# EMPLOYMENT TRIBUNALS

**Heard at:** Croydon (by video) **On:** 11 October 2021

**Claimant:** Mr Thomas Norman

**Respondent:** Virgin Atlantic Airways Limited

**Before:** Employment Judge Fowell

**Representation:**

**Claimant:** In person

**Respondent:** Ms Crawshay-Williams of counsel

# JUDGMENT ON A PRELIMINARY ISSUE

The claim was presented out of time and is dismissed.

# REASONS

**Introduction**

1. This is a case which unfortunately has become mired in complexity. This hearing is to decide whether or not the complaints were brought in time.

2. By way of brief background, Mr Norman works for the respondent as cabin crew and has been with them since January 2017. He raised three grievances against other member of staff, mainly his managers. In outline, the first was submitted as long ago as 8 August 2018. It concerned a colleague, LP, a union representative. (I shall use initials in this decision for those who have not been parties or witnesses). She posted some personal information about him on Facebook. That grievance was upheld against her. He also included a complaint against a TM from the HR department (Head of People and Performance Management) but that grievance was not upheld.

3. Then in 2019 he raised a further grievance. That was on 18 July. It followed a comment Mr Norman made on Facebook about Unite, which was then circulated by LP, and Mr Norman's line manager, JN took LP's side in that dispute. Later he obtained information from a subject access request and saw a sarcastic email about him and what he saw as collusion between managers against him. He raised that grievance against JN and again against TM.

4. A further incident occurred on 24 July 2019, a few days later. It involved a colleague, KC, whom he said racially abused him in the course of a flight, by criticising him unnecessarily in front of passengers, slapping him on the hand and using racially inappropriate language. He then gave her a negative review or reference and that led to her manager, DY, coming to speak to him about the incident. He told Mr Norman that he had not been asked by KC to intervene, but C later found from another subject access request that this was not true.

5. That grievance was not raised until an email on 17 January 2020. At that time grievance appeal proceedings were still ongoing over the second grievance. There was a hearing over the latest allegations on 3 March 2020, shortly before lockdown, which had a huge impact on the travel industry. Most of their employees were sent on furlough, including the claimant, for about a year, and many of those concerned have since been made redundant.

6. ACAS was contacted for EC on 10 May 2020. A day later that Early Conciliation ended and the claim form was submitted. And on 7 July 2020 the claim form was resubmitted. The only difference was that Mr Norman had removed or anonymised the name of one person. In due course that was served on the respondent and a response filed on 26 August 2020.

7. That was the background to a preliminary hearing on 7 June 2021. Employment Judge Tsamados identified that time limit issues were in issue and listed this hearing. I should say that since then a further claim form has been lodged over further issues in the workplace. I have not seen that. The respondent asked for an adjournment so they could apply to join the two cases, which Mr Norman opposed. I concluded that it was not necessary for me to see the second ET1 to decide whether the allegations in the first one were in time and refused the application.

8. Hence, complicated issues are raised today about what complaints were raised in the first claim form, whether Mr Norman is trying to add new complaints or whether his further information simply gives additional information about those existing complaints. If they are new, issues then arise again about time limits for those allegations.

9. I heard evidence from him about his knowledge of time limits. Suffice to say that he maintained that he knew nothing of any employment tribunal time limits and was not in a position to take advice from his original union, Unite, with whom he fell out, or the Cabin Crew Union, who were his representatives at the time of lodging this claim.

I also had a bundle of 105 pages and I heard submissions on each side.

*The Case Management Order.*

10. I will turn to consider the case management order of Employment Judge Tsamados in more detail. At paragraph 2 he listed this hearing on time limit issues, secondly to consider any application by the claimant to amend, any applications in response and then case management issues.

11. At paragraph 26 the Judge stated that the claim alleged direct race discrimination, harassment and victimisation, adding "He also raises a complaint of whistleblowing in so far as he ticked the relevant box on the claim form." (The claim form did not mention whistleblowing anywhere in the text, although it sets out details grounds over several pages.)

12. Later, at paragraph 28 he went on to say that Mr Norman wished to amend his claim to include whistleblowing, unlawful deduction from wages and detriment due to Trade Union activities. No such application was received however, and Mr Norman was clear today that he was not pursuing any wages or claim based on Trade Union activities.

13. Arguably the Employment Judge felt that a further application was needed to add a complaint of whistleblowing, but given the mention of the relevant box being ticked, I conclude that he accepted that Mr Norman was alleging that one or all of his grievances was a protected disclosure. That is my view too. Hence, the complaints presented were, on this favourable interpretation for the claimant:

    a. direct discrimination (under section 13 Equality Act 2010) on grounds of race

    b. harassment (under section 26 Equality Act 2010) on grounds of race

    c. victimisation (under section 27 Equality Act 2010)

    d. detriment at work under section 47B Employment Rights Act for making a protected disclosure, i.e. the grievances.

14. It follows that any additional protected disclosures would have to be the subject of an application to amend. I am reinforced in that view by the rest of the Order in which Employment Judge Tsamados set out in bold the further information required from C, in particular:

    a. the alleged disclosures;

    b. to whom they were made;

    c. the alleged detriments which resulted;

    d. the acts of direct discrimination relied on;

e. the acts of harassment relied on;

f. the protected acts supporting the complaint of victimisation; and

g. the acts of victimisation relied on.

15. Mr Norman took some trouble to set out his further information and has added much extra detail but has not include lists of acts etc. in the way directed.

16. A further point raised in that Order is that there were two versions of the claim form. Employment Judge Tsamados noted that if the second version was the correct on, only acts on or after 8 April 2020 would be in time. The alternative view is that the complaints were raised on the first occasion on 11 May 2020. I prefer that view. It is possible to withdraw a complaint and re-present it but that depends on the employment tribunal giving permission. They may simply dismiss proceedings at that stage. There was no such order made, one way or the other. It may be that the claim form was simply not actioned before the second one arrived.

17. According to C's further information:

> "The claimant submitted his claim to the tribunal on the 11th May 2020, but he immediately followed up the submission with an email to the Tribunal requesting an amendment to remove a name from the claim. The Tribunal responded to the claimant on 6th July 2020, stating he would need to "submit another claim form [omitting the name]". The claimant submitted another claim form on the 7th July 2020 requesting the previous claim be disregarded in lieu of this claim, as per the Tribunal's instructions."

18. It is in fact not open to a claimant to lodge a claim and then correct it in this way. Nor is he entitled to insist on anonymity. But equally, he did not intend to change his case in any real way and the attached grounds are identical. It seems to me that this correction did not invalidate the original claim form.

19. For discrimination claims time begins to run from the last act of discrimination, or failure to act, as set out in s.123 EA:

> "(1) …. proceedings … 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.
>
> …

20. Since early conciliation began on 10 May, any act or detriments on or after **11 February 20**20 is in time, otherwise not.

*The Further Information*

21. This was provided on 3 September 2021. It contains a section headed “Claims outlined in ET1” then later on page 8 another heading which states “Expansion on ET1 claim”. Mr Norman says that this second section is an expansion of the allegations originally raised in the claim of 11 May 2020. I cannot agree. It goes on immediately into wholly new matters. The first matter is a complaint he raised with his MP. Then he talks about the respondent’s handling of the furlough scheme in April and May 2020, then about further communications with his MP that month, then on 23 June 2020, a disagreement about a colleague’s mental health in the course of a redundancy. That was of course after the date of the claim form and so cannot be an expansion of anything in that form.

22. It then goes on, under the heading ‘harassment’, to describe an altogether new incident of sexual harassment of him in October 2019. This had simply not been mentioned before. Then there is mention of a union related protected disclosure. Under the heading ‘victimisation’ it describes a difference with an Employee Relations Manager, who told him that his grievance was being put on hold during lockdown. Again, this is entirely new.

23. At the end the claimant helpfully listed the six acts or detriments which he says were in time. It is important to focus on the detriments for these purposes, as time starts to run from them:

    a. On 16 February 2020, receiving the outcome of his second grievance;

    b. On 3 March 2020, filing a complaint of discrimination and harassment and so having to recount his experiences;

    c. From 25th March 2020 – 23rd June 2020 suffering harassment from an NK during a call on 23 June 2020 having raised a concern over health and safety (connected with the redundancy process)

    d. On 30 March 2020, being told by an Employment Relations Manager, SP that his grievance appeal was being put on hold;

    e. On 30 April 2020, the claimant questioned why his second appeal was still on hold and felt that the company was initiating disciplinary procedures (unexplained)

    f. On 5 May 2020, SP telling him that there are no managers available to deal with his appeal, also delay in processing his subject access request.

24. Hence, only two allegations were in my view raised in the ET1. Again, item (c) occurred after the ET1 and the next three concern putting his appeal on hold during the furlough period.

25. Of the first two, the second one is simply having to recount the experience by raising a grievance. There are two obvious points here. (The grievance was in fact raised

on 17 January 2020. 3 March 2020 was the date of the grievance meeting.) Secondly, he has to be made 'subject to' a detriment by the respondent, and he has not been subject to anything here. On any view I cannot accept that raising a grievance is itself a detriment.

26. That raises the broader question of what is a detriment? The term 'detriment' is widely used in the EqA but is not in fact defined. In **Ministry of Defence v Jeremiah 1980 ICR 13, CA,** the Court of Appeal took a broad view of the words 'any other detriment'. Lord Justice Brandon said it meant simply 'putting under a disadvantage', while Lord Justice Brightman stated that a detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'.

27. Subsequently the Court of Appeal in **De Souza v Automobile Association 1986 ICR 514, CA**, the Court said the term meant 'disadvantaged in the circumstances and conditions' of work. This view was approved by the House of Lords in **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL**, where their Lordships emphasised that a sense of grievance which is not justified will not be sufficient to constitute a detriment. There has to be some reasonable sense of grievance.

28. This was illustrated by the Employment Appeal Tribunal more recently in **Singh v Cordant Security Ltd 2016 IRLR 4, EAT**. There, an employment tribunal found that Mr Singh, who was of Indian origin, had suffered race discrimination when his employer failed to investigate his allegations of racial abuse by his white manager, whereas allegations made against him by a white colleague were promptly investigated.

29. So that was not simply a case of him raising a grievance. There was a disparity of treatment. That allegation of disparity has to be raised. Equally, it is not simply enough for there to be a delay in handling a grievance. There is always some time taken to do so. To be a detriment, it has to be alleged that that the delay is itself because of a protected characteristic or a protected act such a relevant grievance. There is also a risk of circularity in arguing that a grievance has been delayed because a grievance was raised.

30. The broad position is that if some act of harassment or discrimination occurs at work, time starts to run from then on. There is no rule that while a grievance about that act is underway time limits are extended. An employee may receive the outcome of a grievance and resign in response. This is a common scenario. But it does not follow that the claim is in time just because it was lodged shortly after the internal process was concluded. Something beyond the fact of an unwelcome grievance outcome is required, let alone the fact of raising a grievance, to amount to a detriment or unlawful act of discrimination. Nor does that make it a continuing act, and that appears to be the only basis on which that is suggested as a possibility.

31. However, as already noted, time may be extended if it is just and equitable to do so. In **Robertson v Bexley Community Centre** [2003] EWCA Civ 576, at paragraph 25, Lord Justice Auld held that:

> "It is also of importance to note that the 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."

32. Quite recently the Court of Appeal has revisited the correct approach to this in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** 2021 EWCA Civ 23. Tribunals were cautioned against relying on the factors listed in s.33 of the Limitation Act 1980 as a checklist. The main questions were the length of the delay, the reasons for the lateness and the potential prejudice to the other party.

*The length of the delay*

33. The first grievance was in 2018, over two years before the complaint was raised, the second in mid-2019. There was then a delay of over six months by the claimant in raising the third and most recent grievance against KC and DY. No explanation has been given for that delay which does not depend on any knowledge of employment law. It was simply brought out at a much later stage, which is surprising given the nature of the allegations that he was, among other things, slapped at work.

*The reasons for the lateness*

34. Again, the only reason advanced is lack of knowledge. Unfortunately it is rare now for that alone to make it just and equitable to extend time. We live in the internet era where there are plenty of opportunities to obtain information about how to pursue an employment tribunal claim, and people routinely turn to the internet for all manner of everyday problems. ACAS and the CAB are well known bodies. Their websites have much useful information. Mr Norman was also trained by the Cabin Crew Union as a union representative so he could have asked them too when and how to pursue a claim.

*Prejudice to the respondent*

35. Here there appears to be real prejudice. I heard from Ms Crawshay-Williams and accept that most of the staff involved are no longer employed by the respondent given the extensive redundancy programme. That includes TM, LP who were the subjects of the first grievance, his line manager JN, an Employee Relations Consultant mentioned in the claim form, FM, and another manager said to be protective of LP, DT. It also includes KC and DY, the subjects of the third grievance, and the manager and Employee Relations Consultant responsible for investigating

it. All have gone. I note too that these events go back to 2018 and 2019, already a considerable time ago.

36. So for all the above reasons I conclude that it would not be just and equitable to extend time here.

37. That covers the position under the Equality Act 2010. The allegations of whistleblowing are brought under the Employment Rights Act 1996, but there the test is stricter still; whether it was reasonably practicable to have brought the relevant complaints in time. Here too, lack of knowledge of the relevant time limits is not itself a sufficient reason, unless that lack of knowledge was itself reasonable, and given my conclusions above that is not the case here.

38. For completeness, there is then the question of whether to allow an amendment to bring in the more recent complaints. Neither party in fact raised this, no doubt because it was felt to stand and fall on the question of whether any complaints were in time, but for completeness, the relevant test here is the balance of prejudice between the parties applying the principles in the case of **Selkent Bus Company v Moore 1996 ICR 836**. Without setting out that guidance at any length, the main three considerations are:

    a. The nature of the amendment, i.e. whether it is a minor amendment or the addition of factual details on the one hand, or on the other hand raises entirely new factual allegations;

    b. The applicability of time limits to the new claim or cause of action; and

    c. The timing and manner of the application to amend.

39. This is ground which has already been covered very largely on the question of time limits. Firstly, the new application does raise entirely new factual allegations, including sexual harassment, furlough and the company's handling of its redundancy process. Secondly, all of those applications have not been raised until after the preliminary hearing in June 2021, so are raised over a year into the process. The relevant date is from when any such amendment is allowed: **Galilee v Commissioner of the Police for the Metropolis** UKEAT/0207/16/RN. The Upper Tribunal in that case has held that time limits may now be addressed at a later stage, but it does not seem to be in accordance with the overriding objective to allow out of time amendments to be added now, only to consider later (again) whether it would be just and equitable to extend time. I take the view that it would not be just and equitable. The main fact here is that there are no in time allegations to add them too, and I repeat the points made above about the prejudice to the respondent.

40. For all of the above reasons the claim is dismissed.

Employment Judge Fowell

Date 11 October 2021