EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr D Hedges		British Broadcasting Corporation

Heard at: London Central (in public, by video) **On**: 15 May 2022

Before: Employment Judge Stout (sitting alone)

Representations
For the claimant: Mr C Hadrill, Solicitor
For the respondent: Mr C Kelly, of Counsel

WRITTEN REASONS

Introduction

1. Mr D Hedges (the Claimant) was employed by the British Broadcasting Corporation (BBC) (the Respondent) from 12 November 2018 as Radio Presenter until he resigned on 26 August 2022. The case was listed for a public preliminary hearing to determine whether the Claimant's claims of constructive unfair dismissal, failure to make reasonable adjustments, race-related harassment and victimisation were out of time. For reasons given orally at the hearing, I decided that all the claims were out of time. A written record of the judgment was sent to the parties shortly thereafter. Written reasons were requested and what follows is the corrected transcript of the oral judgment.

The type of hearing

2. This hearing is a public preliminary hearing by video having been listed on courtserve.net so that any member of the public could have joined although in the event no members of the public have done so.

Background

3. The hearing was listed for the purposes of deciding whether or not the Claimant's claims under the Employments Rights Act 1996 (ERA 1996) and the Equality Act 2010 (EA 2010) had been brought out of time having regard to the time limits provisions in those Acts.

4. In advance of this hearing, the Claimant through his solicitor Mr Hadrill has accepted that a number of the Claimant's claims were brought out of time and that there is no arguable basis for extending time in relation to them. Those claims that fall into that category are the Claimant's claim of constructive unfair dismissal arising from his resignation on 26 August 2022 which took effect on 16 September 2022, his claims of a failure to make reasonable adjustments arising from events in June, July and August 2020 and his claim of race-related harassment arising from a Tweet by Mr Harris on 2 July 2020 and also victimisation arising from events of May and August 2022.

5. The three claims therefore that I am invited to consider are: (a) the remaining race-related harassment claim, in other words the Claimant's resignation with effect from 16 September 2022 in response to that Tweet by Mr Harris on 2 July 2020; and, (b), the two claims of victimisation in respect of the rejection of the Claimant's grievance and his grievance appeal on 30 May 2022 and 22 August 2022.

6. The parties are agreed that having regards to the provisions of s.123 of the EA 2010 and s.114(b) of that Act that the relevant dates on which those claims should have been presented are as follows: first, in relation to both of the victimisation complaints, as a result of the Claimant having contacted ACAS and the conciliation certificate being issued on 23 September 2022 they should have been submitted to the Tribunal by 23 October 2022; second, in relation to the race-related harassment claim, that claim should have been submitted by 22 December 2022. In fact, the claim form was submitted on 13 January 2023, that is over two and a half months out of time in relation to the victimisation claims and 22 days out of time for the race-related harassment claim.

The evidence

7. Mr Hedges prepared a witness statement for these proceedings which I have read and he also affirmed the truth of the contents of that statement and answered some questions from me in relation to it. Mr Kelly representing the Respondent decided not to cross examine Mr Hedges.

The facts

8. I take the essential facts from the Claimant's claim form as at this stage I take the case at its highest. I do not understand these facts to be substantially in

dispute in any event. I also make findings based on the Claimant's evidence at this hearing, which was unchallenged and which I accept as an honest account.

9. The Claimant commenced employment on 12 November 2018 and the role that he was most recently employed in was one of Radio Presenter. The Claimant is of Irish nationality and Irish national origin.

10. In July 2020 the Claimant was informed that he was at risk of redundancy and an incident also occurred on Twitter which he describes in paragraph 9 of his claim form as being that whilst he was on annual leave on 2 July 2020 he sent a Tweet which contained a picture of an Irish landscape containing a traditional Irish thatched cottage and wrote in Irish or Gaelic words that translate as "the windy day is not a day for thatching". Later that day, the Claimant received a reply to that Tweet from Mr Harris (an Assistant Editor with Radio Solent also employed by the Respondent) which stated "is that the call of a Leprechaun?". The Claimant pleads that he was upset by this particularly as he was aware that Mr Harris had a history of making offensive comments to colleagues.

11. On 17 September 2020 the Claimant submitted an internal complaint about various matters but not at that stage (or, at least, not on his pleaded case at that stage) complaining about the Tweet by Mr Harris. The 17 September complaint was rejected on 24 November 2020 and an appeal against that decision was rejected on 3 March 2021.

12. On 8 December 2021 the Claimant submitted a further complaint that included in it the complaint about the Harris Tweet and made an allegation that this was race-related harassment. A grievance hearing in relation to that complaint took place on 20 January 2022 and the outcome of the grievance was notified to the Claimant on 30 May 2022 and the grievance was rejected, including rejecting that the Tweet amounted to race-related harassment. In outline, the Respondent's case is that it did not amount to harassment because it was not unwanted conduct and was regarded by the Claimant at the time, or reasonably to be regarded by the Claimant at that time, as a joke.

13. On 13 June 2022 the Claimant appealed the grievance outcome and on 22 August 2022 he was informed that his appeal had been partially upheld but not wholly and that it was not upheld in relation to his complaint of race-related harassment regarding the Harris Tweet.

14. On 24 August 2022 the Claimant contacted ACAS. He was at that stage represented by an NUJ (National Union of Journalists) representative. He was not advised at that stage about time limits for Employment Tribunal complaints. Through those who were advising him from the NUJ he requested a legal workshop with the NUJ's lawyer. In the meantime, on 26 August 2022, the Claimant resigned citing as his reasons for resignation (as pleaded at paragraph 19 of the claim form) a number of the matters that the Claimant no longer pursues, or at least accepts are out of time in these proceedings. In other words, the BBC's refusal to make reasonable

adjustments in 2020, the rejection of the Claimant's grievance of 8 December 2021, rejection of the Claimants appeal against a grievance outcome and the discrimination that the Claimant experienced from Mr Harris in the Tweet.

15. By letter of 13 September 2022, the Respondent's HR confirmed that his employment would terminate with effect from 16 September 2022. On 23 September 2022, ACAS issued the certificate in respect of early conciliation. On 27 September 2022 the Claimant received some advice from Mr Hussain and Mr Law (to whom he had been referred through his home insurance helpline) to the effect that his claim was out of time and his case had no chance of success. I observe that that cannot have been a reference to any claims arising out of the resignation effective on 16 September 2022, but could have related to earlier claims or, alternatively, if it related to the claims arising out of his resignation on 16 September 2022, then it was incorrect advice.

16. On 18 October 2022 the Claimant had the legal workshop that had been requested previously with the NUJ lawyer and was informed by him that the claims were out of time and that the NUJ would not support him in bringing a case.

17. The Claimant then went the same day to Redmans solicitors who are the solicitors on the record in these proceedings and Mr Hadrill who is representing the Claimant today is a solicitor from Redmans who advised the Claimant from the outset. In an advice of 10 November 2022, Mr Hadrill advised the Claimant that the time limit for submitting his claim was 7 January 2023, and in an advice of 18 December 2022 Mr Hadrill updated that advice stating that he now understood the deadline to be 14 January 2023.

18. On 13 January 2023 Mr Hadrill filed the ET1 claim in these proceedings on behalf of the Claimant and also on 13 January 2023 the Claimant was informed by Mr Law on behalf of his legal expenses insurers that the majority of his claims had been assessed to have reasonable prospects of success and insurance funding had then been granted.

19. The Claimant has during the relevant period experienced some ill health and was prescribed an anti-depressant which he started taking on 1 December 2022, having sought to avoid starting on anti-depressants previously because of his understanding about the adverse effect that the medication would have on his ability to function when he first started taking it. His evidence in his witness statement, which I accept, was that he felt at that stage that he could concentrate on his health having put his legal claims in what he regarded as the safe hands of Mr Hadrill.

The parties' submissions

20. I have heard submissions today from both Mr Kelly and Mr Hadrill. I intend no disservice to them by summarising them very shortly. Mr Kelly in short invited me to find that it would not be just and inequitable to extend time in

relation to the three claims that the Claimant still pursues. He informs me that the managers who conducted the grievance at the grievance appeal were no longer employed by the Respondent and likewise Mr Paris. Mr Hadrill for his part urges me to hold that it would be just and equitable to extend time on the basis that his frankly accepted errors should not be visited on the Claimant. He submits the period of extension is such as to make it just and Cequitable for the Claimants claims to be allowed to proceed.

The law

21. The general rule under s 123(1)(a) EA 2010 is that a claim concerning work-related discrimination under Part 5 of the EA 2010 (other than an equal pay claim) must be presented to the employment tribunal within the period of three months beginning with the date of the act complained. For this purpose: conduct extending over a period is to be treated as done at the end of that period (s123(3)(a)); failure to do something is to be treated as done when the person in question decided on it (s123(3)(b)); in the absence of evidence to the contrary, a person is taken to decide on failure to do something either when the person does an act inconsistent with deciding to do something or, if they do no inconsistent act, on the expiry of the period in which they might reasonably have been expected to do it (s123(4)).

22. The primary time limit is subject to the extensions of time permitted by the ACAS Early Conciliation provisions, i.e. by virtue of s 140B of the EA 2010, any period of ACAS Early Conciliation is to be ignored when computing the primary time limit, and if the primary time limit would have expired during the ACAS Early Conciliation period, it expires instead one month after the end of that period. The early conciliation period does not extend time where the time limit has already expired: Pearce v Bank of America Merrill Lynch and ors (UKEAT/0067/19/lA) at [23].

23. If a claim is not brought within the primary time limit, the Tribunal has a discretion under s 123(1)(b) to extend time if it considers it is just and equitable to do so.

24. Both parties agree that in the context of the EA 2010, the *Dedman* principle well known from cases under the ERA 1996 does not apply: see *Chohan v Derby Law Centre* [2004] IRLR 685, following *Steeds v Peverel Management Services Limited* [2001] EWCA Civ 419. In the latter case, which was concerned with an extension of time under the Limitation Act 1980 rather than in the employment context, the Court of Appeal held that the negligence of solicitors in failing to issue a claim until seven weeks after the expiry of the limitation period was not to be held against the claimant in circumstances where he himself had acted reasonably and promptly and an extension of time was merited where the delay had not caused material prejudice to the respondents: ibid, [13]-[15] and [40]. In *Chohan* the EAT (HHJ McMullen QC summarised the principle in *Steeds* at [16] as: *"The failure by a legal adviser to enter proceedings in time should not be visited upon the claimant for otherwise the defendant would be in receipt of windfall"*.

25. The parties have also referred me to *Robinson v Bowskill* (UKEAT/0313/12/JOJ) which was a case concerned with discrimination and unfair dismissal and which referred back to the judgment of Sir Justice Elias (as he then was) in *Virdi v Commissioner of Police for the Metropolis and anor* [2007] IRLR 24. I have had particular regard to [39]-[41] and [49] of that Judgment. At [49] the EAT summarised the principles thus: *"It is clear from Virdi and authorities before and since Virdi that where the case of a claimant who seeks an extension of time is that he or she put the claim into the hands of a solicitor or experienced representative, the claimant is putting forward an explanation which is capable of being a satisfactory explanation for delay in the presentation of the claim. To quote Elias P in Virdi again, "The errors of his solicitor should not be visited on his head". Unfortunately, the Employment Judge was not referred to Virdi , but, while for this reason the error that, in my judgment, she made by not appreciating that the Claimant was putting forward a potentially valid explanation and should not ordinarily be denied the exercise of discretion when the other relevant facts were in her favour, is forgivable, it remains an error of law which vitiates her conclusions on this issue."*

26. It is thus clear that where a Claimant explains their delay in putting in proceedings under the EA 2010 by reference to an error on the part of a solicitor, that is an explanation that is capable of explaining the delay and, indeed, in the *Robinson* case it was an error of law for the Judge to regard the error by the solicitor as not explaining the delay. However, as Mr Kelly rightly submits, the effect of those authorities is not that an error by the solicitor *automatically* results in an extension of time in a claim under the EA 2010. As is apparent from both my summary of *Steeds* and the citation from *Robinson* above, the explanation for the delay is merely one of the factors that needs to be considered when exercising the discretion as to whether or not time should be extended. All the other factors remain relevant, it is just that if the solicitor's error explains the delay then I have to take that as an explanation for the delay and consider that when assessing all the other circumstances.

27. As to the other relevant factors, the burden is on the Claimant to convince the Tribunal that it is just and equitable to extend time: *Robertson v Bexley Community Centre t/a Leisure Link* [2003] EWCA Civ 576, [2003] IRLR 434 at [24]. The discretion whether or not to extend time is a broad one to be exercised taking account of all relevant circumstances, in particular the length of and reasons for the delay, and balancing the hardship, justice or injustice to each of the parties: see *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23. In an appropriate case the substantive merits may also be relevant, provided that the Tribunal is properly in a position to make an assessment of them: *Kumari v Greater Manchester Mental Health NHS Foundation Trust* [2022] EAT 132 at [63]. The fact that an internal appeal is ongoing is not ordinarily sufficient of itself for time to be extended, although it is one factor to be taken into account: see *Apelogun-Gabriels v Lambeth* [2001] EWCA Civ 1853, [2002] ICR 713 at [16].

Decision

28. So far as the reasons why the claim was submitted when it was submitted, I am satisfied that the legal advice from Mr Hadrill wholly explains why the claims were not put in in time, or - at least - were not put in earlier. The Claimant first instructed Mr Hadrill on 18 October 2023, at which point there was still time to put the claims in in time (by 23 October 2023).

29. It does not seem to me that the advice that the Claimant received from other lawyers previously really has much bearing on the timing of the claims as they advised the Claimant that the claims were out of time at a point when the claims that I am now dealing with (following the Claimant's concessions at this hearing) were in fact in time. That was wrong advice too. In other words, the Claimant has received wrong advice about time limits from three lawyers. He is not someone who has left his legal advice to only one person. In the absence of any specific reason for the Claimant to have doubted Mr Hadrill's competence, I do not consider that the fact that he had had different (wrong) advice from other lawyers prior to instructing Mr Hadrill meant that it was unreasonable for the Claimant to rely on Mr Hadrill's advice or that there was any onus on him to look to get further advice at that stage.

30. There is therefore an explanation for why the claims were submitted when they were, but I have to consider where the balance of prejudice lies and that means I need to look at all the factors.

31. So far as the victimisation claims are concerned, they are very significantly out of time - nearly two and a half months is nigh on doubling the primary time limit and there are good reasons why Employment time limits should be relatively short. Those reasons include the factors that Mr Kelly refers to in terms of members of staff moving on, and the desirability of not having claims hanging over employee's heads. Those are not particularly significant factors in the grand scheme of things, given that many claims in Employment Tribunals involve claims going back over quite considerable periods. Nonetheless, time limits are there to provide a degree of legal certainty and an employer can have a legitimate expectation that once more than three months (plus the ACAS early conciliation period) has gone past since the termination of employment that it will not normally be required substantively to defend Employment Tribunal proceedings in connection with that individual's employment.

32. The race-related harassment claim is not so far out of time being on the face of it only 22 days out of time. But the difficulty with this claim is that it relies entirely on an act of race-related harassment that occurred on 2 July 2020 more than two years' earlier. Further, the Claimant (or Mr Hadrill on his behalf) has already conceded that it would not be just and equitable for me to extend time to deal with that allegation as a free-standing allegation. The reasons for that concession are clear because it is a very old act of alleged race-related harassment. However, in order to succeed on the claim that the

Claimant is now trying to bring he would still have to go back to the facts of that July 2020 Tweet and dig over all that ground in order even to get past first base in establishing that his resignation two years later was in response to an act of race-related harassment so as to establish that his employer was liable for that resignation as itself a race-related act of harassment. So, although this claim is on the face of it only 22 days out of time, the substance of it is a matter in respect of which there has been very great delay by the Claimant - over two years, in fact - before he resigned in response to the matter about which he is seeking to claim.

33. Further, although I am not in a position to judge in any way conclusively what the merits of the case are, on the basis of the material before me, it does seem to me that this is a weak claim for the following reasons: (i) the delay in resigning in response to the Tweet will make it difficult for the Claimant to establish the necessary causal connection so that his resignation is to be treated in law as an act of race-related harassment by his employer; (ii) the 18-month delay between the Tweet and the Claimant complaining about it will also undermine his case that he was genuinely offended by it which will make it more likely that the Tribunal will accept the Respondent's case that the Claimant did not at the time regard the Tweet as meeting the harassment threshold; (iii) the context and nature of the Tweet – in response to the Claimant himself Tweeting a light-hearted Irish aphorism – also means that there is apparent merit in the Respondent's case that he could not reasonably have regarded the Tweet as meeting the harassment threshold.

34. Returning to the victimisation claims, I have also had regard to the merits insofar as I can judge them at this stage. I note that they turn on an allegation that it amounted to victimisation to reject a claim of race-related harassment. That is a type of claim that is frequently made in the Tribunal, but in my experience it can be difficult to establish on the facts that the rejection of the grievance is in material part *because* it included an allegation of race-related harassment (i.e. a protected act) rather than because of the merits of the complaint as they were perceived to be by whoever was dealing with the grievance. In this case, the points I have already made about the weakness of the Claimant's race-related harassment will make success on the victimisation claims even more difficult as there appear on the face of it to have been good reasons for the Respondent to reject the Claimant's complaint about that Tweet. In other words, there appears to be limited scope in this case for the drawing of an inference that the protected act was a material part of the reason for the rejection of his complaint.

35. So far as prejudice going forward is concerned, Mr Kelly relies on the fact that witnesses have moved on from employment with the Respondent. I put very little weight on that as it is very frequently the case that by the time a case gets to the hearing that witnesses have moved on in their employment. That in itself does not give rise to any prejudice to the Respondent. The delay is not such that it will have made any real difference to witness recall or the availability of documentary evidence. However, there is prejudice to the Respondent in terms of the time and costs involved in defending proceedings to a final hearing. If the claims were obviously meritorious that prejudice might

not warrant much weight, but as they are not, it does carry weight, particularly in the Employment Tribunal where costs are not normally recoverable. Some of that prejudice could potentially be remediated by the making of a deposit order if I did grant an extension of time for bringing these claims, but not wholly.

36. So far as the Claimant is concerned, if I refuse to extend time he obviously loses the right to bring his claims, but again my view of the merits is relevant here. The fact that the claims are not obviously meritorious reduces the prejudice to him of not being able to pursue them (and, indeed, will save him the time and costs of pursuing them). I also take into account that the Claimant will in principle have a claim against his solicitors in respect of any claims I do find to be out of time today, which also serves to reduce the prejudice to him.

37. Now I have to stand back and do my best to balance all of these matters in the scales. It seems to me that in this case, although I have considerable sympathy for the Claimant as he was let down by those he went to for advice, there has in fact been significant delay in bringing these claims, and given the weaknesses in the claims, and the impact those weaknesses have on the relative prejudices to the parties, it seems to me that the balance of prejudice in this case falls in favour of the Respondent and against the Claimant and his remedy will have to lie with his solicitors (if anywhere) rather than with the Respondent and the Employment Tribunal. So, for those reasons, and in the light of the concessions (which were in my judgment rightly made), I am afraid that I find all of the claims to be out of time. I will dismiss the claims on that basis.

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Employment Judge Stout

14 June 2023

Sent : 15/06/2023