Case No: 1600870/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr. Andrew Hovord

Respondent: The Commissioners for Her Majesty's Revenue and Customs

Heard on: Video (CVP) **On:** 23 May 2022

Before: Employment Judge S Evans (sitting alone)

Representation
Claimant: In person
Respondent: Ms. Bayoumi, Counsel

RESERVED JUDGMENT

1. The claimant's application to amend his claim to include a claim of harassment in relation to the protected characteristic of race is refused.

2. The claimant's claim of harassment in relation to the protected characteristic of age pursuant to s.26 Equality Act 2010 is out of time and is dismissed.

3. The claimant's claim of victimization pursuant to s.27 Equality Act 2010 is out of time and is dismissed

4. The tribunal has no jurisdiction to hear the claimant's claim of detriment pursuant to s.146(1)(b) Trade Union and Labour Relations (Consolidation) Act 1992. The claim is dismissed.

REASONS

Background

1. The claimant's employment with the respondent began on 14 August 2017 and ended on 21 July 2021.After referring his concerns to ACAS by the Early Conciliation Procedure on 22 June 2021, a certificate was issued dated 23rd June 2021 and an ET1 was issued in the Wales Employment

Tribunal on 23 June 2021.

2. There is another matter brought by the claimant against the respondent issued out of the Bristol Employment Tribunal. Papers relating to that claim were included in the bundle. The claimant confirmed that matters relating to the Bristol claim was not for my attention today.

3. At a Preliminary Hearing on 28 February 2022, it was ordered that a further preliminary hearing be listed. Paragraph five of the Case Management Orders made at that Hearing set out the issues to be considered at that Hearing, which is before me today:

   5.1 Is the Claimant permitted to amend his claim (if permission is required)?
   5.2 Was any complaint presented outside the relevant time limits in the Equality Act 2010 and Trade Union & Labour Relations (Consolidation) Act 1992 and if so should it be dismissed on the basis that the Tribunal has no jurisdiction to hear it?
   5.3 Further or alternatively, because of those time limits (and not for any other reason), should any complaint be struck out under rule 37 on the basis that it has no reasonable prospects of success and/or should one or more deposit orders be made under rule 39 on the basis of little reasonable prospects of success?
   5.4 Dealing with these issues may involve consideration of subsidiary issues including: whether it was "not reasonably practicable" for a complaint to be presented within the primary time limit; whether there was "conduct extending over a period"; whether it would be "just and equitable" for the tribunal to permit proceedings on an otherwise out of time complaint to be brought; when the treatment complained about occurred.
   5.5 Further case management necessary.

4. In accordance with the Order of 28 February 2022, a bundle was before me of 185 pages. In reaching my decision I considered such pages of the bundle to which I was specifically referred. I also had sight of a one-page document referred to as the witness statement of the claimant (undated and unsigned). I heard evidence from the claimant, including confirmation that the contents of his one-page statement were true. I heard submissions from both the claimant and counsel for the respondent. Counsel for the respondent also submitted a skeleton argument dated 17th May 2022 which consisted of seven pages.

5. During the Hearing, the claimant experienced intermittent technical difficulties which he explained were due to broadband widths in his home area in Cardiff. He explained that the connectivity could be affected by the weather. Initially, there were no issues and the claimant gave the first 32 minutes of his evidence without issue. At 11am connection issues arose so that the claimant had to repeat points. The claimant was asked to dial in to the hearing using his telephone so he could be seen on screen with his microphone muted and heard on his telephone. Once this was in place, he was cross-examined by counsel for the respondent. This process worked without incident for some 17 minutes then the claimant could not be heard. The parties were invited to make representations as to

how to proceed. The claimant indicated that he had sprained his wrist so could not hold the phone in his right hand and said he would prefer to attend the tribunal building in Cardiff to use their facilities and stating that he would "be better prepared". I advised the claimant that his need to be better prepared was not the issue but that we needed to ensure the Hearing could proceed fairly. The clerk to the Hearing confirmed that the system of the claimant using his telephone to speak was working well and it was suggested to the claimant that he should put his telephone on a table, using speaker phone, so he did not need to hold it. A break was agreed so the claimant could rest his arm. As there were no further connection issues and I was able to see and hear the claimant throughout these representations, I determined that a fair hearing was possible. When the Hearing resumed after the break, the claimant had his telephone on speaker and confirmed he was able to proceed. The Hearing proceeded to its conclusion without further disruption and at the end of the Hearing both the claimant and counsel for the respondent confirmed that they were happy with the procedure that had been followed and had no issues to raise. The matter was listed for three hours and concluded at 12:39 so judgment was reserved.

Relevant Law

Application to amend

6. I was not specifically referred to any authority on this issue. The Tribunal has a discretion under Rule 29 to permit amendments to a party's statement of case. In Selkent Bus Company Limited v Moore 1996 ICR 836, the Employment Appeal Tribunal stated that, when exercising its discretion in an amendment application, a Tribunal must do so in accordance with the over-riding objective and taking into account all the circumstances, including:
   (i) the nature and extent of the amendment,
   (ii) the applicability of time limits
   (iii) the timing and manner of the application and
   (iv) the relative prejudice/hardship to the parties of either granting or refusing it.

Time limits

The claims brought under the Equality Act 2010

7. Section 123 Equality Act 2010 provides that 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.

8. Counsel for the respondent referred me to the following cases:

   Robertson v Bexley Community Centre [2003] EWCA Civ 536 in support of her submission that the exercise of the Tribunal's discretion to extend time should be the exception, not the rule.

Adedeji v University Hospitals Birmingham NHS Trust [2021] EWCA Civ 23 where the Court of Appeal stated that:

"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".

The claim brought under s.146(1)(b) Trade Union and Labour Relations (Consolidation) Act 1992

9. Section 147(1) Trade Union and Labour Relations (Consolidation) Act 1992 provides that an Employment Tribunal:

   shall not consider a complaint under section 146 unless it is presented—
   (a) before the end of the period of three months beginning with the date of the **act** or failure to which the complaint relates or, where that act or failure is part of a series of similar acts or failures (or both) the last of them**]** , or

   (b)where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, within such further period as it considers reasonable.

Findings of Fact

10. The claimant made an allegation of racial harassment arising from a workshop or similar discussion group held during the course of the claimant's employment on 2nd December 2020. In evidence, the claimant said he raised the issue on 8th December 2020. This is also the date of the incident given in correspondence to the respondent at page 55 of the bundle. Page 148 of the bundle shows email correspondence dated 4th December 2020 referring to the claimant's concerns about the way he had been spoken to during a breakout session. Page 148 also refers to a "catch-up" that took place with the claimant on 7th December 2020 where the claimant raised concern about the way he was spoken to on 2nd December 2020. I find that the date of the incident was 2nd December 2020, during an "Our Conversation" session when the claimant was explaining an incident of racism he had experienced and was told words to the effect that white people do not suffer from racism.

11. Following the complaint of racial harassment made by the claimant, the matter was investigated and on 17th December 2020, the claimant was informed of the respondent's response to his concern, namely the person who had made the comment would be spoken to. Page 149 and Page 150 of the bundle record that the claimant was "happy with the course of action."

12. On 24th July 2021, the claimant emailed Ms. Rushforth of the respondent company (page 151 of the bundle) referring to two text messages he had sent to Ms. Rushforth on 27th May 2021. I was not directed to originals of the May text messages but the content of each was replicated at page 151. The first of those emails said:

"It has been annoying me for a long time I wish to raise a racial complaint against the person who said "White men don't suffer racism" in a race equality workshop I participated in".

The second email said:

"Another participant gave them an example of how they had suffered from racism from a French person and they decried that as well."

The claimant therefore raised a second grievance on 27th May 2021 in relation to the incident which occurred on 2nd December 2020.

13. On 26th July 2021, the claimant emailed Ms. Rushforth (page 154 of the bundle) stating that he had changed his mind "after the talk with you when I agreed to let her Manager deal with the situation when I was told this type of thing has happened con a number of occasions previously with her." Pages 155 – 157 show further correspondence relating to the concern raised in May 2021. All the correspondence relates to the incident of 2nd December 2020.

14. The claimant raised a formal complaint about the incident of 2nd December 2020 on 2nd August 2021. The outcome of that complaint was sent by letter to the claimant dated 25th January 2022.

15. The incident of 2nd December 2020 is the only specific allegation of racial harassment that is raised by the claimant. In evidence, he referred also to racism he suffered when he worked in Bristol but no details were provided.

16. The claimant resurrected his concern about the incident of 2nd December 2020, in 2021, when he was told that similar incidents had happened before to other people in the respondent's workforce.

17. The claimant did not include the complaint of racial harassment in his ET1 issued on 23rd June 2021. In evidence he said he did not want to "waste time".

18. The record of a preliminary hearing held on 28 February 2022 (page 43 – 53 of the bundle) refers, at paragraph 52, to an email sent by the claimant to the Employment Tribunal dated 20 February 2022 referring to the incident of 2nd December 2021 as "additional evidence" in his claim. At the hearing on 28 February, the claimant confirmed he wished to amend his claim to include a claim for race discrimination. A direction was made that any such application should be made to the Tribunal and to the respondent by 14th March 2022, explaining why it was not brought with the ET1 Claim form and why it would be just and equitable for the Tribunal to extend time.

19. The application to amend is in a document provided by the claimant at pages 54 – 56 of the bundle. The document is undated but the index to the bundle gives the date of 14th March 2022. At pages 55/56, the claimant

states that he was concerned that making a complaint to the tribunal (relating to racial harassment) would prejudice his position in the respondent's employment and that it would not be in his interests to raise a complaint until the process was completed (in January 2022). In evidence he said he was wary of retribution and did not know whether the formal concern would be decided in his favour.

20. From 2019 until October 2020, the claimant acted as a trade union floor representative. Part of his role was to hand information to employees about unsocial hours.

21. In July to September 2019, correspondence passed between various employees of the respondent company relating to the hours allocated to trade union representatives to spend on trade union matters (pages 69 – 71 and 76 of the bundle). The claimant was not named in this correspondence. It related to information gathering as to the number of hours allocated to trade union activities for a trade union representative and whether these hours were allocated annually or weekly/monthly.

22. On 19th September 2019, the claimant was sent an email by his manager (page 72 – 74 of the bundle) instructing him to stop sharing information about or discussing unsocial hours. The email included the sentence "If this continues, it will become a conduct issue." The claimant replied by email of 19th September (page 72) asking a number of questions and stating that her felt he was being "discriminated/ bullied/picked on because I am a Union Rep". The claimant received no reply to the email.

23. On 1st October 2019, the claimant sent an email to Mr. Bennett of the respondent organisation (page 75 of the bundle). It stated that the claimant had been in a one-to-one meeting with his manager (the same person as referred to in paragraph 22 above) when she made a comment "you are the oldest one on the team". The email indicated that the claimant did not "appreciate her ageist remarks" and confirmed he was in the process of consulting with his union to raise a grievance against the manager.

24. The claimant raised a grievance against his manager dated 16th December 2019 (pages 81-82 of the bundle). In it, he highlighted the fact that he had not received a reply to his email of 19th September and stated that until he received an apology, "a follow on/ up charge could surface at any moment". He was concerned that misconduct proceedings might be brought against him. His concerns persisted until his dismissal on the basis that he believed "a misconduct charge" was never withdrawn. The claimant was mistaken: he adduced no evidence to show that a misconduct charge was raised against him at any point. The email of 19th September did not go further than stating that if the behaviour persisted "it will become a conduct issue".

25. The grievance dated 16th December 2019 also raised the complaint of age

discrimination referred to in paragraph 13 above. The incident giving rise to the allegation of age discrimination happened on 1st October 2019.

26. On 8th October 2020, the claimant was notified by email (page 103 of the bundle) that his claim of unsocial hours flexitime had been rejected as the timings recorded exceeded the time period of 08:00 – 16:00. This was queried by the claimant by email of 8th October (page 101/102) and responded to at page 101 stating that the claimant's contracted working hours included weekends and that the issue of building flexi time at weekends had been discussed with the claimant "on more than one occasion." The claimant felt he was being victimised because he was carrying out his union duties.

27. On 2nd November 2020, the claimant was sent an outcome letter in relation to his grievance of 16th December 2019. The grievances were not upheld and the letter provided details of the appeal process.

28. The claimant's appeal document appears at pages 123- 124 of the bundle. It is undated but the index to the bundle gives the date of 4 January 2021.

29. An appeal decision notice appears at page 134 – 139 of the bundle and is dated 4th March 2021.

30. Subsequent to receipt of the appeal decision notice, the claimant was in correspondence by email with Mr. Young of the respondent organization between 4th and 26th March 2021 (pages 140 – 142 of the bundle). This correspondence sought advice from Mr. Young as to the next step available to the claimant. The claimant was also in contact with his Union for advice as at 25 March 2021.

31. The claimant said in evidence that he was continually harassed. No other specific incidents were referred to but the claimant felt that things were going on behind his back. He made a subject access request and, as a result, accessed the emails at pages 69 – 71 of the bundle, addressed in paragraph 11 above. He was concerned at the length of time taken to conclude his grievance of 16th December 2019.

32. In evidence, the claimant gave a variety of reasons as to why he did not bring his ET1 claim earlier. He said he feared retribution and felt his fears were well-founded because of his perception that there was an unresolved misconduct charge against him and because of the information he discovered from his subject access request. He also said that he decided to wait for the internal processes to be completed. At other points in his evidence, he said that no-one had told him to bring the claim and, separately, that the union had advised him to wait until the internal process was at an end. The contradictory explanations mean I am unable to make a finding of fact as to the true reason for the delay but I was not persuaded that the claimant has discharged the burden of showing he had

grounds to be concerned about the retribution to which he referred in evidence.

Conclusions

The application to amend

33. In deciding whether to exercise my discretion to allow the proposed amendment, I took account of all the circumstances identified in the evidence before me and the relevant law to which I was referred.

34. The proposed amendment would introduce a new cause of action, involving substantially different areas of enquiry to the claims currently pleaded, focusing as it does on a different protected characteristic and a different setting. It is not simply a re-labelling exercise.

35. Although there is clearly a prejudice and hardship to the claimant in refusing the application to amend, that has to be balanced with the prejudice and hardship caused to the respondent by allowing the application. I have considered this balance carefully and concur with the submission made for the respondent that allowing the amendment would require additional witness evidence and widen the scope and length of any final merits hearing. Applying the overriding objective and having regard to the additional investigation and evidence needed, together with the length of time that has now elapsed, I find that the greater prejudice and hardship lies with the respondent.

36. The claimant was asked at the preliminary hearing in February 2022 whether he sought to bring a claim of racial harassment. He confirmed that he wished to do so but had not actively sought to make an amendment. In considering this issue, I am mindful that the claimant is a litigant in person and take that into account in my review of all the circumstances.

37. The claimant had raised his second complaint about the comment of 2nd December 2020 before issuing his ET1. His evidence was that he was concerned that making a complaint to the tribunal would prejudice his position in the respondent's employment and that it would not be in his interests to raise a complaint until the process was completed. The claimant's employment with the respondent ended in July 2021 and the investigation into his concern was complete by 25th January 2022. Despite this, and despite access to advice from his trade union, he did not mention the issue of racial harassment in the context of the proceedings until February 20th 2022 when it was referred to as "additional evidence".

38. The new cause of action, a claim of racial harassment, would be brought outside the time limit of three months as the incident concerned occurred on 2nd December 2020. The claimant did not discharge the burden of proving why it would be just and equitable to extend that time limit as his evidence was that he had considered it would "waste time" to include this claim in his ET1. The outcome of that complaint was sent by letter to the

claimant dated 25th January 2022. Even if he had included the claim in the ET1, the issue of whether it was just and equitable to extend the time limit would have been relevant. The claimant accepted the outcome of the original investigation into his concern in December 2020. His subsequent change of mind when he resurrected his concerns in May 2021 and his decision to wait until the conclusion of the outcome of his concern, does not discharge the burden of showing it would be just and equitable to extend the time limit to the date of his application to amend. At the earliest, and on a generous interpretation, this would be 20th February 2022, almost a month after the outcome letter was sent to him and just under seven months after his employment was terminated and any concern of retribution would be at an end.

39. Taking into account all the circumstances, including those identified above, I do not exercise my discretion to allow the amendment sought and the application to amend is refused.

Time limits

The claims brought under the Equality Act 2010

40. The claimant brought claims of harassment on the ground of age and of victimisation in the ET1 issued on 23rd June 2021.
41. The claim of harassment relates to a comment made on 1st October 2019. The claim was not therefore, brought before the end of the period of three months starting with the date of the act to which the complaint relates.
42. It therefore falls to me to determine whether the claim of harassment was brought in such other period as I think just and equitable. Taking account of the law drawn to my attention, I am not satisfied that it is just and equitable to extend the time for bringing the claim. In exercising my discretion, I assessed all the factors in this particular case, including the length of, and the reasons for, the delay. The length of the delay is around 20 months. The reasons given by the claimant in evidence were varied and contradictory. He did not discharge his burden of showing the reason for the delay. The claimant issued the ET1 before he left the employment of the respondent. He produced no persuasive evidence to support concerns about retribution if he issued proceedings and, if he had such concerns, there was no logical explanation as to why he commenced the claim in June 2021 when those concerns would still be valid. Although account is taken of the fact that the claimant is a litigant in person, he also gave evidence that he had access to advice from his union at the relevant time.
43. I therefore find that the claim of harassment relating to the protected characteristic of age is out of time and is dismissed.
44. The claimant's submission is that the indication that misconduct proceedings might be brought against him, if his actions persisted, in September 2019, amounts to victimisation. The first date on which a protected act could have occurred was when the claimant complained about the age comment on 1st October 2019. The matters that arose in September 2019 cannot therefore establish a claim of victimisation under s.27 Equality Act 2010.

45. The other points made by the claimant were the length of time taken to conclude his grievance (16th December 2019 to 2nd November 2020) and the rejection of his unsocial hours flexitime in October 2020. No evidence was adduced that, to the extent that either amounted to a detriment, either of these matters arose because the claimant did a protected act or because the respondent believed the claimant had done or may do a protected act. I cannot identify a date on which a cause of action arises for the claim of victimisation as no evidence of this cause of action has been provided.

46. If the claimant *had* shown that the length of time to conduct the grievance, or the rejection of his flexitime , established a claim of victimisation, the claim was not brought before the end of the period of three months starting with the date of the act to which the complaint relates.

47. It would then have been for me to determine whether the claim of victimisation was brought in such other period as I think just and equitable and the points made in paragraph 42 above would have applied equally here.

48. Accordingly the claim of victimisation is made out of time and is dismissed.

<u>The claim brought under s.146(1)(b) Trade Union and Labour Relations (Consolidation) Act 1992</u>

49. The claimant's claim of detriment contrary to s.146(1)(b) Trade Union and Labour Relations (Consolidation) Act 1992 relates to the events of 19th September 2019. The claimant mistakenly proceeded from that date onwards in the belief that he was subject to a "misconduct charge". There was no evidence to suggest that this was the case.

50. The other particularised detriment linked to trade union matters was the rejection of his unsocial hours flexitime in October 2020 and/or the correspondence of July to September 2019, relating to the hours allocated to trade union representatives to spend on trade union matters and/or the length of time taken to investigate the grievance of 16th December 2019.

51. None of the matters above occurred in the three months prior to the presentation of the ET1 claim on 23rd June 2021. The tribunal cannot therefore consider the complaint unless I am satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period and that it was presented within such further period as I consider reasonable.

52. The burden here is more onerous than for the Equality Act claims and I cannot accept jurisdiction unless the claimant has discharged the burden of showing, firstly, that it was not reasonably practicable to bring the claim within three months of the matter giving rise to the detriment and, if that burden is discharged, secondly, that the claim was brought within a reasonable period of time after the primary limit had expired.

53. The claimant did not discharge his burden of showing it was not reasonably practicable for him to comply with the primary time limit. As outlined above, the reasons given by the claimant in evidence were varied

and contradictory. He had access to advice at the time, he produced no evidence to show that he could not issue the claim and his evidence as to concerns about retribution were not persuasive. Furthermore, if he had such concerns, there was no logical explanation as to why he commenced the claim in June 2021 when those concerns would still be valid.

54. Accordingly, the claim is brought out of time and the tribunal has no jurisdiction to hear it.

Employment Judge S. Evans

Date 21st June 2022

JUDGMENT SENT TO THE PARTIES ON 22 June 2022

FOR THE TRIBUNAL OFFICE Mr N Roche