EMPLOYMENT TRIBUNALS

Claimant: Krystian Smuda

Respondent: Great Bear Distribution Ltd

HELD AT: Liverpool (by CVP) **ON:** 19 February 2024

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimant: No attendance
Respondents: Ms S Clarke, counsel

Polish interpreter Mrs D Joseph

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant has no reasonable prospect of establishing that any of the alleged complaints of unlawful race discrimination which occurred before 29 January 2023 were part of a course of conduct over a period which included the dismissal.

2. The claimant has no reasonable prospect of establishing that it is just and equitable to extend the time limit to the 6 May 2023 for bringing complaints of discrimination in relation to those acts. The claimant's complaint of direct race discrimination is dismissed.

3. The claimant's claim of a discriminatory dismissal has little reasonable prospect of success and the claimant is ordered to pay a deposit the amount to be ascertained at a preliminary hearing held by CVP video link listed for 3 hours on the **23 April 2024 starting at 10:10am** with a Polish interpreter present.

4. The final hearing listed for 3 days on 8-10 April 2024 is adjourned and will be re-listed.

REASONS

Introduction

1. This has been a remote hearing by video which has been consented to by the parties. The form of remote hearing was CVP video fully remote. A face to face hearing was not held because all issues could be determined in a remote hearing.

2. This is a preliminary hearing to consider the respondent's application to strike the claimant's complaints of race discrimination brought under section 13 and 15, of the Equality Act 2010 ("the EqA").

3. The Tribunal has before it a bundle consisting of 225 pages including a written statement from the claimant, a Skeleton Argument submitted on behalf of the respondent, and extracts from Harvey on Industrial Relations and Employment Law Time Limits in Discrimination and Detriments claim also included in the bundle.

4. I did not heard evidence from the claimant as to why he had brought his claims in relation to Mr Harper outside the statutory time limit, and took note of his witness statements contained in the bundle together with the documents he produced.

5. I delivered oral judgment and reasons at the preliminary hearing. I have set out the reasons for the decisions made, which I decided should be sent to the claimant who needs to understand the position in respect of his claims, and the difficulties with an actual/hypothetical comparator referenced below. The claimant will come to the next preliminary hearing with his statement dealing with income and outgoings, documentary evidence of this and be prepared to explain and discuss his remaining discrimination claim and comparator he relies on. There is a possibility that I could reconsider my decision to order the claimant pays a deposit as a condition of continuing with this claim, and it is possible that I may decide to ultimately strike it out depending on how the claimant puts it. The claimant would do well to get legal advice on this remaining claim if he can before the next hearing.

6. The claimant did not appear at today's hearing. The claimant applied for an adjournment earlier this morning on the day of the hearing giving the reason as follows: "caused by the fact that my employer introduced top-down guidelines regarding holidays and financial savings for the month of January (the second half of it) until the end of February. (this situation repeats approximately every 5 years when the entire trucks fleet is changed) Considering the fact that I am a relatively young employee, this is a situation that I could not have predicted that I could have influenced it in any way

beforehand. Therefore. I would like to ask you to set a date for the case on the next available date in March…"

7. The Tribunal had no availability dates in March. I refused the claimant's adjournment request for the following reasons having noted that the claimant and his representative (Reverend C Dunbar) agreed today's hearing date. Reverend C Dunbar has also not attended today. These are the reasons given:

   7.1 "The hearing was originally listed on the 6 October 2023 and adjourned as there were issues with the bundle and case management orders were made leading to today's hearing by CVP video link.

   7.2 A Polish interpreter has been booked for today's hearing and it appears that apart from the issue of the agreed bundle, the hearing can proceed. Employment Judge Shotter has read your bundle and witness statement dealing with the strike out application.

   7.3 The Tribunal is very busy and listing cases for months ahead, longer cases are being listed in 2025. It is not in accordance with the overriding objective for today's hearing to be adjourned because the claimant has not managed to sort out his timetable/book a holiday.

   7.4 Finally, today's hearing was agreed at the 6 October 2023 preliminary hearing and a notice of hearing was sent to the parties on 6 October 2023. The claimant has had plenty of time to make the necessary arrangements and yet has made an application to adjourn on the morning of the hearing. The hearing will proceed at 10am as listed."

8. The hearing proceeded at 10.40 after an adjournment waiting for the claimant. During which the Tribunal clerk attempted to contact the claimant on a number of occasions and left a message which was not returned. The interpreter was on stand-by until 12pm in the event of the claimant deciding to join. I considered adjourning the hearing given the draconian nature of a strike out, with a cost order being made against the claimant, however, having read the papers including the claimant's statement I concluded that the hearing should proceed on the basis that the claimant's case as described by him in the ET1 and witness statement should be taken at its highest. It is notable that the claimant has not dealt with his income and outgoings, and concluded that if this becomes an issue I will make case management orders and list a short preliminary hearing to decide on the amount of deposit that will be ordered taking into account the claimant's means as a deposit should not be a barrier to justice. In short, the agreed bundle has been prepared, the claimant has provided a witness statement, the respondent is represented by counsel and the interpreter is present, taking into account the overriding objective and the less than valid reasons given by the claimant for seeking an adjournment, I concluded it was in the interest of justice for the hearing to proceed.

<u>Background to today's preliminary hearing</u>

9. Two preliminary hearings have taken place. The first on the 15 August 2023 which set out how the claimant put his discrimination claims and leave was given for him to amend his claim to include a discriminatory dismissal. It was at this hearing the claimant mentioned for the first time allegations concerning Stephen Harper as a consequence the respondent had not knowledge of any claim involving allegations of race discrimination by Stephen Harper until 15 August 2023.

10. At the preliminary hearing he agreed issues were recorded as follows:

"Discriminatory dismissal

21.The complaint of discriminatory dismissal was presented within the time limit. It is common ground that the claimant was dismissed. There is one issue: What is the reason why the claimant was dismissed? Was it because he is Polish? Or was it wholly for other reasons?

Other race discrimination

22.All the other discrimination is said to have been done by Mr Harper. Here is a complete list of the ways in which Mr Harper allegedly treated the claimant less favourably because he is Polish.

22.1.Mr Harper regularly allocated early starts to "English "drivers in preference to the claimant. **This continued until Mr Harper changed his role, approximately 6 months before the end of the claimant's employment** [my emphasis].

22.2.Mr Harper regularly called the claimant on his rest days, and would not call "English" drivers on their rest days. This happened until Mr Harper changed his role.

22.3.About 3 months before Christmas 2022 (after the claimant returned from sick leave), he spoke to Mr Harper at the window of the transport office and accused him of giving priority to the English drivers and said that Mr Harper was lying and cheating. Mr Harper reacted in a way that was cold and angry, and threatened to reprimand the claimant for what he had said.

22.4.At around the same time, Mr Harper said to the claimant that he did not care what the Shift Manager said.

23.Time limit issues arise for a complaint of discrimination about anything done before 29 January 2023. **The claimant accepted that the dismissal was the only act of discrimination that happened on or after 29 January 2023, but argued that Mr Harper's treatment of him was part of the same discriminatory culture that led to his dismissal"** (my emphasis).

11. A second preliminary hearing was converted from a strike out/deposit application to case management on the 6 October 2023. The claimant was

again represented by Reverend C Dunbar, at which it was confirmed "the claimant says the respondent discriminated against him because of his Polish nationality by dismissing him on 24 May 2023. The claimant says Mr Harper discriminated against him because of his Polish nationality in the way Mr Harper allocated shifts and work and in his treatment of the claimant.

The agreed issues for today's hearing

12. The purpose of today's hearing was set out as follows in the Order sent to the parties on 24 October 2023:

"The preliminary hearing will therefore be listed for a one day hearing before an Employment Judge sitting alone by CVP. That will be on 19 February 2024. The issues to be considered are as follows:

(i)Whether the allegations against Mr Harper should be struck out on the grounds set out at para 9 of E J Horne's Case Management Order dated 15 August 2023.

(ii)The respondent's application for a strike out of the claim as a whole (including the alleged discriminatory dismissal) on the basis it has no reasonable prospects of success.

(iii)(If no striking out order is made) whether a deposit order should be made.

(iv)What case management orders should be made if any part of the claim is allowed to proceed, including reviewing whether the current final listing of the case for a 3 day final hearing on 8-10 April 2024 should be re-listed (including for a longer final hearing).

However, the Judge at the Preliminary Hearing may decide not to determine any of these issues if it appears them to be in accordance with the overriding objective not to do so.

The claim form.

13. The references below are to various documents in the agreed bundle. If this matter proceeds to a final hearing I wish to make it clear that I am not binding the Tribunal by these references and my findings, who will reach their own findings of facts after considering all the relevant evidence.

14. The claimant commenced proceedings in a claim form received on 6 May 2023 following ACAS early conciliation between 28 April 2023 to 2 May 2023. It does not appear to be disputed that the claimant's discriminatory dismissal claim was lodged within time but his claims in relation to Stephen Harper were lodged outside the 3 month statutory time and outside ACAS early conciliation.

15. The claimant has produced two witness statements. The first deals with liability and is titled "Statement from claimant relating to discrimination grounds" together with a "Chronology of Events", the second "Statement from

the claimant relating to unfair dismissal on the grounds of race." In short, the claimant sets out why there is a continuing act and why it is just and equitable to extend the time limits in addition to a number of other matters. I have considered these documents in detail, and spent time during my deliberations going through them bearing in mind that strike out is a draconian step and if there is any doubt that justice will not be served, ordering a deposit and/or proceeding to a liability hearing may be the preferable depending on where the balance of justice lies.

16. Turning to the claimant's chronology of events and taking them at face-value it appears that the allegations of race discrimination made in relation to Stephen Harper refusing the claimant to change his shift pattern to an even earlier pattern than originally agreed with the claimant occurred on 7 March 2022 when the claimant's request was refused. On the 21 April 2022 Stephen Harper "ceased to offer early starts" which suggests that some early starts took place by the use of the word "ceased" and it appears by June 2022 the position was resolved, although this is not entirely clear.

17. It is notable that within the chronology the claimant refers to being spoken to for "harsh breaking" in June 2022, and issued with a final warning for harsh breaking in December 2022. It appears there was an issue with the claimant "harsh breaking" for which he received additional training, however, the final written warning was for a health and safety breach when the claimant was issued with a level 3 final written warning for tampering and damage to company vehicle camera. The disciplinary outcome letter dated 23 January 2023 refers to a disciplinary hearing held on 20 January 2023 before Craig Stannard who warned the claimant that *"Further occurrences of misconduct could result in further disciplinary action being taken against you, up to and including dismissal."*

18. The respondent's Employee Handbook includes a Disciplinary Procedure that provides for level 3 final warning followed by dismissal.

"Level 3 – Final Warning. This may result from a serious offence or from persistent failure to meet expected standards outlined in previous verbal and/or written warnings. The warning will specify the nature of the offence, a statement that any recurrence may lead to dismissal and, if appropriate, specify the improvement required and over what period."

19. The claimant does not mention the final written warning. It may be that he is confused. Nevertheless, at no stage does the claimant allege that the final warning and the way he was dealt with for "harsh breaking" amounts to discrimination, and it is clearly not relevant to his argument concerning a continuing act. However, it is relevant to his dismissal as the final written warning was in place when he committed the act of misconduct and he had been informed that further misconduct on his part could result in dismissal.

20. It is agreed between the parties that the claimant had a live final written warning on his record at the time when the decision was made to dismiss him, and he had been employed by the respondent for less than 2 years.

21. It is apparent from the information before me that the claim against Stephen Harper is limited to the claimant's request for an even earlier start time that resolved itself by June 2022. If I am wrong on this point, and the last act concerning Stephen Harper was at a later date I took the view that it could not have been later than 1 August 2022. I have been referred in the agreed bundle to a signed document confirming the changes made to Stephen Harper's terms and conditions of employment when he took over the position of Transport Compliance Supervisor. The consequence of this is that this change resulted in Stephen Harper no longer line managing the claimant's line manager and no longer having anything to do with management of individuals on a day-to-day basis including the claimant. This accords with the Record of Preliminary Hearing dated 15 August 2023 recorded at para 22.3, where the last allegation concerning the claimant accusing Stephen Harper of giving priority to English drivers and calling him a liar and a cheat, resulted in Stephen Harper reacting in a cold and angry manner threatening to reprimand the claimant. The claimant's case was that Mr Harper regularly allocated early starts to "English "drivers in preference to the claimant. This continued until Mr Harper changed his role, approximately 6 months before the end of the claimant's employment.

22. I have concluded that after 1 August 2022 the claimant had no dealings with Stephen Harper, and for the purpose of the continuing act it is apparent Stephen Harper was not involved in the subsequent disciplining and dismissal of the claimant. There is nothing to connect Stephen Harper with the investigating officer, dismissing officer and appeal officer, and no basis from the pleadings on which the claimant can argue that his treatment was part of a "discriminatory culture" as he appeared to maintain at the first preliminary hearing.

23. It is an accepted fact that the claimant was disciplined for the second time "Failure to report damage on vehicle PN23 EUZ and poor driving performance." He was alleged to have damaged a vehicle and was invited to a disciplinary hearing held on 2 June 2023. The claimant went off ill with stress and asked for the disciplinary hearing be adjourned until his sick leave ended. The claimant was aware that the allegations may amount to gross misconduct and he was at risk of being dismissed following correspondence sent to him, for example, the disciplinary invite letter dated 22 May 2023. An investigation took place including a statement being taken by the claimant on 24 April 2023 regarding the damage that occurred to the vehicle driven by the claimant on the 29 March 2023. The claimant was suspended on full pay throughout until summary dismissal confirmed in a letter dated 24 May 2023.

24. The claimant appealed and it is notable that nowhere in is grounds does he link Craig Stannard's decision to dismiss with the alleged discrimination by Stephen Harper earlier. The claimant alleged the decision to dismiss "without proper investigation could be construed as discriminatory" without explaining why this was the case, and there was no reference by him to any "English drivers" who had damaged a vehicle, failed to report the damage in

compliance with procedure and were guilty of poor driver performance, being treated better in comparison to the claimant.

25. It is undisputed the claimant did not attend the disciplinary hearing. He did attend the appeal hearing heard on the 12 June 2023 accompanied by Christian Dunbar, PCS union representative who also represented the claimant at the preliminary hearings referenced above.

26. Anthony Powis heard the appeal, and the claimant has not set out any link between Anthony Powis and the allegations made against Stephen Harper. The signed appeal minutes recorded the claimant's concern with his perceived difference of damage to the vehicle and a "scratch" and that is why it was not reported in accordance with procedure. Christian Dunbar argued "that in the circumstances was on mitigation. Anthony Powis rejected the claimant's appeal in a letter dated 14 June 2023 pointing out the claimant had refused to attend two disciplinary hearings and had contradicted himself. With reference to the alleged discrimination he wrote; " you explained that this was because of your shift pattern and that you requested earlier start times due to child care. You confirmed that once you had spoken to Carl, the issue was resolved and you were back to your early start times."

The law and conclusion

Time limits

27. The time limit within which claims to the employment tribunal must be brought is set out at section 123 of the Equality Act 2010 which at the relevant time provided: "(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. […] (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."

28. I am grateful to Ms Clarke setting out the law in her Skeleton Argument, part of which has been reproduced below. I have taken the principles set out into account, including the balance of prejudice between the parties. I have not duplicated rule 37 and 39 as this is mentioned in the Summary of Preliminary Hearing and is well-known to the parties. It is also referenced in Ms Clarke's skeleton argument.

Strike out.

29. Ms Clarke referred to Bahad v HSBC Bank plc [2022] IRLR EAT 83 the EAT (HHJ Tayler) took the opportunity to address the issue of strike out in the particular context of discrimination and whistleblowing cases. I have had in

mind throughout deliberations that strike out is draconian especially in discrimination claims which are often fact sensitive and often require the issues to be resolved after hearing all the evidence tested by cross-examination;

"To strike out a claim the employment judge must be confident that at trial, after all the evidence has come out, it is almost certain to fail, so it genuinely can be said to have no reasonable prospects of success at a preliminary stage, even though disclosure has not taken place and no witnesses have given evidence. When discrimination claims succeed it is often because of material that came out in disclosure and because witnesses prove unable to explain their actions convincingly when giving evidence."

Issue 1

30. I have divided the first issue into two parts. The first deals with conduct extending over a period and the issue to be decided is whether the allegations against Mr Harper should be struck out on the basis that there was no reasonable prospect of the tribunal finding that these allegations formed part of conduct extending over a period, which included the dismissal. I concluded that there was no reasonable prospect of the claimant establishing this.

31. Ms Clarke referred to the EAT case of E v X, L & Z UKEAT/0079/20/RN [para 50], Ellenbogen J provided the following guidance as to the correct approach to be applied at a preliminary hearing in respect of time limit arguments [para 50]:

*1) In order to identify the substance of the acts of which complaint is made, it is necessary to look at the claim form: **Sougrin**;…*

3) Nonetheless, it is not essential that a positive assertion that the claimant is complaining of a continuing discriminatory state of affairs be explicitly stated, either in the claim form,

*or in the list of issues. Such a contention may become apparent from evidence or submissions made, once a time point is taken against the claimant: **Sridhar**;*

*4) It is important that the issues for determination by the tribunal at a preliminary hearing have been identified with clarity. That will include identification of whether the tribunal is being asked: (1) to consider whether a particular allegation or complaint should be struck out, because no prima facie case can be demonstrated, or (2) substantively to determine the limitation issue**: Caterham**;*

*5) When faced with a strike-out application arising from a time point, the test which a tribunal must apply is whether the claimant has established **a prima facie case,** in which connection it may be advisable for oral evidence to be called. It will be a finding of fact for the tribunal as to whether one act leads to another, in any particular case: **Lyfar**;*

6) An alternative framing of the test to be applied on a strike-out application is whether the claimant has established ***a reasonably arguable*** *basis for the contention that the various acts are so linked as to be continuing acts, or to constitute an on-going state of affairs:* ***Aziz; Sridhar****;*

7) The fact that different individuals may have been involved in the various acts of which complaint is made is a relevant, but not conclusive, factor: ***Aziz;***

8) In an appropriate case, a strike-out application in respect of some part of a claim can been approached, assuming, for that purpose, the facts to be as pleaded by the claimant. In that event, no evidence will be required — the matter will be decided on the claimant's pleading: ***Caterham*** *(as qualified at paragraph 47 above);*

9) A tribunal hearing a strike-out application should view the claimant's case, at its highest, critically, including by considering whether any aspect of that case is innately implausible for any reason: ***Robinson*** *and paragraph 47 above;*

*10) If a strike-out application succeeds, on the basis that, even if all the facts were as pleaded, the complaint would have no reasonable prospect of success (whether because of a time point or on the merits), that will bring that complaint to an end. If it fails, the claimant lives to fight another day, at the full merits hearing****: Caterham****;*

11) Thus, if a tribunal considers (properly) at a preliminary hearing that there is no reasonable prospect of establishing at trial that a particular incident, complaint about which would, by itself, be out of time, formed part of such conduct together with other incidents, such as to make it in time, that complaint may be struck out: ***Caterham…***

13) If it can be done properly, it may be sensible, and, potentially, beneficial, for a tribunal to consider a time point at a preliminary hearing, either on the basis of a strike-out application, or, in an appropriate case, substantively,, so that time and resource is not taken up preparing, and considering at a full merits hearing, complaints which may properly be found to be truly stale such that they ought not to be so considered. However, caution should be exercised, having regard to the difficulty of disentangling time points relating to individual complaints from other complaints and issues in the case; the fact that there may make no appreciable saving of preparation or hearing time, in any event, if episodes that could be potentially severed as out of time are, in any case, relied upon as background more recent complaints; the acute fact-sensitivity of discrimination claims and the high strike-out threshold; and the need for evidence to be prepared, and facts found (unless agreed), in order to make a definitive determination of such an issue: ***Caterham.***

32. I noted in respect of the claim form the claimant made no mention of Stephen Harper and the alleged acts of racism despite his reference to the following "I am not afraid to use the word racism, because it is not the first time that I am humiliated, unheard, forgotten omitted." There is no suggestion of a prima facie case in relation to Stephen Harper in the Grounds of Complaint, and it is

clear that the claimant was concerned with being paid money owned and whilst he could give examples "however, at the moment, I am only requesting a refund…" which is indicative of the discrimination complaint becoming an issue if the claimant was not paid.

33. Ms Clarke submitted that the claimant has not made out a prima facie case or that it is reasonably arguable that the conduct relied in respect of his shift start times and his later dismissal constitutes conduct extending over a period. I agree. As made clear in Hendricks v Metropolitan Police Commissioner [2003] 1 All ER 654 [para 52]: "*the concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'…the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."*

34. I agreed with Ms Clarke that the claimant has not discharged the burden to show that the alleged discriminatory acts by Stephen Harper *are linked to the claimant's dismissal for gross misconduct and that they are evidence of a continuing discriminatory state of affairs covered by the concept of 'an act extending over a period'*. As set out above, the claimant makes no mention in his statements or chronology of how Stephen Harper's actions formed part of a course of conduct and does not point to anything which connects Stephen Harper to his dismissal, nor does he explain in any way the basis on which he considers that his dismissal was discriminatory. Stephen Harper played no role in the investigation, dismissal process or appeal against a backdrop of a final written warning given to an employee with less than 2-years' service who had repeated performance issues. The claimant does not assert Stephen Harper was instrumental in any way in the decision to dismiss. He relies on a nebulous reference to a "discriminatory culture" without explaining what that amounts to in his case.

35. The shift allocation difficulties allegedly experienced by the claimant ended in June 2022, Stephen Harper was no longer in the department by 1 August 2022. The claimant's performance difficulties that required extra training, his breach of health and safety which resulted in a final written warning and his dismissal for causing damage to a vehicle and failing to report it in accordance with procedure and his continuing poor performance have not been linked in any way by the claimant to a "discriminatory culture.". It is notable that Stephen Harper's involvement was limited to the early shift requests and nothing else, and I agree with Ms Clarke that the allegations are of an entirely different nature and involve different people. I would add that there is no suggestion by the claimant the different individuals involved in the disciplinary process conspired with Stephen Harper or each other to dismiss the claimant because he was a Polish national, and had this been the case the dismissal could have taken place earlier, for example, as a result of the

claimant's poor performance and breach of health and safety when the claimant moved the camera in the cab so that the respondent could not have monitored whether he was getting tired or not when driving for which the final written warning was issued.

36. For all of these reasons I concluded that there was no reasonable prospect of the claimant establishing that these allegations formed part of conduct extending over a period, which included the dismissal.

Just and equitable extension

37. The second and last part of issue one is whether in the particular circumstances of this case it was just and equitable to extend time, and I found that it was not as the claimant has not discharged the burden of persuading me to do so.

38. Whilst s.123(1)(b) EqA allows a Tribunal to consider a complaint out of time where it is just and equitable to do so, there is no presumption that the Tribunal should exercise its discretion to extend time. In his statement titled "Statement of Krystian Smuda regarding retention of complaints relating to racial discrimination by Mr Steven Harper" the claimant relied on 2 factors:

    38.1 "I was also frightened of raising issues formally as I believed this could jeopardise my employment. Subsequent events served to prove my concerns were well founded when I received a first and final warning for allegedly moving an 'in cab' camera in my vehicle,

    38.2 my unfamiliarity with UK Employment Law processes."

39. Tribunal should not extend a time limit unless the Claimant can demonstrate that it is just and equitable to do so as confirmed in the Employment Appeal Tribunal case of *Robertson v Bexley Community Centre [2003] IRLR 434*.

40. The exercise of discretion should be the exception rather than the rule. This approach was approved by the Court of Appeal in *Department of Constitutional Affairs v Jones [2008] IRLR 128.*

41. The factors set out in section 33 of the Limitation Act 1980 are matters to which the tribunal can have regard, albeit there is no requirement for a rigid adherence to these factors [Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23]. The factors are:

    (a) the length of and reasons for the delay;

    (b) the extent to which the cogency of the evidence is likely to be affected by the delay;

    (c) the extent to which the party sued had co-operated with any requests for information;

(d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and

(e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

42. In Kumari v Greater Manchester Mental Health NHS Trust [2022] EAT 32 the EAT held the tribunal is entitled to consider the merits of the claim when deciding whether to extend time.

43. As regards ignorance of one's ability to bring a claim, this must be genuine and reasonable- see Bowden v MOJ UKEAT/0018/17.

44. I accept Ms Clarke's submission that the claimant has not made out a prima facie case that he brought his claim within such time as was just and equitable. Apart from the claimant's reference in his witness statement he provides no further information on why he was "too frightened" to raise issues formally, bearing in mind that he had no difficulties raising discrimination complaints before he was dismissed, and on his own account repeatedly raised the issue of early start times in 2022. Ms Clarke has referenced the claimant's ET1 that he was *"not afraid to use the word racism"* undermining the argument that he was too afraid when the reality was that he issued proceedings alleging race discrimination before he was dismissed.

45. It is not credible that the claimant, who was supported by a union representative at appeal stage and beyond including these proceedings, had no access to advice and had no knowledge that he could bring a claim of race discrimination. Taking the claimant's case at its highest, the claimant started ACAS early conciliation on 28 April 2023 and had access to a union representative, nevertheless it was not until the preliminary hearing held on 15 August 2023 that he raised the allegations against Stephen Harper when there was no suggestion in the claim form that the claimant believed he had been discriminated against when requesting earlier start times and regularly called on rest days by him.

46. Ms Clarke submitted the claimant was aware of his rights in 2023 and a little bit of online research would have made his rights "crystal clear". I accept her submission that any lack of knowledge as to his rights was not reasonable. By the time the claimant issued proceedings he was clearly aware of his rights, and yet there is no mention of the historical allegations brought against Stephen Harper. The claimant has not shown any good reason as to why his claim has been brought out of time, however this one factor is not necessarily fatal.

47. Turning to the balance of prejudice, the fact that the claimant made no complaint, raised no grievance and said nothing about the behaviour of Stephen Harper until he was invited to the disciplinary that led to his dismissal, is relevant bearing in mind the delay and effect on cogency of the evidence. What has persuaded me to strike out the claimant's claims in relation to the Stephen Harper allegations in the passage of time, the effect on the cogency of the evidence and the most important factor, which is Stephen Harper passed away on the 10 September 2023. The delay in presenting the claim has caused the respondent prejudice.

Weighing the balance of prejudice to the claimant in not being allowed to present his race discrimination claim against the balance of prejudice to the respondent in being unable to defend it properly, taking into account that the claimant was silent about the allege discrimination until he was facing dismissal for misconduct with a live written warning and history of underperformance as a relatively new employee who had less than 2 years' service. I accept Ms Clarke's submission that the respondent will face the greater prejudice if the allegations are allowed to proceed, as it will not be able to present any evidence from Stephen Harper. Had the allegations been brought in time, or even been set out in the original ET1, the respondent may have been able to substantively respond, if Mr Harper could recall the period in question given the passage of time over the nine months before the claim form was presented on 6 May 2023 (which gives no hint of Mr Harper's allege involvement and does not put the respondent on notice of it) and approximate 12 months before the preliminary hearing held on 15 August 2023. In short, I accept the cogency of the evidence is affected, and that the respondent will be more severely prejudiced compared to the claimant if the extension were to be granted.

48. In arriving at the conclusion that it was not just and equitable to extend time I accept that the claimant will feel that he has been prejudiced, however, I hope that he will understand that the respondent will suffer the greater prejudice given the delay and death of Mr Harper.

<u>Strike out of the discriminatory dismissal.</u>

49. With reference to the issue, namely, should I strike out of the claim as a whole (including the alleged discriminatory dismissal) on the basis it has no reasonable prospects of success, I have struck out the Stephen Harper allegations for the reasons set out above, and there is no need for me to consider this issue in relation to them. Turning to the discriminatory dismissal, I was very close to striking it out. On the face of it the discriminatory dismissal claim appears to be very weak taking into account the factors that are not in dispute including the performance issues, final written warning and confirmation in the outcome letter of a possible dismissal in the future if the claimant committed another act of misconduct, the second act of misconduct and the fact the claimant did not have 2 years continuous service. All of these factors point to difficulties the claimant may have in establishing a prima facie case and comparator, whether actual or hypothetical.

50. This is relevant to his claim that the dismissal was discriminatory and I accepted Ms Clarke's submission that had the respondent wanted to dismiss the claimant earlier because he was Polish it had the opportunity to do so earlier at the 20 January 2022 disciplinary hearing given the serious health and safety breach that merited a final warning on the claimant's file for a 12-month period, and the separate issues it experienced with the claimant underperformance involving "harsh breaking." In short, the claimant was an employee with less than 2-years' service who underperformed and had committed two acts of misconduct, the first justified a final written warning and the second resulted in dismissal. It is notable that the claimant has not explained how a comparator (actual or hypothetical) would have been treated differently when found to have committed a second act

of misconduct as a result of damaging a vehicle and failing to report it in accordance with the respondent's policy coupled with continuing underperformance.

51. At no stage has the claimant, who is bringing a complaint of direct discrimination only, referenced an actual or hypothetical comparator, or provided any information from which it can be inferred that English drivers would have been treated more favourably (better than the claimant) in the same circumstances where there are no material differences other than the claimant's race. It is clear from the outcome letter that Craig Howard did not believe the claimant's explanation and concluded the claimant contradicted himself, he had caused the damage and not reported it following the correct procedure, He also concluded that despite re-training "your driving has failed to reach the required standard and this is evidenced by the harsh braking report provided to you in your disciplinary pack. "

52. The total absence of a comparator who was treated better than the claimant almost persuaded me to strike out the claim. I am concerned that no comparator was referenced in any of the documents before me, including the preliminary hearing summaries and claimant's statement. As a consequence there may not have been an opportunity to explore this with the claimant. Had the claimant attended the hearing today I would have discussed this with him and better understood his position. I am mindful that he is a litigant in person and vulnerable due to a language barrier, he has a poor grasp of English and required an interpreter: Equal Treatment Bench Book and Presidential Guidance on vulnerable witnesses.

53. Ms Clarke submitted that it was unsurprising he was dismissed given what appears to be the background of this case, which is largely undisputed although the claimant appears to be arguing about the extent of the damage that was caused to the vehicle. Ms Clarke is also correct that the claimant has failed to point to any evidence which indicates that Mr Stannard was in any way motivated by race, or pointed to similar situations in which English drivers were treated differently, and from the information before me to date it does appear that he is be unable to even raise a prima facie case of discrimination and has simply made an entirely unsubstantiated allegation of race discrimination in order to be able to bring a claim, given that he does not have the requisite service to bring an ordinary unfair dismissal claim. I would go further and add that the claimant's claim for wages is the prime motivator for the race discrimination claim and is the lever by which the claimant sought to be paid out against the threat of elaborating on his allegations if he was not paid.

54. I am mindful of the caution that should be exercised when striking out a discrimination claim, and the need for me to be confident that the discriminatory dismissal claim is almost certain to fail such and should be struck out, or at the very least, that it is 'pretty clear' that they will not succeed [Bahad], It is in nobody's interests for such a weak claim to proceed to trial, and the claimant should take note of this when he thinks about his comparators and how he now puts his claim.

55. The claimant is ordered to comply with the following case management orders leading to the preliminary hearing listed above;

    1. The claimant will produce a signed statement setting out his income, savings and expenditure. He will attach to the statement evidence supporting what he is saying, for example, his new employment contract showing salary, wage slips, bank and building society statements, bills, direct debits and so on. This information will be provided to the Tribunal and respondent no later than **29 March 2024** to give the claimant time to get legal advice.

    2. The claimant does not copy the respondent in to the communications he sends to the Tribunal. If either side has to contact the Tribunal, rule 92 requires all emails or letters to the Tribunal to be copied to the other side. Correspondence not copied to the other side might not be considered by the Tribunal.

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Employment Judge Shotter
22 February 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON

Date: 5 March 2024

FOR THE SECRETARY OF THE TRIBUNALS