



EMPLOYMENT TRIBUNALS

Claimant

Mr Brandon Lawson

Respondent

Park Holidays UK Limited

v

PRELIMINARY HEARING

Heard at: Bristol Employment Tribunal (by video)

On: 30 November 2023

Before: Employment Judge C H O'Rourke

Appearances

For the Claimant: In person

For the Respondent: Mr M Grant – Solicitor

RESERVED JUDGMENT

The Claimant's claims of automatic constructive unfair dismissal and sexual orientation harassment are dismissed for want of jurisdiction, as they were presented out of time.

REASONS

Issues

1. Following an application by the Respondent, this matter was listed for hearing today, by way of preliminary hearing, to determine whether, as both claims had been brought out of time, the Tribunal should exercise its discretion, subject to s.111(2) Employment Rights Act 1996 (ERA) (in respect of the automatic constructive unfair dismissal claim) and s.123(1)(b) of the Equality Act 2010 (EqA) (in respect of the harassment claim), to extend time. At the outset of the Hearing, Mr Grant stated that the Respondent also wished to make a costs application, but in view of this hearing only being listed for three hours and that being taken up with the hearing of evidence and submissions, there was insufficient time to either give judgment on the day, or to consider any costs

application. Mr Grant indicated that he would reserve the costs application for a later date, pending receipt of this Judgment.

2. Background. The Claimant initially brought claims of unfair dismissal and disability discrimination against the Respondent, on 8 June 2022 [64], the date of his resignation. However, as he had not included the ACAS Early Conciliation number in that initial ET1, the claim was struck out on 6 June 2023 [154]. Following re-presentation of the claim, by the Claimant, on 6 June 2023, alleging harassment on grounds of sexual orientation and automatic constructive unfair dismissal on grounds of protected disclosure, it was accepted by the Tribunal as presented on that date.
3. The Claimant entered ACAS Early Conciliation on 9 March 2023 and the Certificate was issued on 13 March 2023 [4].
4. It was not in dispute that taking the actual date of presentation, therefore, of 6 June 2023, the claims were nine months out of time.
5. While I note that in his second ET1 the Claimant ticked the 'disability discrimination' box in the form, he provided no information in his particulars of claim, or since, as to any acts of discrimination, related to disability. What he seems to say, instead, is that other alleged non-discriminatory acts by the Respondent worsened his '*mental health*' but were not caused by or as a consequence of any disability. The Claimant did not disagree with that conclusion and confirmed in this Hearing that his claims were purely of automatic constructive unfair dismissal and sexual orientation harassment.
6. Documents and Evidence. The Claimant gave evidence. The Respondent provided a bundle of documents for the Hearing and both parties provided skeleton arguments.

The Law

7. In respect of the automatic constructive unfair dismissal claim, I referred myself to s.111(2) ERA, which states:

(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.
(2) an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—
(a) before the end of the period of three months beginning with the effective date of termination, or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
8. I also referred myself to the following cases:
 - 8.1. **Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53 EWCA**, in which Lord Denning MR set out the principles to be considered in such a case, to include the reasons for the failure to meet the

deadline, whether there was acceptable ignorance of the fact and other factors, such as awaiting information from the employer, or physical impediments etc.

- 8.2. The burden of satisfying the Tribunal that it was not reasonably practicable to present the claim on time rests firmly on the claimant (**Porter v Bandidge Ltd [1978] IRLR 271 EWCA**) and as confirmed in the subsequent case of **Polystar Plastic Ltd v Liepa [2023] UKEAT 100**).
9. In respect of the discrimination claim, s.123(1) EqA states that:
- (1) ... 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.
10. The case of **British Coal Corporation v Keeble [1997] IRLR 336 UKEAT** indicated that the factors set out in s.33(3) of the Limitation Act 1980 may be useful when considering time limitation points. These are (as relevant to this claim):
- (a) the length of, and the reasons for, the delay on the part of the plaintiff;
- (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed ...
- (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
- (d) ...;
- (e) the extent;
- (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.
11. However, the more recent case of **Adedeji v University Hospitals Birmingham NHS Trust [2021] EWCA Civ 23** cautioned, at paragraph 37 that:
- '...rigid adherence to a checklist (with reference to s.33 Limitation Act) can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language (as occurred in the present case – see para. 31 above). 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.'

12. The case of **Robertson v Bexley Community Centre [2003] IRLR 434 EWCA** stated, in the context of the exercise of discretion as to a time limit in discrimination cases that *'there is no presumption that they (tribunals) should do so, unless they can justify failure to justify 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.'*
13. **Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278, UKEAT** indicated that the potential merits of a claim were relevant factors to be taken into account, in considering the balance of prejudice to the parties.

The Facts

14. I heard evidence from the Claimant.
15. An uncontentious chronology is as below:
 - 15.1. 6 April 2022 – the Claimant commenced employment.
 - 15.2. Sometime in the last week of his employment (1 to 8 June 2022?) – the Claimant claimed to have been subject to harassment on grounds of sexual orientation.
 - 15.3. Again, in the same week, the Claimant claimed to have made a protected disclosure.
 - 15.4. 8 June 2022 – the Claimant resigned and issued his first ET1, on-line [64].
 - 15.5. 10 June 2022 – the Claimant brought a grievance [171].
 - 15.6. 7 September 2022 – primary limitation expired.
 - 15.7. 6 February 2023 – the Respondent raised the lack of an Early Conciliation Certificate (ECC). It followed that up, later that month, with extensive correspondence setting out the legal position and an application for strike out [107-117].
 - 15.8. 9 March 2023 – the Claimant commenced EC [4].
 - 15.9. 13 March 2023 – ECC issued.
 - 15.10. 21 March 2023 – following a preliminary case management hearing a preliminary hearing was listed to determine the strike out application [147].
 - 15.11. 6 June 2023 – the preliminary hearing proceeded and struck out the claim due to its lack of an ECC [154].

- 15.12. 6 June 2023 – the Claimant presented this current claim [5].
- 15.13. 15 October 2023 – the Respondent’s response to that claim having been accepted, today’s hearing was listed to determine jurisdiction as to time limits. The Claimant was ordered to send any documents upon which he sought to rely, along with a witness statement, to the Respondent, by 29 October 2023 [33].
16. The Claimant said the following, both in oral evidence and in his statement [47]:
- 16.1. He was not aware as to the error in failing to obtain an ECC for his first claim until the 21 March 2023 preliminary hearing, although it was pointed out to him by Mr Grant that he had notified him of this situation in early February 2023.
- 16.2. He is a litigant-in-person, whereas the Respondent is professionally represented.
- 16.3. He said that he had been incorrectly advised as to the procedure to follow in respect of the first claim, which was that an ACAS ECC was not required, but believed that his claims were nonetheless in time, referring to civil court limitation periods of between three to six years, for personal injury claims and breach of contract.
- 16.4. As to the advice he had received, he said the following:
- 16.4.1. He took advice from the CAB, who told him that ‘ACAS was *not able to conciliate because of the nature of the claims*’ (in particular, he said later, in relation to the protected disclosure claim, although he was unable to explain, therefore, why his claim of disability discrimination should not have been subject to EC). He was challenged as to why he had not, as requested by the Respondent [55], disclosed a copy of that advice, or any record of correspondence with the CAB, for this Hearing and said ‘*it was past the time that the CAB would hold such records*’.
- 16.4.2. He was referred to an extract from the CAB website [181] which referred to the need for obtaining an ECC before commencing a claim and that following completion of EC, ‘*you’ll get a document called an ‘early conciliation certificate’. The certificate has a number – you’ll need to put on your employment tribunal claim form*’ and a link was provided to the Employment Tribunals website as to ‘*before you go to the tribunal – using early conciliation*’. When it was suggested to him, therefore that he could not seriously be suggesting that the CAB would have told him the opposite to this, he referred to an apparent exception in ‘*Rule 10*’, that he been informed of by either ACAS, or the CAB. He was asked to clarify what this Rule related to, and he was unable to do so. He was referred to the Tribunal Rules, of which Rule 10 relates to national security proceedings. Nor, on further enquiry, is it s.10 of the Public Interest Disclosure Act, which relates to crown employment. (There is no ‘Rule 10’ in the Employment Tribunals

(Early Conciliation – Exemptions and Rules of Procedure) Regulations 2014.)

- 16.4.3. He agreed that the Tribunal website [166] stated that *'you must tell ACAS that you intend to make a claim to the tribunal ... if early conciliation does not work, ACAS will send you an early conciliation certificate – use this when you make a claim to the tribunal ... once you receive the certificate, you'll have at least one month left to make your claim.'* When it was suggested to him that he had willfully ignored that guidance, which is put in very plain English, he said that he *'didn't think he had to and had tried to adhere to the procedure'* and referred to his disability as affecting his capability to do so.
- 16.5. He was asked whether, on being informed by the Respondent of the problem in relation to the lack of an ECC, in March 2023, he had said that *'ACAS said they deleted certificates after six months'* and agreed that he had (as referred to in his letter of that time [124]). He denied, however, that he knew full well that there was no certificate but lied about that fact.
- 16.6. He had made contact with ACAS, after commencing his first claim, but not in any form of EC and agreed that the correspondence he had provided between him, and ACAS did not predate 17 June 2022 [88-105].
- 16.7. He agreed that the contents of the Respondent's letter of 28 February 2023, (and also subsequent correspondence over the following week) setting out why his first claim could not proceed was a very clear and plain explanation of the situation [107, 120 and 123]. When it was again suggested that he had ignored this advice and lengthy correspondence, he again referred to his disability.
- 16.8. When challenged that whatever disability he may have, it did not prevent him from corresponding in detail (as evidenced by the contents of the bundle) he said that he had software on his computer that assisted him in this respect.
- 16.9. He was asked why, the situation having been made clear to him, that he did not, as requested on 3 March 2023 [126], withdraw his claim, as it was doomed to fail, and avoid the need for the preliminary hearing, and said that he did not agree that it was destined to fail. He considered that the decision would be one for the discretion of the Tribunal and while *'it was unlikely, it was worth a try'*.
- 16.10. He was asked why, when invited to comment on what should be included in the bundle, three weeks before this Hearing, he had not asked for inclusion as to any evidence of disability, he said it was because he had already emailed it to the Tribunal. On that point, he was challenged as to why neither of his two previous statements [45 and 47] had referenced any specific disability (instead simply referring to his 'disability' and 'mental health') and he said it was because *'you (Mr Grant) knew that.'* He denied that this was an example of him saying whatever he thought appropriate when challenged.

- 16.11. He did not accept that the potential Respondent witnesses would have difficulty remembering the alleged incidents, now, after a year and a half, or that many or all had moved on since. He said that they would have written witness statements at the time. He was challenged as to why they would have done so, when his allegations were so vague, with, for example, his grievance making only very general allegations, not naming anybody, or providing dates or, in the case of the alleged harassment, any detail of the incident. He said that that was *'the normal process'* with such a grievance and such matters were better put face-to-face. When it was pointed out to him that these concerns were particularly pertinent as he had already left the Respondent's employment, he said that that was not the case and that he had brought it while still employed, but was obliged to accept, when shown the dates that this could not be the case.
- 16.12. Finally, he was questioned as to why, only days (possibly 14 June 2022) after having brought the grievance and to which there had been no outcome, he said in a WhatsApp message to the Respondent [174] *'Hi Johnathan I forgot at the end of the meeting to ask if withdrawing my complaint and my notice is an option at this stage, now I've spoken to you all I feel confident enough that if I have any further concerns I can come to you and if you want me back I'll come back.'*, with the implication therefore that what had said in the grievance was *'a pack of lies'*. He said that he was the only person working in his household and was trying to get his job back.

Submissions

15. Respondent Submissions. Mr Grant made the following submissions:

- 15.1. He referred to his skeleton argument.
- 15.2. The tests are different for automatic unfair dismissal and discrimination. In respect of the dismissal, all but one of the alleged protected disclosures was made after the Claimant resigned.
- 15.3. In respect of the dismissal claim, even if was not reasonably practicable to have presented the claim within time, it was certainly not presented within such further period as was reasonable.
- 15.4. Ignorance of rights is not an excuse.
- 15.5. While the Claimant has asserted that his stated disabilities of depression and dyslexia impeded his ability to deal with this matter, he has provided no evidence whatsoever of any such conditions. And, even if he had, it is not sufficient to simply show the existence of a particular condition, but also the reasons as to why that condition would prevent him progressing this matter. It should be noted in this respect that any such conditions did not prevent him bringing his first claim within time, indeed on the same day as his resignation, or from engaging in extensive and lengthy correspondence since.

- 15.6. As to his failure to engage in ECC, in his first claim, he relies on misunderstandings on his part or poor advice. In respect of the latter, it is utterly implausible that both ACAS and the CAB would have advised him that he did not need to engage in EC. Also, while he accepts that he read the Tribunal website, it is again implausible that he would, despite there being no mention of any protected disclosure exemption, nonetheless misread it as so. The Claimant proceeded hastily, not listening to, or dismissing advice, because he thought he knew better. Such behaviour cannot bring him in within the protection of the 'just and equitable' exception.
- 15.7. Whatever as to the plausibility of his explanation at the point of bringing his first claim, it is entirely implausible that he could have realistically sustained that position in February 2023.
- 15.8. He has got nowhere near satisfying the Tribunal that it should extend time.
- 15.9. As to the balance of prejudice, all relevant witnesses have now left the Respondent's employment (their P45s are in the bundle), and the Respondent has no ongoing contact with them. The Claimant's grievance, shortly after his resignation, made no concrete allegations, capable of investigation, so there was nothing at the time that the Respondent could have done. This was particularly so as the Claimant then sought to withdraw his complaint. Even in his first claim there was not enough information for the Respondent to be able to conduct an investigation. It was not, in fact, until March 2023 that the Claimant even attempted to '*put some meat on the bones*', but even that was inadequate. This is not a case that is reliant on documentation, but on witness evidence, which would cause immense prejudice to the Respondent.
16. Claimant's Submissions. The Claimant made the following submissions:
- 16.1. It was part of his disability that he would be '*scatterbrained, or disorganized*', or erratic. He found dates and times difficult.
- 16.2. The Respondent has deliberately cherrypicked from the evidence.
- 16.3. The Respondent was aware that he had brought a formal grievance.
- 16.4. He has found this '*whole ordeal difficult*' and has tried to rectify his errors, but he is not a solicitor. He had not realised what evidence was not included in the bundle.

Conclusions

17. Claimant's Credibility. I did not find the Claimant to be a credible witness, for the following reasons:
- 17.1. On several occasions, when confronted with a difficult question, he clearly simply made up an answer on the spot, regardless of its truth, or otherwise. One example was his answer to the question as to why he had

not attempted to obtain a copy of the alleged first ECC from ACAS, when requested, being that they didn't keep records for more than six months. He clearly had not approached ACAS and also will have had no idea of their record-keeping procedures and in any event his statement that there was an earlier certificate was untrue. He also gave a similar answer to the question about obtaining copies of correspondence with the CAB, as to again that organisation not retaining such information. I somewhat exceptionally felt the need to remind him that he was giving evidence on oath.

- 17.2. He was quite willing to give absolutely categoric answers to questions, when, perhaps, the answer may have been that he would need to look at the bundle to check, or that he was unsure. On one occasion, in relation to when he had brought his grievance, he maintained his position more than once, that it was before his dismissal, until it was shown to him from the correspondence that that could not be the case.
18. Disability. The Claimant had provided no corroborative evidence whatsoever as to any claimed disability or mental health condition. He conducted this Hearing (the third such now) without any obvious difficulty, being perfectly able to understand what was being said to him. He has also engaged in extensive correspondence with the Respondent solicitors, all of which is generally well-expressed and detailed and even, on occasion, somewhat arrogant and dismissive. I note also my view stated above as to his credibility and I do not therefore consider that the Claimant can rely on any stated disability to excuse his actions.
19. Automatic Unfair Dismissal. I find that it was reasonably practicable for the Claimant to present his claim on time, and I do so for the following reasons:
- 19.1. I did not believe the Claimant's explanations as to why he apparently misunderstood the clear, plain-English explanations of the EC procedure on the CAB, ACAS and Tribunal websites.
- 19.2. I consider, instead that having perhaps at some later point in June 2022, when in discussions with ACAS, or on further reading of the relevant websites, he may have realised his error, but decided, nonetheless, to persist with the claim on the vague hope that he would somehow get round the problem, as it '*was worth a try*'. He had until 7 September 2022 put matters right but did not do so.
- 19.3. As stated, I don't consider that his stated disability can excuse this failure.
- 19.4. He is clearly an intelligent young man, who took the trouble to take advice from the CAB and ACAS (and later basic advice from a solicitor, in perhaps January 2023), but, in any event, very many claimants present such claims, within time, following the correct procedure, without the benefit of any advice, but perhaps through their own research on the internet, or elsewhere, which the Claimant was clearly capable of doing.

- 19.5. If not before, it must have been crystal-clear to him in February 2023 that he was in error, but he somewhat arrogantly dismissed the Respondent's detailed and clear arguments, refusing to withdraw his claim and start another, until, approximately four months later, it was dismissed by the Tribunal. Therefore, even if (which I don't consider to be the case) it was not reasonably practicable by, at the latest February 2023, for him to present this claim, he certainly did not do so thereafter within such further period as was reasonable.
20. Discrimination. I considered the following factors:
- 20.1. The length of the delay is great – nine months.
- 20.2. As with my findings above, in respect of the reason for the delay, no satisfactory reason has been advanced as to why the Claimant missed the time limit.
- 20.3. The effect on the cogency of the evidence caused by the delay is significant. A final hearing of this matter is unlikely before late next year and therefore witnesses (even if available) would need to be able to recall matters which they may not have thought significant at the time, well over two years after the event. The Claimant's allegations at the time, in his grievance, were vague in the extreme, rendering it difficult for the Respondent to carry out any meaningful investigation, or gather evidence. His first claim, significantly, made no mention of harassment on grounds of sexual orientation.
- 20.4. Applying Rathakrishnan, I am entitled to consider the potential merits of the claim and I consider this claim to be of little merit (such that I would have, if necessary, at least ordered a deposit order), for the following reasons:
- 20.4.1. I don't consider the Claimant a credible witness, as set out above.
- 20.4.2. The Claimant, when asked in this Hearing, can still not state the date or time of the alleged act of harassment, beyond thinking that it may have been in the last week of his employment.
- 20.4.3. His attempt, only a week or so after his resignation and days after his unresolved grievance, to withdraw that grievance and return to work, with a colleague who allegedly committed an act of '*sexual violence*' [173] renders this element of his claim potentially implausible.
- 20.5. In balancing the prejudice between the parties, I consider that that balance falls in the Respondent's favour, as while the Claimant will be prevented from bringing his discrimination claim, the Respondent should not, in the circumstances of the Claimant's failure to meet the time limit, without good reason, be obliged to have to defend against a weak claim, involving allegations from a Claimant who lacks credibility and which allegations, by the time this case would come to hearing, would be at least

two and a half years old. I consider, applying **Robinson v Bexley Community Centre** that the Claimant has not met the test that '*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*'.

Judgment

21. For these reasons therefore the Claimant's claims of automatic constructive unfair dismissal and sexual orientation harassment are dismissed, for want of jurisdiction.

Employment Judge O'Rourke
Date: 1 December 2023

Judgment sent to the Parties: 8 December 2023

For the Tribunal