EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	AND	**Respondent**
Mr C Graham		Swansway Garages Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham (remotely, via CVP)

ON 20 October 2021

BEFORE EMPLOYMENT JUDGE Dimbylow

Representation
For the claimant: In person
For the respondent: Mr C Baylis, Counsel

This Open Preliminary Hearing (OPH) took place against the background of the coronavirus pandemic; and was conducted remotely by video platform in accordance with safe practice and guidelines.

JUDGMENT having been sent to the parties on 21 October 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claim. This is a claim by Mr Carl Graham (the claimant) against his former employer Swansway Garages Limited (the respondent). There was a Closed Preliminary Hearing ("the CPH") held on 20 July 2021 by Regional Employment Judge Findlay by telephone. I do not propose to recite the history and background to the claim as it is set out in the case management summary of Judge Findlay. By a claim form presented on **1 December 2020**, following a period of early conciliation from 29 October 2020 to 29 November 2020, the claimant brought complaints of discrimination on grounds of sexual orientation.

2. At the CPH the claimant represented himself. Various orders were made for the just disposal of this hearing, although the date was not fixed at that time for the final hearing, pending disposal of the applications I dealt with today. It was, however, fixed later for 6 days commencing on 19 April 2022.

3. There were 3 things for me to deal with today as preliminary matters: (1) the claimant's application to amend his claim to include claims for sex discrimination, unfair dismissal and constructive unfair dismissal, (2) the respondent's application to strike out the claim as having no reasonable prospect of success, and in the alternative (3) the respondent's application for a deposit order because the claim had little reasonable prospect of success.

3. The evidence. I received oral evidence from the claimant only. The parties also made submissions to me, which I mention later; and I received documents which I marked as exhibits as follows:

R1 Agreed bundle of documents (42 pages) for this OPH
R2 The respondent's skeleton argument
C1 Medical report for the claimant dated 14 October 2021
C2 Bundle of photographs submitted by the claimant on 19 October 2021

4.1 The law. The respondent took time points in defending the application to amend. Whether a claim is in time is determined by reference to section 123 of the Equality Act 2010 (EQA). Stated shortly, there is a 3-month limitation period starting with the date of the act to which the claim relates. This time can be extended if I find it is just and equitable to do so. There are other provisions dealing with conduct extending over a period. Because of the way in which the claimant has explained his case I found that I had to deal with the issue of a continuing act, although I was not addressed on the point by the respondent's representative. I had regard to the legacy case law which pre-dated the EQA, as it is still relevant. In the case of Calder –v- James Finlay Corporation Limited [1989] IRLR 55, which was approved by the House of Lords in Barclays Plc –v- Kapur and others [1991] IRLR 136, where it was held that an act extending over a period gave rise to continuing discrimination throughout employment when the claimant then was told that she was not "eligible" for a mortgage subsidy and alternatively this was subjecting her to a detriment whilst employment continued. A continuing act should be approached as being a rule or regulatory scheme which during its currency continues to have a discriminatory affect. The fact that a claimant continued to be paid less than a comparator was a consequence of the decision not to up-grade, not a continuing act of discrimination in the case of Sougrin -v- Haringey Health Authority [1991] IRLR 447. The matter was looked at again in the case of Cast -v- Croydon College [1998] IRLR 318. The Court of Appeal held, amongst other things, that the claimant's complaint was of several decisions by the employer which indicated the existence of a discriminatory policy in her post and its application to her and that this constituted an "act extending over a period". The Court of Appeal considered the issue in Hendricks –v- Commissioner of Police for the Metropolis [2003] IRLR 96. The question is whether the acts complained of by the claimant amounted to an "act extending over a period" as distinct to a succession of unconnected or isolated specific acts, for which time would begin to run from a date when each specific act was committed. The claimant asserted that incidents were linked to one another and that they were therefore evidence of a "continuing state of affairs". The claimant asserts that discrimination took place daily until

the last act which took place on 8 August 2020 when he was suspended from work following an incident between he and a colleague. The claimant only returned to work as part of the disciplinary process and subsequent appeal. Stated shortly, the claimant's narrative is that there was a continuing state of affairs until 8 August 2020.

4.2 I then consider the exercise of my discretion over the three-month time limit applying to the EqA, and I have to consider whether it is "just and equitable" to let the case, or part of it, in after three months if the acts complained of are out of time and do not form part of an act extending over a period. This is relevant to existing claims and any application to amend. The case of British Coal Corporation v Keeble [1997] IRLR 337 provides guidance on how to exercise my discretion. This was considered later in the case of Chohan v Derby Law Centre [2004] IRLR 685 EAT. I also considered the matters mentioned in s.33 of the Limitation Act 1980. Although that refers to the broad discretion for the court to extend the limitation period of three years in cases of personal injury and death, it also requires the court to consider the prejudice which each party would suffer as a result of a decision to be made. I am required to have regard to all the circumstances of the case and in particular, amongst other things, to –

(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 respondent had co-operated with any request for information.

(d) The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action.

(e) The steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking action.

4.3 In the case of Robertson v Bexley Community Centre [2003] IRLR 434 the Court of Appeal confirmed that the Employment Tribunal had a wide discretion in determining whether or not it was just and equitable to extend the time. The tribunal is entitled to consider anything that it takes to be relevant. Nevertheless, the case re-asserts that time limits are exercised strictly in Employment Tribunal cases. When considering the discretion over a claim that is out of time, and whether the time should be extended on just and equitable grounds, the Court of Appeal said that there was no presumption that the tribunal should do so. The tribunal cannot hear a complaint, unless the claimant convinces it that it is just and equitable to extend the time. Thus, the exercise of the tribunal's discretion is the exception rather than the rule.

4.4 The law in relation to time limits in connection with a claim for unfair dismissal or constructive unfair dismissal is different to the EQA, and derives from section 111 of the Employment Rights Act 1996 (ERA). The primary time limit is 3 months from the effective date of termination of the contract of employment. However, there is an escape clause, and I have discretion to allow it to be presented in such further period that I consider reasonable if I am satisfied that the claimant could not bring the proceedings in 3 months because it was not reasonably practicable.

4.5 The law in relation to the amendment application. Rule 29 of the tribunal rules gives a broad discretion to the Employment Tribunal to allow amendments at any stage of the proceedings either on its own initiative or an application by a party. This discretion must be exercised in accordance with the overriding objective of dealing with cases fairly and justly in Rule 2, which states:

"Overriding objective

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

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

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

4.6 I know from Selkent Bus Co Ltd v Moore [1996] ICR 836, EAT, that when making a determination of an application to amend I am required to carry out a careful balancing exercise of all relevant factors, having regard to the interests of justice and the relative hardship that would be caused to the parties by granting or refusing the amendment. Relevant factors include: the nature of the amendment, the applicability of time limits, and the timing and manner of the application.

4.7 A significant feature in this case was that the parties recognised the application to amend was, on the face of it, made out of time. In considering the exercise of my discretion I would need, in part, to take into account the 3-month time limit applying to the EqA and the ERA, and the provisions for extending time as described above.

4.8 I make some general observations at this point, including some which were drawn to my attention in the submissions. I am conscious of the fact that when deciding whether or not it is just and equitable to extend time for the presentation of a discrimination complaint, or an amendment, it is unnecessary to give separate consideration to the merits of the claims; but it is part of my task in the exercise of balancing the prejudice likely to be suffered by both parties should time not be extended. It has long been established that in cases such as this there is a multi-factorial assessment involved when no single factor is determinative. In exercising my discretion, I must ensure that no significant circumstance is left out. A key factor is whether a fair trial of the issue is still possible. Nevertheless, as described above, I must weigh other factors such as

serious and avoidable delay by the claimant in bringing his claim, or in obtaining advice about the possibility of a claim, and of any amendment to it.

4.9 The law on striking out a claim and/or ordering a deposit. Rule 37 (1) of the Employment Tribunal Rules 2013 provides that all or any part of a claim or response may be struck out if it has no reasonable prospect of success or there are other specified grounds established. Tribunals always give special consideration to striking out a claim of discrimination. In the case of Anyanwu and another v South Bank Students' Union and another [2001] ICR 391, the House of Lords highlighted how important it was not to strike out discrimination claims except in the most obvious cases, because they are generally fact sensitive and require a full examination to enable a proper determination of the issues. Such a cautious approach to striking out claims of discrimination has been emphasized in subsequent cases, such as Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330. This has given rise to the proposition that it is unfair to strike out a claim where there are crucial facts in dispute and there has been no opportunity for the evidence in relation to those facts to be considered. It is a draconian measure and one which I would not entertain lightly. My starting point is that I will not strike out a claim. If I were to consider that any specific allegation or argument in a claim had little reasonable prospect of success, I may make an order requiring the claimant to pay a deposit as a condition of continuing to advance that allegation or argument. This power stems from Rule 39 (1). It is important that I arrive at a decision which is just, fair and proportionate, having regard to the overriding objective, as more particularly described in Rule 2 above.

5. The facts. I acknowledge the fact that the claimant is a litigant in person. It is a difficult task to give evidence and present the case. However, the claimant presented as articulate and intelligent. He was able to respond to questions in a reasonable way and in reasonable time, and was adept at dealing with the case remotely. The claimant had sought no advice from a solicitor or barrister and did not approach the CAB or any other advice agency. At one stage he sent a bundle of his papers to an advice agency to see whether or not he was eligible for legal aid; but he was told he had too much capital and they were unable to help him. All his understanding of his claim, the law and procedure is derived from this research upon the Internet. This included his valuation of the amount of compensation that he was seeking. He told me that he had no idea about time limits, although the claim form was presented very shortly before the end of the primary limitation period. I find it surprising that the claimant was not told about time limits when using the services of ACAS in early conciliation.

6. The claimant set out his application to amend the claim form to include sex discrimination, unfair dismissal and constructive unfair dismissal in emails which appeared in the bundle at pages 37 to 39 dated 1 August 2021 and 40.

7. The claimant failed to provide the detail about the amendment as I would have expected. Nevertheless, I was able to deal with the applications before me on the information of the parties had provided. In summary, the claimant relies upon the fact that he had no education in law and was suffering from mental health issues because of the loss of his job and this caused some confusion and distress when he filled the claim form in online. He advanced the argument that he thought that he had ticked the box for unfair dismissal, although he had not.

10. The **claimant's submissions**. The claimant told me he relied upon the reasoning he had set out in pages 37 to 39 of the bundle, that is, in his application dated 1 August 2021, and in page 40, being his witness statement dated 4 October 2021. In summary, the claimant asserted he was confused and distraught when he filled in his form online.

11. I then heard from Mr Baylis with the **respondent's submissions**. He addressed me orally and referred to his skeleton argument. I do not propose to set out everything that he said in it here. He also referred to the case of the Bahl v The Law Society [2004] IRLR 799, CA, but he did not provide me with a copy of it. He said that he had forwarded it to the tribunal and the claimant, although it had not made its way to me. However, I am familiar with the case. He reminded me that it gave rise to the principle that not all unreasonable behaviour amounted to discrimination; whereas all discriminatory behaviour is unreasonable. He submitted that although no admissions were made by the respondent, if the things reported to have been said by the respondent's employees did happen, then this was unreasonable but not discriminatory.

12. I canvassed with the claimant as to why he had sent in to the tribunal and the respondent the photographs the day before the hearing. He said this was to draw attention to how things have changed in relation to social media since the time of the old cases referred to by Mr Baylis; and attitudes had similarly changed with the times.

13. My conclusions and reasons. I apply the law to the facts and explain my analysis. Dealing with the amendment application first.

14. The length of and reasons for the delay. The claimant explained that he did not know the law and sought no advice. The trigger for making the application to amend was having to deal with the case at the CPH. The claimant was dismissed on 3 September 2020. The application to amend was dated 1 August 2021 and the statement in support dated 4 October 2021. He also produced medical evidence, in the form of a report dated 14 October 2021, following a consultation on 12 October 2021, to explain why he did not include the new matters originally in the claim form and also the delay in making the application to amend.

15. The extent to which the cogency of the evidence is likely to be affected by the delay is relevant in this case. This was not put forward as an issue by the respondent. I am conscious of the fact that the claimant was taken through a suspension, investigation, disciplinary procedure and appeal. Furthermore, a grievance was brought by him. In the circumstances, I conclude there is likely to be a reasonable data trail and the cogency of the evidence is not therefore adversely affected.

16. The claimant has not argued that the respondent had failed to co-operate with any request for information relevant in relation to his claim or the amendment application.

17. The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action. This has been lamentable in relation to those matters that do not appear in the claim form and the new matters. A significant document in the bundle was that at page 17, which is an email from the claimant to the respondent. Here, the claimant refers to his claim in terms of being a man discriminated against because he finds children attractive, and points out that this kind of case would attract a huge amount of media attention. The claimant refers to sexual orientation; but makes no

mention of: sex discrimination, sexual harassment, unfair dismissal or constructive unfair dismissal. If these matters had been present as based on fact, and in the claimant's mind, I find it is more likely than not on the balance of probabilities that the claimant would have mentioned them. I concluded that we were not dealing with a relabeling exercise, but these were new matters.

18. The claimant has taken no legal advice on the original claim nor the amendment application. He would be substantially out of time if he presented a new claim over the subject matters of the amendment.

19. I then looked at the balance of hardship. If I do not grant the amendment application the claimant will be shut out from having those particular issues tried before a full tribunal. He is still able to have a trial of the issues raised in the original claim. There are a number of matters which are in play which can be heard. Has the delay caused prejudice to the respondent? This has not been demonstrated, other than its assertion about having to face what it considers to be an unwinnable case, brought deliberately by the claimant to cause reputational harm to the respondent and using it as a lever to obtain compensation.

20. When coming to my conclusions I had regard to how the claimant presented to me. The claimant is articulate and intelligent. However, he was not always a good witness in his own cause. He was prone to exaggeration. This was apparent in the way in which he valued his injured feelings. The claimant has described many life events in the medical report dated 14 October 2021 which probably have taken a toll upon his feelings and mental health; but he has founded his claim on the basis that the feelings and mental health problems outlined are entirely due to the respondent.

21. I appreciated that the claimant was and is a litigant in person; and that I should do my best to enable and empower him by adapting the system to suit such litigants. This helps with the concept of the equality of arms in litigation, and Rule 2. However, I cannot change the law or adapt it to give him an advantage. The claimant was resourceful and had some knowledge derived from his own research. Unfortunately, he was not always focused, as demonstrated by his correspondence with the respondent after the issue of the proceedings, and the lack of particularity when explaining the details of his case. The claimant's email of 10 February 2021 is unhelpful, and does contain a threat, referring to media attention and going direct to the head of public relations for the respondent.

22. The claimant provided some information about his medical condition and treatment. In effect, the claimant was asking me to imply into this documentation confirmation that he was incapable of submitting a claim form for all of the claims or amending it within a shorter time frame. I cannot come to that conclusion on the information before me. The claimant has failed to demonstrate any relevant physical or mental impediment on the balance of probabilities which would have prevented him doing what was necessary to ensure his claim was brought in time and/or applying to amend shortly thereafter.

23. Therefore, upon the claimant's application to amend the claim to include the sex discrimination, I refuse the application as the claimant has failed to persuade me that I should grant the amendment under Bexley principles. The claimant told me that he did not complain about discriminatory treatment until after he was dismissed and then lodged a grievance which referred to it. I did not see the letter of grievance, although the claimant told me it referred to sexual orientation only. This was sent after he received the

rejection of his appeal against dismissal following a meeting on 22 September 2020. These matters would have been at the forefront of the claimant's mind at the time and had he wanted to, he would have included not only the sex discrimination claim but also the claim for unfair dismissal. I conclude he made a conscious decision not to include them.

24. As I said before, the test is different for unfair dismissal; which involves what is "reasonably practicable". Again, the claimant has failed to demonstrate that it was not reasonably practicable to have presented such a claim in time or to apply sooner to amend. Again, I conclude the claimant decided against bringing such a claim, bearing in mind the respondent's assertion that he was dismissed for assaulting another employee.

25. Therefore, I reject the application to amend in its entirety. There was serious and avoidable delay on the part of the claimant in his application to amend. The claimant told me that he was dismissed by letter and never resigned; and therefore, there was no claim for constructive unfair dismissal to be brought.

26. In relation to the respondent's applications, I deal with the strikeout first. I refuse to make the order because on the information available to me I cannot say that the case has no reasonable prospect of success. Similarly, I cannot come to the conclusion, at this stage, that the case has little reasonable prospect of success. I cannot agree with the respondent's submissions that the facts advanced cannot as a matter of law amount to harassment related to sexual orientation. The key words are "related to" found in the definition of harassment in section 26 of the EQA. A factual analysis is required into whether the conduct complained about was unwanted, had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment. The tribunal will consider the claimant's perception, the other circumstances of the case, and whether it is reasonable for any conduct to have that effect. The matter needs to be decided by a tribunal having heard all the evidence from the witnesses. If it turns out, as the respondent asserts, that the claimant did bring this claim purely out of spite, hoping for compensation by exposing the respondent and its employees to reputational harm having been dismissed, this may be dealt with by a costs order application at the end of the case. This is a fact sensitive case, which I conclude is exactly the sort which is envisaged by Anyanwu as not suitable for striking out; and therefore it is just, fair and proportionate that it is heard by a full tribunal, and I order no deposit to be paid.

Employment Judge Dimbylow
15 November 2021