EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr N Sumula	**v**	**Virgin Active Ltd**

Heard at: Watford **On**: 17 February 2022

Before: Employment Judge R Lewis

Appearances

For the Claimant: In person
For the Respondent: Mr C Hill, Counsel

JUDGMENT

1. The claimant's claim has been brought out of time, in circumstances in which it is not just and equitable to extend time. The claim for disability discrimination in dismissal is therefore dismissed and the proceedings struck out.

REASONS

1. This was the hearing directed by Employment Judge O'Dempsey at a hearing on 16 July 2021.

2. The upshot of Judge O'Dempsey's order was that the only surviving claim was a claim of discrimination in dismissal. Judge O'Dempsey summarised the position at paragraphs 41-43 of his reasons.

3. Mr Hill had not been counsel before Judge O'Dempsey and Judge O'Dempsey had not reserved the remainder of the hearing to himself, as he might well have done. I therefore could attach no weight to counsel's understanding of what had been said or might have been said before Judge O'Dempsey. I explained to the claimant at the start of the hearing that Judge O'Dempsey's findings were binding on the parties at this hearing.

4. In light of any ambiguity, the correct way to proceed seemed to me in stages. The first stage was for the claimant to clarify what the claims of

disability discrimination actually were. The second was to hear and decide the limitation submission, namely whether it was just and equitable to extend time (Judge O'Dempsey had already ruled that the claim was brought out of time). At the third stage, if the claim survived that far, I would hear Mr Hill's submission that it be struck out under Rule 37 on grounds of having no reasonable prospect of success.

5. This approach was agreed. I had a bundle of 164 pages. Mr Hill had submitted a brief skeleton argument, to which he attached authority, notably Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23.

6. At the first stage, I asked for clarification of the complaints of discrimination. In accordance with Judge O'Dempsey's order, the claim was in relation to dismissal only. The respondent had, as directed, reconsidered its position on s.6, and by date of this hearing conceded that at the material time the claimant was a person with disability within the meaning of s.6 of the Equality Act, by virtue of being blind in one eye.

7. At the first stage, it seemed to me right to be proactive in explaining in lay terms the different forms of discrimination which might apply, and discussing the claimant's factual allegations, with a view to identifying how the claim of dismissal might be analysed.

8. The claimant stated that he considered that he was dismissed because he had a visual disability. That is a claim of direct disability discrimination under s.13.

9. I explained the framework of s.15, and the claimant stated that he considered that he was dismissed because of two things arising in consequence of his disability. I understood the claims to be in relation to each separately. The first was his absences from work for hospital appointments; and the second was his difficulty in working in environmentally hazardous areas which might cause eye infection. Each was in theory a feasible claim under s.15.

10. I discussed with the claimant in outline the framework of potential claims under s.19 (indirect discrimination), s.20 (failure to make reasonable adjustments), s.26 (harassment, although that seems to me entirely theoretical where the sole complaint is about dismissal); and s.27 (victimisation for having done a protected act). I was confident that the claimant made no factual allegation which fell within the framework of any of those.

11. During this hearing the claimant returned repeatedly to what he in closing called the root cause of the whole dispute, which was that the respondent's letters to him of 19 and 26 February 2020 (see below) were sent at his home address only in hard copy, and not by email, which he said was the respondent's usual practice. He asserted that as his line manager knew that he was abroad, this was a source of major unfairness.

12. I did not go into the factual dispute about the respondent's communication system, nor could I decide why the hard copy letters were sent. The complete answer to these points was furnished by the claimant himself. He said that he had asked a neighbour to check his post. The neighbour had visited the claimant's flat, and told him on 27 February that a letter had come the previous day in which he had been informed of his dismissal.

13. It follows therefore that whatever the respondent's systems, or indeed intentions, the claimant knew on 27 February that he had been dismissed the day before. That is the relevant factor for today's purposes. I accept the logic that if he had seen the letter of 19 February, he would have been able to answer it and might have been in a position to avert his dismissal.

14. After clarification from the claimant of the framework for dismissal, the claimant was sworn. I asked him briefly a number of scene setting questions, and Mr Hill cross-examined for about 25 minutes. Mr Hill's submissions lasted about 15 minutes, after which the Tribunal adjourned for lunch. After the adjournment, the claimant replied and after a further adjournment, I gave judgment. The claimant asked for written reasons.

15. This application proceeded under s.123(1) which sets the time limit as "three months starting with the date of the act to which the complaint relates". That time limit is now subject to extension for early conciliation. In addition, the s.123 time limit can be extended if the discrimination is a continuing act or if it is just and equitable to do so.

16. I agree with Mr Hill that dismissal is a single event, which in this case took place on 27 February 2020, the day the claimant was notified of dismissal. Mr Hill made three broad points drawing on authority: that extension of time is an exception not an expectation; that the Tribunal should take account of all circumstances, notably the reasons and length of delay; and that time is not necessarily extended by pursuing an internal appeal.

17. The material facts are the following:

    17.1 The claimant was born in 1963, and began employment with the respondent as a cleaner in August 2018. He began a period of annual leave on 29 January 2020 and travelled to Ghana.

    17.2 There seems to have been at least some disagreement or misunderstanding; the respondent thought he was due back on 19 February and the claimant thought he was expected back on 2 March.

    17.3 On 19 February, the respondent sent the claimant a letter querying his failure to return and asking to be notified of the position by 26 February. The letter was sent to the claimant's home in hard copy (118).

17.4 On 26 February the respondent wrote to the claimant to say that as he had not been heard from, he had been dismissed that day. Likewise the letter was sent in hard copy (119).

17.5 On 27 February there were two events. The claimant wrote to the respondent to explain that due to family circumstances his return would be delayed to about 24 March. Also that day, the claimant's neighbour visited his home, and with his authority opened the letter from the respondent and read it to him, so that on that day the claimant knew he had been dismissed.

17.6 On 4 March the claimant wrote to the respondent by email to appeal (121). That is an important letter, because, as Mr Hill said, it shows that the claimant was able to engage with the respondent on a formal matter of great importance to him (121). Correspondence continued about arrangements for the appeal to be heard, which in fact did not take place until 9 September.

17.7 The claimant attempted to travel back from Ghana on about 22 March, but his flight was cancelled. For a period of months it was not possible to travel from Ghana to the UK.

17.8 The bundle contained correspondence from the respondent which was received by the claimant but not addressed to him individually, in which the claimant was told that he remained employed and on furlough. Judge O'Dempsey has dealt with this correspondence in his judgment and I do not add to what he has said.

17.9 The claimant gave evidence that he had had contact with a friend in the UK, who was a social worker, at some time which I understood to be in March or April.

17.10 The bundle contained two letters from the claimant which I thought significant. They were written on 7 May and 8 May, (129 and 137) and addressed his rights under the then JRS and to further payments. I take those as a powerful indication that the claimant had sources of information and advice about employment rights in the UK, including furlough and JRS rights.

17.11 The claimant was not able to return to the UK until 21 August, and he contacted ACAS on 24 August, by which time the claim was just under three months out of time.

18. My findings from the above are the following.

18.1 I accept that the claimant was stranded in Ghana from early March until 21 August. For about the first three weeks of March he was detained by family emergencies and thereafter by lockdown requirements.

18.2 The claimant had access to email and the internet while in Ghana.

18.3 The claimant was able to manage formal and business matters. He was in contact with the respondent about his appeal, the furlough system, and his return arrangements. He mentioned casually in evidence having dealt with bills and his bank account online from Ghana. He accessed information about the JRS and furlough system.

19. I now turn to the factors on which the claimant said he relied in asking the Tribunal to extend time. I disregard two matters about which the claimant plainly had strong feelings because I think he was mistaken and they were not relevant. The first was his evident anger that the February letters had been sent by hard copy only, as he said and not also by email. I agree that that is an oddity of the case, which if the case had proceeded might have been relevant to the question of fairness. However, this was not a case of unfair dismissal, and as the claimant was told about the letters on 27 February, it was also not a source of prejudice to him.

20. Secondly, the claimant said that the respondent had dragged things out in order to prevent him from claiming in time. There was no evidence of that; in the circumstances of the first lockdown, the respondent could not foresee how matters would develop, and had no reason to drag things out.

21. The claim was presented on 25 September 2020. As the claimant did not have the benefit of the "stop the clock" extension, time to present this claim expired on 26 May 2020, and the presentation was therefore one day short of four months late.

22. I turn to the reasons for delay given by the claimant, whether in evidence at this hearing or in writing. I apply my own order to them, which is not order of priority.

23. The first question was did the claimant have knowledge of the time limit? It turned out that the claimant had brought a previous claim, but he could not remember if it was during the fees era or before. It may well have been many years previously. I can draw no inference about knowledge from that single event.

24. However, he gave a significant piece of evidence on this point. He said in cross-examination that while in Ghana he had made contact with a friend, whom he described as a social worker, who while not a lawyer he understood would be able to give him advice. In cross-examination he said (according to my note) "there are rules, and an extension can be allowed". I intervened to ask the claimant the question, extension to what, but he did not reply. However, the inference is obvious. The claimant understood and was advised that there was a deadline to be complied with, but that there was possibility for an extension. I infer from that that before expiry of the primary deadline, the claimant was aware of the existence of time limits.

25. The claimant said, in a number of respects, that he was at a disadvantage because he was in Ghana, which he repeatedly described as a second country. I am not aware of any barrier in law or practice which prevents a person overseas from accessing the websites for ACAS or HMCTS (the Employment Tribunal). It is not unusual for claims to be presented online from outside the UK.

26. In any event, once the national lockdown started, on 23 March 2020, the precise location of the claimant was irrelevant. It did not matter whether he was in Ghana or Glasgow: he was not permitted to access a public office, or a solicitor's practice, and had to proceed online. His location made no difference.

27. The claimant stated that he had no access to help. However, the majority of claimants exercise their statutory right not to be represented by lawyers. The Tribunal is well aware of the volume of material available online, including guidance about the early conciliation and Tribunal process. The material online, particularly for example on the ACAS website, is written in plain English and readily accessible. Completion of the Early Conciliation Certificate and the ET1 can readily be undertaken online.

28. This is not a matter of my interpretation of systems with which I may be familiar; it is the experience of the Tribunal, which sees thousands of cases each year presented by members of the public who are unrepresented, may not have a full formal education, and are often using a second or third language.

29. I attach weight to three indications that the claimant was able to use online systems to manage matters while in Ghana. The first was his email of 4 March 2020 in which he appealed, and subsequent email trails in which he pursued his rights of appeal; secondly his evidence was that he had asked his neighbour to go into his home and among other things to open bills so that he, the claimant, could manage his finances online; and the third was the two striking emails of 7 and 8 May, in which he wrote to the respondent in detail about his rights under the JRS and the then furlough scheme (129-137). Those emails showed that he had sufficient internet use to research furlough and JRS developments, with or without assistance. It seemed to me that if the claimant were able to manage these matters, he was well able to manage early conciliation and the ET1 procedure.

30. In his written statement, the claimant said that he had been unable to obtain help from a lawyer in England, and that he had contacted "a couple" of law firms. In cross-examination, when Mr Hill put to him that that did not indicate a great degree of effort, the claimant said that the number of firms he had contacted was more than 10. I would not interpret "a couple" as no more than two, although that is the normal usage, but I would expect it to mean no more than three or four, and certainly not more than 10. I infer that the claimant realised a weakness in his evidence, and amended the evidence to address the weakness. I do not accept that the claimant tried to

consult about a dozen law firms. It may well be that he made 2 or 3 attempts and then gave up.

31. I do not accept that the legal profession, as the claimant put it, closed down with the lockdown. On the contrary, although it was not easy to do so, practitioners and advisers found ways to convert their systems and to work remotely.

32. Drawing these points together, it seems to me that Mr Hill's submission, which was that before expiry of limitation, the claimant decided that he would take the risk of leaving matters until he returned to the UK, was probably well made. The claimant did not of course know when he would be able to leave Ghana. He expected, perhaps as a result of inaccurate advice, that he could get an extension.

33. I accept that the extension provision is an exception, and in all the circumstances of this case, I cannot see that the case for extension has been made out. I add that if the claims were, on their merits, seemingly so compelling as to give rise to an interest of justice in their being heard as a matter of social policy, that would be an additional factor. I make no ruling on their merits beyond stating that I could not see an interest in justice in allowing the extension of time in this case as a matter of discretion. On the contrary, the events appeared to present as a combination of muddle, misunderstanding and miscommunication, and however one may wish to criticise those factors, they fall far short of discrimination in relation to visual impairment.

34. The extension of time is refused and the claim is therefore struck out.

_____
Employment Judge R Lewis

Date: 2 March 2022……..

Sent to the parties on: ……..

.....
For the Tribunal Office