



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr J Wisniewski

v

Volution Ventilation UK Limited

Heard: by video (CVP)

On: 24 and 25 May 2021

And in chambers on

26 and 28 May 2021

And on 9 September 2021

Before: Employment Judge Hawksworth

Ms H Edwards

Mr P Hough

Appearances:

For the Claimant:

Mr P Wisniewski (the claimant's son)

For the Respondent:

Ms C McCann (counsel)

Polish Interpreters:

Ms Walaszek (24 May 2021)

Ms Joseph (25 May 2021)

Mr Zakzrewski (9 September 2021)

RESERVED JUDGMENT

The unanimous decision of the tribunal is:

1. The claimant's complaints of direct race discrimination and harassment were not presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010, and so the tribunal does not have jurisdiction to consider them.
2. The claimant's complaints of direct age discrimination or age-related harassment fail and are dismissed.

REASONS

The claim, response and previous preliminary hearings

1. The claim form was presented on 10 December 2018 after Acas early conciliation from 5 November 2018 to 26 November 2018. The claimant made complaints of unfair dismissal, disability discrimination, race

discrimination, age discrimination and unauthorised deduction from wages. The respondent presented its response on 28 March 2019.

2. Private preliminary hearings took place on 2 July 2019 and 8 April 2020. At a public preliminary hearing on 6 July 2020 Employment Judge Anstis decided that the claimant was not, at the relevant times, disabled within the meaning of the Equality Act 2010. Judge Anstis struck out the claimant's complaints except for three complaints of race discrimination, and two complaints of age discrimination.
3. In the case management order of 6 July 2020, the remaining complaints of race discrimination were identified as complaints of direct race discrimination or racial harassment (with the claimant describing his race or ethnic origin as "European", and the surrounding circumstances being described at pages 13 and 14 of the claimant's particulars of claim) as follows:
 - a. The claimant's work being "sabotaged" and as a result the claimant having to put in additional work to meet his targets.
 - b. The claimant and other European staff (including Grzegorz Rosinski) being required to work on 4-5 machines at the same time, whereas Asian workers were only required to work on 1-2 machines at the same time.
 - c. Being told (by Asian workers) that he 'stinks' and 'his food stinks'.
4. The case management order included an 'unless' order requiring the claimant to provide further information about the race discrimination complaints.
5. The remaining complaints of direct age discrimination or age-related harassment were recorded in the case management order as:
 - a. Being sent a letter (on turning 65¹ years of age in 2018) saying that the respondent would not tolerate his lateness;
 - b. Bola Akinmarin telling him in May 2018 that he should not be working and should be retired by now.
6. Further information was provided on behalf of the claimant on 21 August 2020 and 22 August 2020 in response to the unless order. In a letter dated 19 November 2020 the tribunal confirmed the dismissal of the race discrimination complaints by operation of the unless order. Mr Wisniewski made an application to set aside the dismissal. Unfortunately, that application had not been considered by the start of the hearing before us on 24 May 2021. We return to this below.

The hearing before us

¹ The case management order says the claimant turned 66 in 2018 but this must be a typing error as the claimant was born in 1953.

7. The first two days of the hearing took place by video (CVP) on 24 and 25 May 2021. The claimant was represented by his son, Mr Paul Wisniewski. In this judgment we refer to Mr Paul Wisniewski as Mr Wisniewski and to Mr Jan Wisniewski as the claimant. The claimant's brother, Mr Marek Wisniewski, a witness for the claimant, is referred to as Mr Marek Wisniewski.
8. Polish interpreters were requested for the claimant and some of the witnesses. We are grateful for their assistance. Interpreters were present on 24 May and on 25 May. They interpreted the hearing for most of those two days, as we explained in our judgment of 8 June 2021. We also explained in that judgment some preliminary matters raised by Mr Wisniewski and how we dealt with them.
9. During discussions on the first day of the hearing about the issues for determination by us, Mr Wisniewski made the tribunal aware of the outstanding application to set aside the dismissal of the race discrimination complaints. We discussed with the parties how we should proceed, and, for reasons set out in our judgment of 8 June 2021, we decided that we should proceed to hear the two complaints of age discrimination. We decided that we should also hear the parties' submissions on the outstanding application in respect of the complaints of race discrimination. We told the parties that if the application succeeded, another hearing would be required for those complaints.
10. After hearing evidence and submissions on the age discrimination complaints, and submissions on the application to set aside the dismissal of the race discrimination complaints, we reserved our judgment. The tribunal deliberated in chambers on 26 May 2021 and 28 May 2021.
11. We decided that the claimant's application to set aside the dismissal of his race discrimination complaints should succeed, for reasons set out in our judgment of 8 June 2021. In a separate order also dated 8 June 2021, we ordered that the question of whether the claimant's complaints of race discrimination were presented in time should be considered on the next hearing day, 9 September 2021, and we made case management orders for the parties to prepare for that. The orders provided for exchange of statements and any additional documents, and for the respondent to prepare an outline skeleton setting out the relevant legal and factual matters. In the meantime, our decision on the complaints of age discrimination remained reserved, for further deliberation after the next hearing day or days.
12. The resumed hearing on 9 September 2021 also took place by video. It started at 10.50am as Mr Wisniewski had connection difficulties. A Polish interpreter attended from 11.00am to 12.18pm. The claimant was not present on 9 September 2021 and Mr Wisniewski chose to give his evidence and make submissions in English. The interpreter remained in the hearing while Mr Wisniewski was giving evidence. After his evidence was concluded, Mr Wisniewski confirmed that he did not require the interpreter any further, and so the interpreter left the hearing.

Evidence and submissions

13. For the hearing on 24 May 2021 there was a bundle of documents with 598 pages. Mr Wisniewski had disclosed some further documents on 11 May 2021 and these were added at the back of the bundle and numbered 599 to 708. In this judgment references to page numbers without prefixes are references to that bundle.
14. After our reading on the first day, Mr Wisniewski said that he had an outstanding application for disclosure. We considered this before hearing any evidence. We refused the application for further disclosure because it was (as set out in Mr Wisniewski's email to the tribunal of 12 October 2020) either an application which had already been considered and refused at the preliminary hearing on 8 April 2020 or it was a request for information about toxins used at the factory where the claimant worked, which was not relevant to the issues before us.
15. Written statements on behalf of the claimant were provided by Mr Wisniewski, Mr Grzegorz Rosinski (three statements), Mr Dariusz Kitka (one statement) and Mr Marek Wisniewski, the claimant's brother (one statement).
16. On 24 May 2021, we heard the claimant and Mr Wisniewski's evidence.
17. The claimant did not prepare a formal witness statement himself but relied on typed English translations of three sets of handwritten notes written by him in Polish in 2018/2019, in September 2018 and on 29 July 2020. He has been diagnosed with a medical condition which affects his memory. A medical report dated 4 February 2020 (page 527) said that obvious deficits in his short-term memory have been noticed since 2017. Mr Wisniewski said that the claimant was not able to be cross examined because of his medical condition. The judge explained that if the claimant was not cross examined, the tribunal could consider the claimant's written notes and invite the respondent to set out what questions they would have asked the claimant if he had been able to be cross examined. The tribunal would then attach such weight to the claimant's notes as it considered appropriate in the circumstances, bearing in mind that he had not been questioned. At Mr Wisniewski's request, the claimant was sworn and confirmed his written notes, but he was not asked any questions by the respondent's counsel or by the tribunal.
18. Mr Wisniewski gave evidence for the claimant and was cross examined.
19. In relation to the claimant's other witnesses, Mr Wisniewski said that as the tribunal was only considering the age discrimination complaints on these days, only Mr Kitka's evidence was relevant and he did not propose to call the claimant's other witnesses Mr Rosinski and Mr Marek Wisniewski. Mr Kitka's evidence was to be heard on 25 May 2021 as he was not available on 24 May.
20. On the morning of 25 May 2021 we started hearing the respondent's evidence before hearing from Mr Kitka, because the interpreter had not

arrived and Mr Kitka was to give evidence via the interpreter. We heard from the respondent's witnesses:

20.1 Ms Bola Akinmarin, HR and payroll advisor,

20.2 Mr Harpal Singh Purewal, the claimant's line manager, and

20.3 Ms Rachel Hawkins, HR director.

21. All of the respondent's witnesses had served written statements.
22. The interpreter arrived when Ms Akinmarin had completed her evidence and we suggesting hearing from Mr Kitka at that point. Mr Wisniewski said he preferred to finish the respondent's other witnesses. We allowed this.
23. Once the respondent's evidence had concluded, Mr Wisniewski said that on reflection he had decided to call Mr Rosinski and Mr Marek Wisniewski. Mr Rosinski was sworn and confirmed his statements. There were no questions from the respondent or the tribunal. Mr Marek Wisniewski was unable to join the hearing by video or telephone despite trying several times. The respondent's counsel confirmed that she would not have had any questions for him. We told the parties we would take Mr Marek Wisniewski's statement into account as far as it was relevant to the issues for determination.
24. Mr Kitka joined the hearing by telephone. He was sworn and confirmed his statement. There were no questions from the respondent or the tribunal. We refused permission for Mr Wisniewski to ask Mr Kitka additional questions about age discrimination, as Mr Kitka had the opportunity to include his evidence about age discrimination in his witness statement.
25. The respondent's counsel and Mr Wisniewski made closing comments.
26. The hearing resumed on 9 September 2021 to decide the question of whether the claimant's complaints of race discrimination had been presented in time. A separate bundle was prepared for the resumed hearing. It had 591 pages. Pages 295 onwards had been added at Mr Wisniewski's request. The bundle included additional disclosure which the parties had exchanged and which was relevant to the question of whether the claimant's race discrimination complaints had been presented in time. The bundle was paginated from page A6 to page E591. In this judgment, page references with prefixes are references to the second hearing bundle.
27. At the hearing on 9 September 2021 we heard from Mr Wisniewski on behalf of the claimant, and Ms Hawkins, HR director, for the respondent. Both had served witness statements.
28. The respondent's counsel provided written submissions dated 20 August 2021. Mr Wisniewski provided written submissions in an email of 6 September 2021 headed 'Commentary'. Both Mr Wisniewski and the respondent's counsel made oral submissions.

29. We reserved judgment. The employment judge regrets that a period of absence for ill-health has led to a delay in the promulgation of this judgment, and apologises to the parties and their representatives for this.

Issues for determination

30. As explained above, the issues for determination by us are:
- 30.1 whether the claimant's three complaints of race discrimination or harassment (as set out in paragraph 3 above) were presented within the time limits in sections 123(1)(a) & (b) of the Equality Act 2010; and
 - 30.2 whether the claimant was subject to direct age discrimination or age-related harassment in:
 - a. Being sent a letter (on turning 65 years of age in 2018) saying that the respondent would not tolerate his lateness;
 - b. Bola Akinmarin telling him in May 2018 that he should not be working and should be retired by now.
31. Mr Wisniewski provided us with a lot of other information, for example relating to health and safety issues at the factory where the claimant worked. We explained that we have to focus our enquiry on the complaints identified by the claimant in his claim and clarified on his behalf at the two preliminary hearings and in his further information. We take other information into account only if and as far as it is relevant to those complaints.

Findings of fact

32. We make the following findings of fact based on the evidence we heard and read.
33. The respondent designs, manufactures and distributes ventilation and fan equipment. The claimant was employed as a mould-shop operative for the respondent from 10 January 2005 until his employment terminated on 31 December 2018. He worked in the respondent's factory in Reading.
34. When he first began working for the respondent, the claimant worked on the night shift. In June 2014 he moved to the day shift (page B82).
35. During the period October 2017 to March 2018 the claimant had five periods of time off work for sickness for a number of different reasons. As recorded in self-certification forms, the claimant was off sick from 2 to 10 October 2017 (page 127), on 7 November 2017 (page 128), from 11 December 2017 to 12 January 2018 (page 133), from 12 to 13 February 2018 (page 136) and from 12 to 16 March 2018 (page 137).
36. The claimant was born in 1953 and turned 65 in mid-March 2018. The claimant's manager Mr Purewal was not aware that it was the claimant's birthday around this time, and he did not know how old the claimant was.

37. The claimant was absent from work on 20 March 2018 and on 21 March 2018 he was an hour late for work (pages 139 and 141). Mr Purewal asked the claimant to attend a meeting to discuss his absence and lateness. A colleague of the claimant attended the meeting to translate for him, and another employee took notes. The notes are at pages 142 to 146.
38. In the meeting, Mr Purewal asked the claimant why he was late that morning. The claimant said he had overslept. Mr Purewal asked the claimant why he was absent the previous day. The claimant said he could not remember where he was.
39. Mr Purewal told the claimant that he had been sick a few times and that he was not leaving Mr Purewal any choice but to give a warning. He said it was down to the claimant to come to work. The claimant did not challenge the sickness absences. He said he had not been feeling well and he had things to think about, 'possibly take/go to pension'. Mr Purewal said, 'If you don't want to lose [your] job, come to work' (page 144). Mr Purewal told the claimant that he would have to issue him with a warning and this would be sent to the claimant by HR.
40. The written warning was sent to the claimant on 28 March 2018 (page 147). It was signed by Bola Akinmarin, one of the respondent's HR advisors. As an HR advisor, Ms Akinmarin had access to records which included the claimant's date of birth, but she was not aware of his birthday or his age at the time she sent the letter.
41. The letter referred to the claimant's high levels of absence and lateness on various occasions within the previous 6 months. The letter noted that a lot of the absences were health related and invited the claimant to inform Mr Purewal if there was any way the respondent could assist the claimant in improving his attendance.
42. The claimant had a right of appeal against the warning but did not appeal.
43. There was no evidence before us of any other employee being treated any differently to the claimant in respect of sickness absence. We accept the evidence of Ms Hawkins that despite conducting a search, she could not identify any employee in 2017 to 2018 with absence levels comparable to the claimant.
44. The claimant was absent for 16 shifts in April 2018 (page 125). After April 2018 he began a period of long-term sickness absence which lasted until his employment terminated in December 2018. The claimant says the last day he worked was in April 2018 (page 56). This is consistent with the respondent's sickness absence record which shows the claimant was absent with sickness on every day in May other than bank holidays, and was then recorded as absent until December 2018 (page 125). The claimant's last day at work was 30 April 2018.
45. In May 2018, while he was off work sick, the claimant went into work to deliver a fit note and to discuss a query about his sick pay. The parties were unsure about the exact date of this meeting. The GP fit notes which the

claimant could have been taking in at around this time are dated 14 and 25 May 2018 (pages 651 and 653). For this reason we find that the meeting took place in mid to late May 2018.

46. Mr Purewal came to meet the claimant when he arrived. As they were walking through the building on their way to Mr Purewal's office, Mr Purewal asked the claimant how he was. The claimant's use of English is limited but Mr Purewal understood his reply to be that his health was not good and that he was considering finishing work to return to Poland at the end of the year.
47. When they got to Mr Purewal's office, Mr Purewal called Ms Akinmarin. She asked Mr Purewal to bring the claimant to her office. While they were on the phone, Mr Purewal told Ms Akinmarin what the claimant had said to him about finishing work. Ms Akinmarin said that she would not raise this with the claimant herself, but would leave it to the claimant to raise it if he wanted.
48. Mr Purewal and the claimant went to Ms Akinmarin's office where all three remained during a discussion about the claimant's sick pay. The claimant did not mention retirement, finishing work or returning to Poland, and so it was not discussed. Mr Purewal saw the claimant out.
49. We accept the evidence of Ms Akinmarin that she did not use the words alleged by the claimant about retirement, and that she did not discuss retirement or finishing work at all. We accept this because her evidence was consistent, and it was supported by Mr Purewal who was with her at all times throughout the meeting. We think it is more likely that the claimant was thinking of the comment about retirement which he had made in his discussion with Mr Purewal. He had made a similar comment in the earlier meeting in March 2018.
50. On 11 June 2018 the claimant emailed the respondent about his sick pay. Mr Wisniewski said this was a grievance. In the email the claimant said that sometimes he was treated by management like a subhuman and that he felt overexploited and underpaid. He said that he was left with no choice but to take legal action against the company. The email does not mention discrimination (page 657). We do not accept that, as Mr Wisniewski suggested, the reference to being treated like a subhuman was a complaint of race discrimination. The claimant did not submit any grievance or other complaint about race discrimination.
51. The claimant tried to present an employment tribunal complaint on 25 October 2018 but his claim was rejected on 21 November 2018. There had been no Acas early conciliation before the claim was presented, although Mr Wisniewski did have some email correspondence with Acas on about 25 October 2018.
52. The claimant notified Acas for early conciliation on 5 November 2018. The Acas early conciliation certificate was issued on 26 November 2018 (page A22). The claimant's second employment tribunal claim was sent by post to the employment tribunal on 7 December 2018 and recorded as received by the tribunal on 10 December 2018 (page A8).

53. In the course of preparing for the hearing of the claim, the respondent's HR director checked the respondent's employment records. She also contacted a former operations director and 16 potential witnesses. She has not been able to identify any employee who can assist with recalling any of the events described in the claimant's further information about his complaints of race discrimination. The claimant's supervisor on the night shift, the alleged main perpetrator in the claimant's complaints of race discrimination, left the respondent's employment on 3 December 2015. Ms Hawkins has taken steps to contact him for the purposes of these proceedings but without success.
54. In respect of the claimant's witnesses, Mr Rosinski and Mr Kitka did not work in the department or on the shifts which the claimant worked on. Mr Marek Wisniewski was signed off work for sickness after 13 April 2015.

The Law

Direct discrimination because of race and/or age

55. Race and age are protected characteristics under section 4 of the Equality Act 2010.
56. Section 13 of the Equality Act provides:

“(1) 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.

“(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.”

Harassment related to race or age

57. Under section 26 of the Equality Act, a person (A) harasses another (B) if
- “a) A engages in unwanted conduct related to a relevant protected characteristic, and*
- b) the conduct has the purpose or effect of –*
- i) violating B's dignity, or*
- ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
58. In deciding whether conduct has the effect referred to, the tribunal must take into account:
- “a) the perception of B;*
- b) the other circumstances of the case;*

c) whether it is reasonable for the conduct to have that effect.”

59. This means there is both a subjective element (the effect on the claimant) and an objective element (whether it was reasonable for the conduct to have that effect on the claimant).

Time limit

60. The time limit for bringing a complaint of discrimination or harassment is set out in section 123 of the Equality Act. A complaint 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”.*

61. Conduct extending over a period (sometimes called a ‘continuing act’) is to be treated as done at the end of the period (section 123(3)).
62. When calculating the end date of the period of three months, time spent in a period of Acas early conciliation is not counted:

“In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A [the day on which the claimant contacts Acas for early conciliation] and ending with Day B [the day on which the claimant receives the early conciliation certificate] is not to be counted” (section 140B of the Equality Act).

63. Employment tribunals have a wide discretion to extend time under the ‘just and equitable’ test in section 123(1)(b) and may take into account all relevant factors (*Hutchinson v Westward Television Ltd* 1977 ICR 279 (EAT)). However, ‘there is no presumption that the tribunal should [extend time] 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 the discretion is the exception rather than the rule’ (*Robertson v Bexley Community Centre t/a Leisure Link* 2003 IRLR 434, CA). This does not mean that exceptional circumstances are required; the test is whether an extension of time is just and equitable.

Burden of proof

64. Sections 136(2) and (3) of the Equality Act says:

“(2) 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.

(3) This does not apply if A shows that A did not contravene the provision.”

65. This means that if the claimant is able to prove facts from which the tribunal could decide that there has been unlawful discrimination, the burden of proof shifts to the respondent to satisfy the tribunal that there has not been unlawful discrimination.

Conclusions

66. We have applied these legal principles to our findings of fact and have reached the following conclusions.

Direct race discrimination or harassment

67. The three complaints of race discrimination are put as direct race discrimination or alternatively racial harassment. We have to consider whether these three complaints were presented within the time limits set out in the Equality Act 2010.
68. We have started by considering the basis of each of the three complaints of race discrimination, and when the treatment complained of occurred.
69. First, the claimant said his work was sabotaged and as a result he had to put in additional work to meet his targets. In the further information he provided in August 2021 the claimant said the sabotage was i) hiding his tools, ii) putting faulty elements in his boxes, iii) dumping boxes with unfinished elements on him and iv) telling lies about his behaviour. The claimant says this was conduct by his supervisor and manager (both of whom are named) and 'other colleagues' (who are not named). Mr Marek Wisniewski is said to have witnessed the sabotage (pages 97-99).
70. This treatment is said to have taken place during 2005 to 2014, when the claimant was working on night shifts (page 99).
71. The claimant's second complaint is that he and other European staff (including Mr Rosinski) were required to work on 4-5 machines at the same time, whereas Asian workers were only required to work on 1-2 machines at the same time. In his further information of August 2021, the claimant said the other European workers who were overworked were Mr Marek Wisniewski, Steven and Ralph (no surnames given). He says that the Asian workers who were treated better were 'all Asian employees' of the respondent (no names given). He says the machines operated by Asian employees were slower, and Europeans were given harder to operate machines (page 99 to 101).
72. The claimant says this treatment occurred on the night shift and continued during day shifts as well (page 101). This treatment must have ended on 30 April 2018 at the latest, as that is the last day the claimant was at work before his long-term sickness absence and the termination of his employment.
73. The claimant's third complaint is that he was told (by Asian workers) that he 'stinks' and 'his food stinks'. The claimant has not been able to provide information about who told him this. He says that it is difficult to provide the names of the employees who made these comments, because rotas did not

include full names, name tags were not worn, and there was a language barrier (page 101 and 102).

74. The claimant says these comments took place a few times during the years 2005 to 2017 (page 102).
75. The time limit for presentation of a complaint of direct discrimination or harassment in section 123(1)(a) is three months less one day from the date of the act complained of. When the treatment complained of is conduct extending over a period, the three months starts from the end of the period.
76. In the claimant's case, the allegations cover long periods, dating back to 2005 in at least two of the complaints. For the purposes of considering when the time limit would have expired, we have considered the end of the three-month time period, assuming that there was conduct extending over the period complained about. This means that:
 - 76.1 For the first complaint, the claimant's last day of working on night shifts was 30 June 2014 at the latest. The period of three months from that date ended on 29 September 2014;
 - 76.2 For the second complaint, the treatment complained of took place no later than 30 April 2018 as that was the last day when the claimant was working. The three-month period from then ended on 29 July 2018.
 - 76.3 For the third complaint, the treatment took place on 31 December 2017 at the latest. The period of three months from then ended on 30 March 2018.
77. The time limit under section 123(1)(a) for the complaints of race discrimination therefore expired on 29 September 2014, 30 March 2018 and 29 July 2018.
78. There is no extension of time arising from the period of Acas early conciliation. Section 140B works by 'not counting' a period of early conciliation which falls within the three month period under section 123(1)(a). It does not work by always adding an automatic extension equal to the period of early conciliation at the end of the original three month period. This is an important distinction. In the claimant's case, Acas early conciliation did not start until after the time limit under section 123(1)(a) had expired. The early conciliation took place wholly outside the period of three months beginning with the date of the conduct complained of. There was therefore no period of early conciliation to discount when calculating the date of expiry of three month period in any of the claimant's race discrimination complaints.
79. Therefore, when the claim was presented on 10 December 2018, it was outside the three month time limit in section 123(1)(a) in all of the claimant's three complaints of race discrimination.

80. That means that we have to consider whether the claim was presented within such other period as we think just and equitable under section 123(1)(b).
81. To do that, we have started by looking at the length of the delay and the reasons for it. In terms of the length of the delay, the first complaint was presented over 4 years later than expiry of the three month period, the second over 8 months later, and the third over 4 months later. These are all lengthy delays in the context of a complaint which has a three month time limit.
82. In terms of the reasons for the delay, Mr Wisniewski set out some reasons in his witness statement sent on 2 August 2021. The statement is lengthy and not always easy to follow. We understand the reasons given by Mr Wisniewski's for the delay to include the following:
 - 82.1 The respondent was 'playing on time', deliberately ignoring the company's internal procedures and Acas code of procedures (page B75);
 - 82.2 The claimant had given up reacting and trying to change things, because the treatment had gone on for so long and he was afraid of losing his job (page B78).
83. The first of these reasons does not explain the delay. We have found that the claimant did not make any internal complaint or grievance about race discrimination, and so it is not clear what internal procedures the claimant says the respondent was ignoring or what steps the respondent should have been taking under the Acas Code of Practice. Mr Wisniewski was first in touch with Acas on about 25 October 2021 and then notified Acas for early conciliation on 5 November 2021. Both of these dates were after the expiry of the three month time limit in all the three complaints. In other words, the three month period had already expired by the time Mr Wisniewski contacted Acas, so any delays by the respondent in responding to Acas cannot have been the reason for the delay in presenting the race discrimination complaints.
84. The second reason given is that the effect of the respondent's treatment of the claimant was such that he decided not to challenge the respondent. This explains why the claimant had decided not to pursue a claim (or investigate the possibility of pursuing a claim) but not why or when his position changed such that he decided to present a claim.
85. We have gone on to consider the related question of the claimant's knowledge about his rights and how quickly he acted once he knew about the possibility of making a claim. The claimant was aware that he had a right to pursue legal action, as he mentioned this in his email of 11 June 2018. He was aware from at least 25 October 2018 that he had a right to present an employment tribunal claim, as he attempted to present a claim on that date. The claimant knew on 21 November 2018 that his first claim had been rejected and from 5 November 2018 he clearly had concerns about whether

he had followed the correct procedure, because he started Acas early conciliation on that date. His claim was presented on 10 December 2018.

86. We have taken into account what the claimant says about the effect of the treatment, his ill health and the fact that he is being represented by his son who is not legally qualified. However, given the long delays, we do not think that the claimant took action promptly after June 2018 when he was aware of the possibility of taking legal action. Four months passed before he took steps to start an employment tribunal claim. There was a further delay in taking prompt action after 5 November 2018 when he was aware that his first claim may not be accepted. It was a further month before the claimant sent his second claim form on 7 December 2018.
87. Having considered the length of and reasons for the delay, we have weighed up (on the one hand) the prejudice to the respondent if we extend time and (on the other) the prejudice to the claimant if we do not extend time.
88. We accept that if the race discrimination complaints are allowed to proceed, the respondent will be prejudiced because:
 - 88.1 the passage of time since the treatment complained of makes it difficult for the respondent to respond to the claimant's complaints. The cogency of the evidence is very likely to be affected by the delay in presenting the complaint, particularly where, as here, the complaints lack specificity in relation to dates of incidents and name;
 - 88.2 despite taking reasonable steps to do so, the respondent has not been able to identify any employee who can assist with recalling any of the events described in the claimant's further information. The alleged main perpetrator, the claimant's supervisor on the night shift, left the respondent's employment on 3 December 2015 and the respondent has been unable to contact him.
89. We accept that these factors will lead to prejudice to the respondent if the claimant's complaints of race discrimination are allowed to proceed out of time. The passage of time and inability to identify appropriate witnesses would significantly affect the cogency of the evidence and the respondent's ability to respond to the complaints.
90. Against the prejudice to the respondent, we have to weigh up the prejudice to the claimant if the complaints of race discrimination are not allowed to proceed. If the claimant is not able to pursue his complaints of race discrimination, the prejudice to him will be greater the stronger the merits of those complaints. We have concluded that the merits of the claimant's race discrimination complaints are poor, for reasons which also relate to the passage of time, and that consequently there is little prejudice to him from not being able to pursue these complaints, for the following reasons:
 - 90.1 even after two preliminary hearings to clarify the complaints and after the provision of further information in response to an unless order, the claimant has been unable to set out in his claim or his further

information specific incidents, dates of the alleged treatment and the names or full names of individuals involved;

- 90.2 the claimant has a progressive condition which affects his memory. Mr Wisniewski said in the preliminary hearing on 6 July 2020 that he doubted whether the claimant would be well enough to give evidence. The claimant was not well enough to be cross-examined in relation to his age discrimination complaints in May 2021. It seems unlikely that he will be able to do so in relation to his race discrimination complaints;
- 90.3 there is little documentary evidence to support the claimant's complaints of race discrimination. The handwritten notes from 2018, 2019 and 2020 largely post-date the period complained about, lack specificity and would be likely to be given little weight if it were not possible to test the evidence in cross-examination;
- 90.4 the evidence of the witnesses relied on by the claimant is very unlikely to support these complaints because two of the witnesses (Mr Rosinski and Mr Kitka) did not work in the department or on the shifts which the claimant worked on. Mr Marek Wisniewski was not at work after 13 April 2015 and so could not give any evidence of any relevant events after that date.
91. Having considered the length of the delay and the reasons for it, and weighed up the prejudice to the respondent from extending time with the prejudice to the claimant of not extending time, we have decided that it is not just and equitable to extend time in this case. The prejudice to the respondent from allowing the complaints to proceed outweighs the prejudice to the claimant from not allowing them to proceed. Therefore, we do not consider it to be just and equitable to extend time for the complaints of race discrimination.
92. This means that the tribunal does not have jurisdiction to consider the complaints of direct race discrimination or harassment.

Age discrimination/harassment

93. The treatment complained of by the claimant in the complaints of direct age discrimination or harassment because of age are the written warning dated 28 March 2018 which he was given for absence and lateness, and the comment by Ms Akinmarin in May 2018 that he should not be working and 'should be retired by now'.
94. In the direct age discrimination complaint, we have to consider whether there is evidence from which we could conclude that the issuing of the written warning was less favourable treatment because of age. The claimant relies on the fact that his birthday was in mid-March and he turned 65 shortly before he was asked to attend the meeting to discuss absence and lateness.
95. Other than this timing, there is no evidence to suggest that the written warning was because of the claimant's age. No one commented on the

claimant's age or his birthday. Mr Purewal was not aware of the claimant's birthday or his age. Ms Akinmarin had access to the claimant's date of birth in HR records, but there was no evidence that she accessed those records, and she was not aware of his birthday or his age at the time she sent the letter.

96. There was no evidence before us of an actual comparator being treated any differently to the claimant. We have accepted the evidence of Ms Hawkins that there was no evidence of another employee with absence levels comparable to the claimant in 2017 to 2018. There was no evidence from which we could conclude that a hypothetical comparator with similar absence levels would have been treated any differently to the claimant.
97. The claimant has not proved evidence from which we could conclude that the written warning for absence was discrimination because of age. The timing of the claimant's birthday and the issue of the warning was coincidental; the respondent's managers who issued the warning were not aware of it. The burden of proof does not shift to the respondent.
98. If we had decided that the burden of proof did shift to the respondent to prove that the issue of the written warning was not direct age discrimination, we would have accepted that the respondent has a non-discriminatory explanation for the issue of the written warning, namely the claimant's absence record in the six months before the warning.
99. We are satisfied that the decision to meet with the claimant to discuss his absence was prompted by the claimant being absent on 20 March 2018, for reasons he could not remember, and being an hour late on 21 March 2018, in circumstances where he had significant sickness absence in the previous six month period. It was not because of the claimant's age or his recent birthday. The claimant had been unfit for work on 5 occasions between October 2017 to March 2018, amounting to 50 days sickness in total (including non-working days). That was a substantial number of occasions and days of sickness. It was reasonable for the respondent, after meeting with the claimant to discuss his absences, to issue a written warning. We accept that the claimant's absence record is the reason why the respondent issued a written warning to the claimant. It was not because of the claimant's age or age in general.
100. This means that the claimant's complaint of direct age discrimination in respect of the written warning fails and is dismissed.
101. For similar reasons, the complaint of harassment does not succeed. The written warning was reasonable management action in the circumstances, and did not have the purpose required by section 26. If it had that effect on the claimant, it was not objectively reasonable for it to have done.
102. Further, there was no evidence from which we could conclude that the issuing of the warning was related to the claimant's age, his recent birthday or to age in general. If there had been, we would have accepted the respondent's explanation that the warning was issued because of the claimant's absence record in the six months before the warning.

103. The claimant's second complaint of age discrimination was the alleged comment by Ms Akinmarin to the claimant in May 2018 that he should not be working and should be retired by now. We have found that Ms Akinmarin did not make this comment to the claimant or anything like it. We have found that it was the claimant who commented on finishing work and that he did so to Mr Purewal only, not Ms Akinmarin. The factual basis for this complaint is not made out and so it cannot succeed.
104. The complaints of direct age discrimination and age-related harassment fail and are dismissed.
105. This means that none of the claimant's complaints identified at the hearing on 6 July 2020 as remaining for decision have succeeded and the claimant's claim against the respondent is therefore dismissed.

Employment Judge Hawksworth

Date: 24 January 2022

Judgment and Reasons sent to the parties
On: 28 January 2022

For the Tribunal Office