



EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case No: 4102294/2022 (V)

Open Preliminary Hearing held at Dundee ET (via CVP) on 16 December 2022

Employment Judge Tinnion

10

Mr. Scott Hughes

Claimant
In Person

15

WH Malcolm Ltd.

Respondent
Represented by
Mr. G. Mitchell,
Solicitor

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Claimant's claims of direct race discrimination under ss.13(1) and 39(2)(d) of the Equality Act 2010 and harassment related to race under ss.26(1) and 40(1)(a) of the Equality Act 2010 (collectively, the "Race Discrimination Claims") were not presented in time.
- 25 2. It is not just and equitable to extend time for the Race Discrimination Claims.
3. The Tribunal has no jurisdiction over the Race Discrimination Claims, which are struck out under Rule 37(1)(a) (lack of any prospect of success given lack of jurisdiction).
4. The following applications by the Respondent are now moot and dismissed:
 - 30 a. Respondent's alternative application to strike out the Race Discrimination Claims on their merits under Rule 37(1)(a);
 - b. Respondent's alternative application for a deposit order relating to Race Discrimination Claims under Rule 39.

REASONS

1. Between December 2018 and December 2021, the Claimant worked for the Respondent driving a Forklift Truck (FLT). By letter dated 9 December 2021, the Respondent dismissed the Claimant for alleged gross misconduct relating to an incident on 25 September 2020 concerning his driving of an FLT that day.
2. Having contacted ACAS on 25 February 2022 and received an ACAS early conciliation certificate on 7 April 2022 [1], by an ET1 presented on 27 April 2022 [7-19] the Claimant presented claims of (1) unfair dismissal (2) race discrimination (3) claims for “*other payments*”, against the Respondent [12].
3. By its ET3 [21-28] and paper apart [29-37], filed on 27 May 2022, the Respondent denied the Claimant’s claims.
4. At a first Preliminary Hearing for Case Management (PHCM) on 24 June 2022, which he attended, the Claimant identified (and the Tribunal noted down) his race as “*Gypsy Traveller*” [66, para. 15]. By email on 20 July 2022, the Respondent admitted this protected characteristic [70].
5. At a second PHCM on 23 August 2022, which he also attended, the Claimant clarified his race discrimination claims to be the following:
 - a. direct race discrimination – on 16 October 2020, the Claimant asked Mr. James Millar (Weekend Shift Manager) for PPE which Mr. Millar did not provide because of the Claimant’s race [76, para. 20(a)];
 - b. direct race discrimination – on 16 October 2020, the Claimant asked Mr. Millar for lighter duties because he had injured his hand outside of work, which Mr. Millar refused because of the Claimant’s race [76, para. 20(b)];
 - c. harassment related to race – on 11 December 2020, Mr. Peter Hume discriminated against the Claimant as a Gypsy Traveller by stating [in writing] “*you self-identify as being a Traveller*” which (according to the Claimant) was both wrong and hurtful [76, para. 20(c)].
6. Pursuant to a Tribunal Order [76, para. 21], the Claimant provided the following additional particulars of his direct race discrimination claims involving Mr. Millar:

“I asked Robert Inglis to witness as I asked James Millar for lighter duties and PPE. The reason for asking for lighter duties was due to a hand injury and at the time I was struggling with mental health as well as family problems. I was refused lighter duties and the reason given was that there were no lighter

5 duties, Robert and I suggested numerous duties such as working within materials, printing labels and admin office work as well as labelling at
10 takeaway. James Millars response was that Colin and Derrick does not want me working beside them. Colin and Derrick being my bullies at work. James told me that the only place left for me to go is line 16 deshrouding pallets. The problem with this is it is much more physically demanding and harder labour than my original role. I then asked him for PPE so that I could get to work as he was not willing to help with lighter duties. He asked what happened to the PPE that he gave me on 02/10. I told him that the gloves did not fit and that
15 the knife had been misplaced in between times. James then told me to go to line 16 and he would bring fresh PPE to me. I did not receive any PPE from James; this forced me to have to work without the appropriate glass cutting gloves as well as having to share a knife with a Diageo employee during the height of the covid pandemic. I decided to call HR about not being allowed lighter duties and spoke with Georgia Bow, she said that there was nothing she could do until the main manager was back on the Monday. I informed her that I was injured, she replied if you can't do the work you will have to leave site and be put on Statutory Sick Pay. I went to line 16 to follow instruction –
20 on the same day there was an accident, a pallet collapsed on me, and I was rushed to the hospital. That was my last shift and has severely affected me since.” [85]

7. Pursuant to a Tribunal Order [76-77], the Claimant provided the following additional particulars of his harassment claim involving Mr. Hume:

25 “Self-identifying as a Traveller. When a person self identifies as something it is a personal idea of oneself, it is their own identity and to do with that individuals self-image. It is more a belief system about themselves. My ethnicity is what I am, it is not subjective. It is not something that can be identified into, it is simply how I was born. It is a fact. By saying that I am self-
30 identifying as what I am makes it sound as though others can identify into it and that I can identify out of it which cannot be done. It says to me that this can be a changeable characteristic rather than objective reality for me and my people. By saying that I self-identify is putting me into a category that I do not belong to nor want to belong to. For example, some people self-identify their gender as other than their sex. This is a type of belief system or ideology about how people see themselves and how this can be a changeable idea, it follows the process that this perception of their identity starts from within a person's self which is completely different to my ethnic heritage which is how I was born. For me to be a Gypsy Traveller the condition is that I am borne
40 from Gypsy Travellers. This cannot change and is an intrinsic part of me. It suggests to me that I could have identified out of the lifelong discrimination that Gypsy Travellers face. It makes me feel that my heritage is not recognised as important enough to be thought of as an absolute ethnic origin and that is deeply offensive and hurtful, Moreso because of the hardships
45 faced for simply existing as such. Another problem with the use of 'self-identify' language is that if I were to have visible characteristics such as a darker skin tone, would the problematic self-identify language have been

used towards me? Because it would be visibly apparent to all. Just because I am not of colour appearing does not mean that I should be treated differently because I do not appear dark enough or I am too pale. The issue with calling me a Traveller is that I am a Scottish Gypsy Traveller and there is a distinct difference between Gypsy Travellers and Travellers. For example, New age Travellers are not of ethnic heritage, these people call themselves Travellers and adopt a nomadic lifestyle. It is widely accepted and known that this group are very much of a free-living hippie type persuasion rather than a heritage of cultural traditions and practices as Gypsy Travellers. New age Travellers are not of the same community as my people and have differing ideas, ways and living styles as us. Romany Gypsies originated from India and have differing cultural traditions than Gypsy Travellers although they are remarkably similar in a lot of ways and have similar language styles. Although rare to marry out with Romany culture there are a lot of Romany Gypsies married into Gypsy Travellers as is the case with my ancestors. Scottish Gypsy Travellers includes Highland, Lowland and Border Gypsies as their own shared group and share common language, culture and beliefs. As such we are of the same group. English Gypsies are often of Romany heritage as well as British Gypsy. We share many of the same customs but have different language. Irish Travellers are also similar to Scottish Gypsy Travellers although, again, we have different language use. Culturally these groups share more ideas, thoughts and practices although each with their own communities.” [88-89].

8. Pursuant to a Tribunal Order [77, para. 23], the Claimant provided the following basis for contending that it was just and equitable to extend time for his Race Discrimination Claims (as particularized above):

“Culturally it is a given that in almost every case Gypsy Traveller men are self-employed. This is because we are generally on the road a lot and being self-employed is the only way to make a living and is customary to our communities. Gypsy Travellers are very traditional in the sense that it is the man's duty to feed his family. This is known from a young age, therefore fathers will teach their sons in whatever trade or craft that they themselves have been taught from the generations before them so that they do not have to rely on handouts from the state. Growing up, I missed some education and when I did finish school my family and I were back on the road again. What this means is that I have never had experience working in a non-Gypsy Traveller environment therefore, I was unaware and still am ignorant to what would be considered common workplace knowledge and practices as well as legislations. I went into this job on my own merit alone and the legal and procedural practices of employment were all new to me. Because of my dyslexia I find it difficult to read and understand anything that I have read in the past. The way I learn is by eye and being talked to. These points above clearly show that I was unable to have known about something that I did not even know existed at the time. Non-Gypsy Travellers of similar age would know because they have been in this type of environment for several years

whereas I do not have that experience from my working life. I have grown up with people looking down on me my entire life due to my ethnic background so this type of treatment, although hurtful has been the norm for me.” [90]

9. By letter dated 3 October 2022 [99-103], the Respondent’s solicitors applied
5 (i) to strike out the Race Discrimination Claims on the grounds that they are time-barred (ii) to strike out the Race Discrimination Claims on the grounds that they have no reasonable prospect of success on their merits (iii) in the alternative, the Respondent applied for a deposit order under Rule 39(1) regarding the Race Discrimination Claims, and requested its applications be considered at an Open
10 Preliminary Hearing (OPH).

10. The Claimant objected to the Respondent’s applications, as well as an OPH to determine them, and provided the following additional basis for extending time:

15 *“All parties must understand that from the date of the claimant’s accident he has not been mentally or physically well on top of the issues that was previously set out regarding the time barring situation. The claimant had been on strong medication such as morphine and was not in the appropriate mind space to deal with outward issues at the time. The rules of the equality act allow for a just and equitable decision on extension of time of time on such matters as extenuating circumstances which is believed to be the case here with restrictions/limitations of knowledge of workplace legislation and rights because of cultural traditions. As well as the considerable life-threatening mental anguish the claimant was going through taking priority over all else ...The statements that the claimant made regarding knowing his rights were
20 taken out of context, what was meant by this is that he knew that he had rights to ask for evidence that he needed to defend himself at the disciplinary, not
25 that he knew of any rights relating to the tribunal ...” [107-108]*

11. The Tribunal subsequently ordered an OPH to determine the following issue: “To deal with opposed strike-out request” [112].

30 12. The OPH via CVP was held on 16 December 2022 and lasted a full day (the hearing began at 10am and ended just after 5pm). The Claimant represented himself. The Respondent was represented by solicitor Mr. Mitchell. The Claimant gave oral evidence, and called a witness (Mr. Robert Ingles) to give evidence. The Respondent did not call any witnesses. The Tribunal was referred to a joint
35 production of approximately 174 pages – references in square brackets are to the relevant page of that production. The Respondent had no objection to the Claimant relying on a few additional documents he emailed the Tribunal on

15 December 2022. The Claimant made oral closing submissions. The Respondent's solicitor made oral and written closing submissions.

Relevant law

13. Section 123 of the Equality Act 2010 (EqA 2010) provides:

123 Time limits

- (1) ^[F1]Subject to ^[F2]^[F3]section 140B]] proceedings on a complaint within section 120 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.
- (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
 - (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
 - (b) such other period as the employment tribunal thinks just and equitable.
- (3) For the purposes of this section—
 - (a) conduct extending over a period is to be treated as done at the end of the period;
 - (b) failure to do something is to be treated as occurring when the person in question decided on it.
- (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
 - (a) when P does an act inconsistent with doing it, or
 - (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

5

14. The question of whether there is conduct extending over a period of time rather than a distinct succession of unconnected or isolated acts requires a focus on the substance of the claimant's case. Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530, CA. The test to be applied is whether the claimant has a reasonably arguable basis for contending that the complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs. Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ. 1548, CA.

10

15. The burden rests on the claimant to persuade the Tribunal to exercise its discretion to extend time to present a complaint on just and equitable grounds. There is no presumption a Tribunal will do unless it can justify a failure to do so. The exercise of the discretion is the exception, not the rule, but that is not to say that exceptional circumstances are required. Robertson v Bexley Community Centre [2003] IRLR 434, CA at para. 25.

15

16. In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640, [2018] IRLR 1050, Leggatt LJ said (at [18]–[19]):

5 "...it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike s 33 of the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in s 33(3) of the Limitation Act 1980 (see *British Coal Corporation v Keeble* [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see *Southwark London Borough Council v Afolabi* [2003] EWCA Civ 15, [2003] IRLR 220, para [33]. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under s 7(5) of the Human Rights Act 1998: see *Dunn v Parole Board* [2008] EWCA Civ 374, [2009] 1 WLR 728, paras [30]–[32], [43], [48]; and *Rabone v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 All ER 381, para [75]. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

17. In Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, Underhill LJ stated:

30 "The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay". If it checks those factors against the list in *Keeble*, well and good; but I would not recommend taking it as the framework for its thinking."

18. Where a claim to the Tribunal is delayed while an employee pursues an internal appeal, that may result in a claim being presented out of time. In Aniagwu v London Borough of Hackney and Owens [1999] IRLR 303, the EAT held that this justified an out-of-time claim. The EAT used language suggestive of a new principle limiting the generally wide discretion enjoyed by Tribunals to deal with late applications, so that delays for this reason should always be excused. In Islington London Borough v Dean EAT/594/97 (1 Dec 1999), Charles J observed

that key features of Aniagwu were that the claimant had taken a conscious decision to delay the initiation of legal proceedings to allow internal processes to run their course, and the employer had been made aware of that decision. It does not follow that in every case a delay caused by internal procedures will provide
5 an excuse for being out of time. In Robinson v Post Office [2000] IRLR 804, EAT, it was said that Aniagwu did not establish 'a proposition of broad applicability'. In Apelogun-Gabriels v London Borough of Lambeth [2001] EWCA Civ 1853, [2002] IRLR 116, the Court of Appeal confirmed this is the correct approach. Thus just because an internal process is unexhausted, delay to await its outcome will not
10 always excuse an otherwise out of time claim - this is a factor, nothing more.

Discussion / Conclusions

Issue #1 - Whether Race Discrimination Claim were presented in time

15 19. The Tribunal concludes the Race Discrimination Claims were not presented in time (and the Tribunal notes the Claimant agreed they were not – “*I do accept that these three claims have been presented out of time*”). Taking each claim individually, the Claimant had until 15 January 2021 to present timely claims in respect of his direct race discrimination claims based on Mr. Millar’s conduct on
20 16 October 2020, and had until 10 March 2021 to present a timely claim of harassment based on what Mr. Hume wrote in his letter to the Claimant dated 11 December 2020. It is not in dispute that during these two periods, the Claimant neither presented an ET1 claim form raising any of these complaints nor benefited from any extension of time based on contacting ACAS to start an early
25 conciliation process.

20. The Claimant did not argue his Race Discrimination Claims constituted conduct extending over a period of time in respect of which a timely complaint had been made, and there was no evidence before the Tribunal suggesting they were. Determining the timeliness of his claims does not benefit from any application of
30 s.123(3)(a) of EqA 2010.

Issue #2: Just and equitable extension of time

21. The Tribunal's conclusion is that it is not just and equitable to extend time in relation to any of the three Race Discrimination Claims. The Tribunal reached that conclusion on the following grounds:

5 22. First, all three claims were presented just under or just over a year out of time – a very substantial delay on any reasonable view.

23. Second, the Tribunal is satisfied the cogency of the evidence the Respondent is likely to be able to adduce relating to the direct race discrimination claims (but not the harassment claim) – in particular, witness evidence based on their
10 recollection of the events of 16 October 2020 - is likely to be prejudicially affected by the Claimant's substantial delay in presenting these two claims. The harassment claim is different because what the Claimant complains about is something which Mr. Hume wrote in a communication to the Claimant, and there is no dispute that this letter was sent to the Claimant or what it literally says.

15 24. Third, the Claimant's initial explanation for omitting to present his Race Discrimination Claims in time was that he did not know the applicable time limits because of his Gypsy Traveller background (see para. 8 above). Taking the Claimant's case at its height, the Tribunal accepts ignorance of the applicable time limits because of cultural reasons might be a factor weighing in favour of
20 extending time, but in the Tribunal's judgment, this must be at best only a relatively minor factor, given the time limits Parliament has set down are of general application, and apply as much to those who know the law intimately as to those who know nothing at all about UK employment law.

25 25. Fourth, the Tribunal is not satisfied the Claimant's omission to present his Race Discrimination Claims in time can be satisfactorily explained, excused or justified based on any physical impairments he may have suffered. The Tribunal accepts the Claimant had a workplace accident on 16 October 2020 which required him to go to hospital, but the Claimant accepted in his oral evidence that by November 2020 he was asking to return to work – see Claimant email sent 5
30 November 2020 [151] (“*My doctor says I am fit enough to work*”). He would not have made this request had he not believed he was sufficiently physically fit and well enough to do so, certainly this appears to have been his GP's view.

26. Fifth, the Tribunal is not satisfied the Claimant's omission to present his Race Discrimination Claims in time can be satisfactorily explained, excused or justified based on any mental impairments (and their effects) he may have suffered. The Tribunal notes the medical evidence before the Tribunal was not satisfactory as it did not include any GP notes recording his GP visits in 2020 or 2021 (according to the Claimant, his GP told him his former employer had to request these records). An OH report dated 4 December 2020 [154-155] noted the Claimant was awaiting an appointment with a counsellor to help him deal with some mental health issues he was experiencing – but no details of those mental health issues was provided. An OH report dated 20 January 2021 [156-157] stated the Claimant stated his mental health had deteriorated slightly since his last consultation, which he blamed on the time it was taking to be taken through a disciplinary process. An OH report dated 22 February 2021 [158-159], however, stated "*Medically Scott states that he is feeling slightly better.*" There was no medical evidence before the Tribunal which cast doubt on the Claimant's mental health and fitness to prepare and present an ET1 claim form in the second, third or fourth quarters of 2021. In brief, the Claimant has failed to establish his case on this point.

27. Sixth, it is clear that in 2021 the Claimant (with the assistance of a sibling, according to the Claimant, and notwithstanding any dyslexia he says he has) was able to state his case to his employer in relation to an ongoing dispute in writing with a considerable degree of force and intellectual coherence. See, eg, Claimant's email to Paul Hobday, sent 25 February 2021:

"As I have made you aware I could not attend today's meeting because the company has still not sent the information/documents I have requested. Can the company arrange new meeting(s) date and times but forward the information/documents I have requested before said date and times are arranged. If the company is not willing to attend to my requests can you explain why? Do I need to raise more grievances to obtain the information I have requested? Again I have asked for said information/documents for months now(backed up by emails).The company is coming across as if it is trying to cover certain incidents that has happened against myself. All information/documents I have requested is involving myself and is vital I see this before any meetings take place. It is all part of my evidence. Paul I can pick ten emails out our thread date starting 16/2/21 where I have requested said information/documents. I still have not received them. That is ten from

5 *our thread I have loads more email threads when I have requested the same and I have been given the run around or just simply ignored. This is not professional I do not see what the issue is for me to obtain information/ documents regarding myself. I feel like the company is now withholding information from me to disrupt my evidence so my case does not look as strong as it is. I would like to remind everyone I am still a Malcolm employee and have requested information/documents regarding myself for my evidence as part of a grievance/appeal meetings to take place. I have took legal advise. I know my rights as an employee. I would like to resolve this matters by myself with the company but past emails, repeatedly given the run around and ignored. The company is forcing me into thinking should I just let my lawyer deal with this as all said above is starting to make my mental health worse. Again this is not professional.” [139]*

15 28. The Claimant now claims he did not take legal advice, and accepted in oral evidence that his statement to the contrary in this email was false. Whether or not that is true, what is important is the Claimant’s awareness in February 2021 that he had legal rights as an employee.

20 29. Seventh, the Claimant sought to argue that the purpose (or one of the purposes) of the Respondent’s decision to suspend him was “*to keep me away from the Employment Tribunal*”. The Tribunal rejects this theory – suspending the Claimant would not impair or undermine his ability to prepare or present an ET1 claim form. The Tribunal considers the contrary more likely to be true: suspended from work, the Claimant had more time to consider his situation, seek advice from third parties, investigate his employment rights by conducting appropriate internet searches, and draft and present a simple ET1 claim form.

25 30. In sum, the Claimant has failed to satisfy his burden of showing that it is just and equitable for the Tribunal to exercise its discretion to extend time in relation to his Race Discrimination Claims. In the absence of jurisdiction over these claims, they must be struck out.

Issue #3: Respondent’s strike out application under Rule 37(1)(a) based on merits, alternative application for a deposit order under Rule 39

30 31. Given the Tribunal’s conclusions on jurisdiction, these applications are now moot and dismissed on that basis. For the record, the Tribunal would have dismissed the application to strike out the direct race discrimination on the grounds that they lack a reasonable prospect of success. The Tribunal was satisfied both claims were legally and evidentially arguable, and enjoyed some prospects of success,

dependent, of course, on a Tribunal's detailed findings of fact at a final hearing. The Tribunal would not have dismissed the Claimant's harassment claim on its merits under Rule 37(1)(a) either, however, the Tribunal would have ordered the Claimant to pay a £500 deposit as a condition of being allowed to pursue this claim which the Tribunal considers has a very low prospect of success on its face and is likely to fail.

5

Employment Judge: A Tinnion
Date of Judgment: 22 December 2022
Date sent to parties: 22 December 2022

10