rights. The Respondent accepted that the Claimant was on medication and undertaking therapy and had been attempting to pursue a secondary referral for therapy during 2020. However, the Respondent thought that the Claimant's activities showed that he was still able to bring a complaint and indeed ought to have done so. The Respondent referred to the fact that it had been made clear on 25 February 2020 that it was not commenting further and that since then the Claimant had worked on the Anti-Racist Social Club and had posted on LinkedIn about experiencing racism in his last job and confirmed that he was contacted about this post on 7 September 2020 which meant the post predated that.

30 The Respondent acknowledged that the Claimant relied heavily on racial trauma arising from events in the United States around the time the limitation period was running, but pointed out that the project which the Claimant had chosen

to involve himself in following that was fundamentally concerned with the issue of racism and therefore the Respondent suggested that the Claimant was capable of bringing a claim within the primary limitation period. Even if he was not capable initially, he had waited rather too long to do so. In relation to the Claimant's argument that he was ignorant of his rights, he had a background and education which showed that he was an individual well versed in the use of technology and capable of conducting online research to understand his rights.

31 In relation to the merits of the claim the Respondent suggested it was inherently lacking in merit and that the Claimant had merely asserted a difference of treatment and a difference of protected characteristic without more. The Respondent referred to the cases of Chandhok v Tirkey [2015] and Madarassy v Nomura International Plc [2007].

32 The Respondent referred to the case law guidance that Tribunals should look at the factors identified in section 33 of the Limitation Act 1980. In general terms the Respondent argued that there was a four month delay and the Claimant had not explained it properly.

33 The Respondent argued cogency of the evidence would be affected because the in the period of seven months after the Claimant had left before he broke late the claim the Respondent on its employees considered that issues relating to his employment had been had concluded. The Claimant knew all the relevant facts when he was dismissed. This was not a case about something he learned of later. The Claimant had not suffered from any reduced cognitive function and he had carried on with a large and complex project being the Anti-Racist Social Club.

34 The Respondent acknowledged the Claimant would suffer prejudice if he was not permitted to pursue his employment claim but argued that the Respondent also suffered prejudice in the form of having to defend a claim which it should not have to attend according to the time limits. It was going to involve significant management time and legal costs and had currently been listed for four three days in September 2021 which was both a practical and legal prejudice. The Respondent also said that one of the witnesses is no longer employed by the Respondent and while they were not suggesting this was a major witness such as the dismissing officer, it was a general factor which would make it more difficult to defend the claim. They had no instructions as to whether or not the witness had been asked whether they would give evidence in an event.

The Law

<u>The Legislation</u>

35 Section 123(1) of the Equality Act 2010 provides:

> *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*.

<u>Case law</u>

36 Hutchison v Westward Television Ltd [1977] IRLR 69, [1977] ICR 279, EAT. A tribunal has 'a wide discretion to do what it thinks is just and equitable in the circumstances … they entitle the [employment] tribunal to take into account anything which it judges to be relevant':

37 (Robertson v Bexley Community Centre [2003] EWCA Civ 576, [2003] IRLR 434, at para 25, per Auld LJ); Department of Constitutional Affairs v Jones [2007] EWCA Civ 894, [2008] IRLR 128, at paras 14–15, per Pill LJ). There is no presumption that a tribunal should exercise its discretion to extend time on the 'just and equitable' ground unless it can justify failure to exercise the discretion as the onus is always on the Claimant to convince the tribunal that it is just and equitable to extend time. The exercise of discretion is the exception rather than the rule.

38 In Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13, Langstaff J said that in order to satisfy that burden a litigant would need to provide an answer to two questions:

> *"The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was."*

39 In British Coal Corporation v Keeble [1997] IRLR 336, it was held that the court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular:

> (*a*) the length of 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 had co-operated 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 appropriate professional advice once he or she knew of the possibility of taking action.

40 There is no legal requirement on a tribunal to go through such a list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion' (Southwark London Borough v Afolabi [2003] IRLR 220 at para 33, per Peter Gibson LJ).

41 Where a Claimant asserts ignorance of the right to make a claim, the same principles that are relevant to the test in cases where the issue is whether it was 'not reasonably practicable' apply when considering a just and equitable extension Bowden v Ministry of Justice UKEAT/0018/17, and Averns v Stagecoach in Warwickshire UKEAT/0065/08. The assertion that the Claimant is ignorant of his rights must be genuine and the ignorance – whether it is of the right to make a claim at all, or of the procedure for making it, or the time within which it must be made – must be reasonable. In a case where ignorance is relied upon, a Tribunal must not only conclude that a Claimant has not acted reasonably and promptly but must also specifically address the alleged lack of knowledge.

42 The essence of those cases is that in a case where the Claimant relies upon ignorance, it is necessary not only to ascertain if he was genuinely ignorant of his rights but also to consider if that was reasonable.

Conclusions

43 The time within which the Claimant should have applied to the Employment Tribunal was three months after the date of dismissal of 17 February 2020. The provisions for ACAS certification would have enabled the Claimant to extend that, provided he had applied to ACAS within that period. He did not do so. In consequence the primary time limit expired on 16 May 2020.

44 This hearing has been concerned with the question of whether to grant an extension of time on a just and equitable basis. The cases indicate this is a matter of judicial discretion which should be exercised in a balanced manner. The factors in the Limitation Act are all matters which should be considered when carrying out that balancing exercise.

The reason for the delay.

45 The Claimant has given 3 reasons for the delay. The Claimant has referred to the global pandemic, although he did not make a significant issue about it. In practice it had an impact on almost everyone and it certainly would have made it more difficult to locate legal advice from a lawyer as opposed to on line information about claiming in an Employment Tribunal in the initial period when there was a stringent lockdown between 23rd March and 16 May. It also impacted on the Claimant in the delay to his referral for longer term therapy.

46 The second reason given by the Claimant was that he was not in a mental condition which enabled him to process the position. It is clear the Claimant was expecting to be referred for therapy. He took steps to chase this up I have no doubt that the Claimant was distressed by losing his job and by the tragic sequence of deaths in America. The Claimant processed his feelings in part by establishing the Anti-Racist Social Club. Although I accept there were other people involved, the Claimant held himself out publicly on social media as being the Founder and most senior executive in that group or organisation, whether it existed in a legal form or not. The Claimant appears personally in the four video clips which were posted online on 8 August and were put up on the website when it went live in September 2020. Those 4 videos indicate the Claimant was capable of being calm and rational and applying careful thought to complex situations of racism in society.

47 The third reason given by the Claimant is that he was ignorant of the law and he claims to have been ignorant of both American law and UK law. The Claimant was not unaware of the facts which he claims amounted to discrimination as he wrote to the Respondent within days of his dismissal complaining about a difference of treatment and raising the possibility that it might have been to do with his ethnicity. He subsequently put up a post complaining of having suffered racism in his previous employment. The ignorance he relies upon was ignorance of his right to bring a claim in relation to that and generally ignorance of the employment tribunal and the process for workplace claims. He blames this on his not being born in the UK and not having had any pointers in the contract of employment or in the manner of his dismissal.

48 I note that the case law makes it clear that ignorance of the law itself is not sufficient. The ignorance must be reasonable or to put it another way, if the facts are known to the individual so that they are aware of a sense of grievance, there are situations where it is incumbent on the individual to do some level of research in order to find out what remedies they have. The case of Averns v Stagecoach in Warwickshire was an unusual one in that the Claimant argued she was ignorant of her rights as a beneficiary of the estate to have the Trustees of the estate bring a claim on behalf of a deceased person. That is not a matter where information would be readily available or understood by many people. Similarly, the Bowers case related to legal rights which had not been well understood in the past and which had been the subject of significant and protracted litigation.

49 This case is where the Claimant is a former employee seeking to bring a complaint relating to racism which he believed he encountered in the workplace. That is a matter which is the subject of a great many website posts by government, the Citizens Advice Bureau, trade unions and private entities such as lawyers. The Claimant had a smartphone, and he was able to carry out research. The simplest of Google searches will provide immediate advice regarding employment tribunal claims if words such as racism and employment are entered into the search engine.

50 The Claimant indicated on 23 February 2020, that he considered his treatment might have some connection with his ethnicity. Some cases have indicated that complete ignorance of a legal right would mean that the individual would not have any reason to research those rights. I do not consider that is the situation in this case. The Claimant says his ignorance of the law, was attributable to his being born and brought up in another jurisdiction. He has, however shown he has a significant interest in racism as a subject and he invested time and effort into that subject throughout the summer of 2020, leading eventually to the creation of the Anti-Racist Social Club. This is not a case where it was difficult for the Claimant to carry out the research, or where he had no reason to do so. In practice the Claimant had the tools available to him to do the research and spent time considering racism and by his own admission researching it in the months after his employment ended.

51 Although the Claimant was suffering from medical conditions including General Anxiety Disorder, OCD and Depression, there is no indication these were so severe that the Claimant struggled to carry out the research. On the contrary, the Claimant worked on racism issues from sometime in June 2020 and I do not find it credible that he never came across the concept of racism in the workplace or the remedies available in the UK for that.

Whether the cogency of the evidence could be affected.

52 The Claimant suggests that cogency of the evidence is not likely to be a problem because the Respondent investigated the position apparently in February 2020 and again in September 2020 and must have some information as a result of those investigations. I note the Respondent says one of its witnesses has left its business but unless and until that witness indicates an unwillingness to give evidence, it will not necessarily impact on the evidence.

The extent to which the party sued had co-operated with any requests for information

53 The extent to which the party sued had cooperated with requests for information is not a matter which frequently impacts on employment tribunal cases. It does not seem to me to impact in this case. It does appear that the Claimant was perturbed by the Respondent's refusal to share the investigation that it had undertaken in September 2020 with him but the facts that he relies upon were known to him prior to that time and no new information was required in order for him to bring a claim.

The promptness with which the Claimant acted once he knew of the facts giving rise to the cause of action

54 The Claimant knew of the facts giving rise to the cause of action from February 2020 when he was dismissed. Once the Claimant was told that the Respondent, who had voluntarily contacted him in order to discuss what it believed was his perception of discrimination while working for them, that he was not be given any more detail about their investigation and they had rejected his assertions, he acted very quickly, taking only 48 hours to obtain advice, obtain an ACAS certificate and issue proceedings. However, the Claimant had taken no action between February and September 2020, a gap of seven months. The Claimant did not volunteer any information to explain what had happened in September to make him suddenly action his claim, other than the fact that he had the conversations with the Respondent at that time and that he finally felt able to process what had happened.

The steps taken by the Claimant to obtain appropriate professional advice once he knew of the possibility of taking action.

55 As noted above, the Claimant acted very quickly in September 2020 when he decided that he wanted to investigate taking legal action. The Claimant insisted that he had no idea about the possibility of taking legal action prior to this time but the only thing that changed at that time was the fact that the Respondent refused to admit that it had acted inappropriately, after it had contacted the Claimant voluntarily in response to a posting he had made in which he complained about his treatment in his previous employment.

56 I do not find it credible that the Claimant had no idea about the possibility of taking legal action prior to 21 September 2020. The Claimant's complaint that he was not put through a disciplinary process as advised by the ACAS code of conduct and that there was nothing in his contract of employment to inform him about its legal rights are of limited relevance here. It is not a requirement that legal rights are identified in contractual information given to employees. The Claimant was in his probationary period and was not dismissed for misconduct.

57 The Claimant says he was ignorant of his rights, but he had complained in February 2020 to the Respondent and later had posted a comment about having suffered racism in his previous job. The Respondent was unable to date that post precisely but knew from the fact that it had contacted the Claimant on 7 September that it had occurred prior to that date. The Claimant was not willing to identify precisely when that post was made and indeed argued that it must have been very shortly before 7th September. The Claimant had posted online four videos on 8 August 2020 and several documents indicate that he had been working on the Anti-Racist Social Club since June 2020.

58 Bearing all the evidence in mind, I have no doubt that the Claimant believed he had been the victim of racism in the workplace for some months if not immediately after his employment ended and that he was involved in contemplating and researching racism in all its facets from June 2020 onwards. In those circumstances, it is simply not credible that he had not come across the remedies for racism in the United Kingdom and specifically the employment tribunal process for addressing racism in the workplace.

59 Taking all these matters into account, I have to consider the balance of prejudice to the parties. The Claimant will, of course, suffer prejudice if he is not able to pursue a claim. I am entitled to take the merits of the claim into account, and I note the Respondent's comments about the nature of this case being one where the Claimant points to a difference of treatment and to his protected characteristic and assumes that the difference is due to that characteristic. The Respondent points to the key cases on the burden of proof to suggest that the Claimant will have difficulty in meeting the burden of proof. However, in discrimination cases it is extremely difficult to take any view on the evidence at this stage and in all the circumstances I am not prepared to take this point into account.

60 The Respondent will suffer some degree of prejudice if it is forced to defend a case which is prima facie out of time without being able to rely on the limitation defence.

61 The Claimant must persuade the court that an extension of time would be just and equitable. When the Claimant gave evidence, I asked him questions at first because the witness statement he had provided was largely silent on what he personally had been doing in the months after his dismissal. His witness statement mainly referred to the three tragic deaths in the USA and various studies on their impact on the black community. The Claimant's evidence about what prompted him to seek legal advice when he did, was vague. From the facts, it is clear that he had been frustrated by the Respondent's refusal to share more information with him about their investigation in September and their refusal to admit any responsibility for what he perceived to be discrimination. There was nothing else which explained what had happened to prompt him to take legal advice in September. It was difficult to get the Claimant to explain what he had been doing during the summer months of 2020 and he was evasive when answering the Respondent's cross examination.

62 The Claimant in his submissions said that by September, after the discussions with the Respondent, he was finally in a place where he was ready to address the matter and understand the issues. He made a very quick decision to apply for legal advice. As regards the history of how the Anti-Racist Social Club came about, and how and when the video clips were made, as I have noted, the Claimant was distinctly evasive.

63 Balancing all the matters together it is my view that despite the hardship the Claimant will suffer if he is deprived of the possibility of bringing his claim it is not just and equitable to extend time for the length of time necessary in order to bring the claim within time.

64 A key issue in this case is the reason for the delay in my view, and whether the circumstances were such that it is just an equitable to extend time for the period necessary to bring the claim in time. I have no doubt that in the period up

to the end of May 2020 when the first lockdown ended, during which the Claimant should have contacted ACAS, the Claimant could have obtained online at information but would have struggled to speak to a lawyer or an advisor as many organisations were disrupted. The primary time limit expired on 16 May 2020. It is certainly possible that the Claimant was ignorant of his rights at that time.

65 From June onwards, the lockdown did not impact in the same way. Although the Claimant had some mental health issues and would have benefited from therapy, he began work on the Anti-Racist Social Club. He was active on social media, even if he was not actively going out and about. By 8 August 2020 he had compiled and filmed the monologues which I have viewed and posted them on the internet. Those show he was able to portray himself as calm and logical. Sometime, probably around the time the videos were made or soon after, the Claimant complained in a public post about having suffered racism in his previous employment. At latest, that public complaint must have occurred shortly before 7 September 2020.

66 Taking the three explanations given by the Claimant for the delay in turn, it is my view that it would have been just and equitable to extend time for a while if the real issue was that the Claimant had encountered difficulties getting in person advice on his claim while the lockdown was in effect, but that is not the argument here. The Claimant is seeking to extend time well beyond that, through all of August and most of September when he was actively involved in developing material about racism in society.

67 The Claimant relies on his mental health issues. While the Claimant clearly suffered from some mental health issues and sought to chase up his longer term therapy referral, there is no indication that they were severe or hampered him in such a way that it would be just and equitable to extend time.

68 The Claimant also relies on his ignorance of his legal rights and the law. The evidence shows that the Claimant was aware of the facts and matters giving rise to his complaint but had taken no steps to obtain legal advice. The Claimant made a low key complaint in February 2020 to the Respondent and then openly and publicly sometime in August or very early September 2020 posted his comment about having suffered racism in his previous employment. By that stage it is absolutely clear he was aware of matters that he referred to as racism. The only matter of which the Claimant was potentially ignorant at this stage was the manner in which a complaint about such matters is made in the court system in the UK. The Claimant says he knew nothing about it and did not take steps to research that. However, when he became frustrated by the Respondent's refusal to share its investigation with him, he was able to source legal advice very quickly.

69 The Claimant did not explain any change other than very generalised concept that he had finally reached a place where he had processed the information to the point where he felt ready and able to take up this issue. The Claimant's interest in racism in society and the fact that he had the equipment to research it and indeed did research various matters to do with racism as well as posting sophisticated videos about the subject, show that he was certainly able to find out about his rights. In the circumstances the Claimant's professed ignorance about his legal entitlement to pursue a claim in the Employment Tribunal arose from his failure to make any effort to find out if there was a system for redress for workplace racism, and the process for doing so, at a time when he was actively researching racism in general. That is not reasonable.

70 The time limits are inherently meant to be observed. The discretion to extend time on a just and equitable basis is not automatic and there must be a credible explanation for the delay within the time period and then afterwards. As I have said, the Claimant's explanation is that it was only by September that he had reached a point where he was able to fully process the information and ready to consider bringing a claim. That is not an adequate basis for a just and equitable extension of time to be granted.

71 While the Claimant will suffer hardship if he is not able to pursue his claim, the Respondent will also suffer some hardship if it is required to defend a claim which was already significantly out of time. I have considered all of the factors in the Limitation Act which are relevant to this situation and I have considered the balance of hardship and prejudice to the parties. Most importantly I have considered the Claimant's explanation for his delay. I am mindful that the test in this case is not a question of whether it was not reasonably practicable. That is a test which applies in different situations. However, there is still a requirement that there is some reasonable explanation for the delay. In practice, none of the explanations given by the Claimant for his delay are such that a just and equitable extension of time should be granted.

72 The Claimant's claim for discrimination is out of time and must be dismissed as the Tribunal does not have jurisdiction to consider it.

Employment Judge N Walker

3 May 2021

Date -RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

04/05/2021..

.....
FOR EMPLOYMENT TRIBUNALS