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THE EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr D Gutierrez Rodriguez	**v**	**(1) Sloane Square Hotel Limited** **(2) Christopher Pass** **(3) Puji Yadam**

Heard at: London Central **On**: 26 May 2017

Before: Employment Judge Goodman (Sitting Alone)

Representation:

Claimant: Mr J Brookes
Respondent: Mr P Yadam, first respondent's company director and third respondent

RESERVED JUDGMENT

The claimant's application under rule 40(5) to reinstate the claim does not succeed.

REASONS

1. The hearing was listed to hear an application by the claimant to reinstate the claim, after it was struck for non-payment of the hearing fee.

2. The application was listed for hearing on 11 May before Judge Auerbach. On that occasion the claimant said that he would like the hearing to be postponed to enable his representative, Mr John Brookes, to attend, because Mr Brookes had drafted the letter making the application. The application to postpone was granted. Regrettably however, although Mr Brookes is here

today, the claimant has not attended. It was said that this was because he could not get a day off work today. His friend, Mr Duddridge, attended.

3. The tribunal was provided with an indexed bundle of documents including emails between the parties and between the claimant and the London Central region tribunal office, and the tribunal fees office in Leicester. The tribunal has also read the claim form and response. There was no formal evidence, in the absence of the claimant or any witness statement from him. Mr Brookes was able to give information about compliance with case management directions. Based on that material, the following is a factual summary of what is relevant to this application.

Factual Summary

4. The First Respondent runs a hotel, and the Second and Third Respondents are employed in the business as managers.

5. The Claimant had been employed in the business from 4 February 2013. In early 2014 he became a Duty Manager. In September 2015 he became the reservations clerk, as maternity cover.

6. On 31 August 2016 he was dismissed on 6 weeks' notice. The dismissal letter is not before the Tribunal but this appears to have related to the impending return of the member of staff who had gone on maternity leave. The Claimant says that between 1 June and 31 August he was deprived of the opportunity to apply for alternative roles within the business and he says that other moves suggest that there was a resignation and someone else was hired in the period around the time his employment terminated. He also suggests that there was no proper process of warning him about dismissal or impending redundancy. He worked his notice and the effective date of termination was 14 October 2016. Even before this date the Claimant had gone to ACAS about not being paid a redundancy payment and that seems to have led to him being put on garden leave for the remainder of his notice.

7. As well as a claim for unfair dismissal, he claims discrimination because of sexual orientation. He refers to homophobic remarks, although without detail of who made them, when, or what was said. There is a suggestion that when this came to his attention he discussed it with his employer in or about February 2015 and this led to his relocation later that year. He says that following transfer he did not get appraisals, he was treated with some distance by the managers, and not consulted about work matters as before..

8. The grounds of claim drafted by his representative Mr Brookes are very lengthy, extending to 110 paragraphs, but in respect of the sexual orientation claim are in general terms, and very light in detail. The Respondent has denied discrimination, pointing to the fact that he was promoted on three occasions.

9. A claim was presented to the Employment Tribunal naming all three Respondents on 1 November 2016.

10. The Claimant was asked to pay the issue fee of £250. He applied for remission of this fee, which was granted on 8 November 2016.

11. The Employment Tribunal accepted the claim against the first respondent, but rejected the claim against the Second and Third Respondents because neither was named on any early conciliation certificate.

12. The Claimant then engaged in early conciliation for the other respondents, and resubmitted the claim. He was asked to pay a further fee for this, and applied for remission. In the event, remission was not granted, the claimant has not paid the second issue fee, and it appears that this claim has been terminated by the fees office on the basis of non payment.

13. The claims having been re-presented, they were accepted. It appears that the hearing fee was consolidated for both claims- the claimant was not being asked to pay two hearing fees as well as two issue fees.

14. On 22 November 2016, a notice was sent to the Claimant asking him to pay the hearing fee of £950 by 8 December 2016, unless he applied for remission.

15. On 29 November 2016, he applied for remission. On 1 December 2016, the application was refused on the basis that, according to the Department of Work and Pensions, he was not currently in receipt of benefits, and he should therefore apply online again, and this time complete the income section with details of his income. The tribunal understands that this is because someone in receipt of means tested benefit is "passported" for remission, and does not have to document his means again. Someone who is not recorded as in receipt of means tested benefit must demonstrate that his means earn him remission.

16. The Claimant replied on 1 December 2016 saying that he did get universal credit (a means tested benefit), but: "DWP can't seem to find my records", and he asked if he needed to reapply. He attached a screen shot of a DWP screen which displays no claim number, reference number, or his name but says "if you are entitled to UC, you will be paid in 16 days" and then says that his circumstances between 10/11/16 and 10/12/16 will be relevant. The tribunal notes that the entitlement to UC (universal credit) is expressed conditionally. This suggests that it is an automated response to an application. It does not show that universal credit has been granted or paid.

17. On 11 January 2017, he was sent a notice that £250 (the issue fee for the 2nd and 3rd respondents) was due, and he also got a letter from the fees office, saying that his appeal against the letter of 16 December 2016 was not accepted, saying: "The universal credit screen shot … does not state if you are in receipt", and they will need a letter from the DWP, or his income details. Mr Duddridge has supplied today that the DWP have told the Claimant that they do not issue paper letters, and that the details of his entitlement will either appear online, or can be evidenced by the fact of payment into the bank account. However, he was not able to supply a

screenshot or other copy of any online message about the claimant's entitlement to universal credit at any date, or the claimant's bank statements to show that he did receive universal credit at any time. As noted below, the claimant's case is in fact that he did not receive 11 January correspondence.

18. The Claimant appears to have taken no action on that fees office response to his application for remission. He did not send proof that he had been paid universal credit, nor did he give details of his income, nor did he pay the fee.

19. This account of the correspondence has been slightly simplified, because there was also some correspondence about the outstanding issue fee on the second claim, which has not been paid, and for which remission has not been granted. However, as noted below, the Claimant has represented that he did not receive any fees office emails after December 2016. If it is correct that he did not receive these emails, they cannot have confused the picture.

20. On 15 February 2017, there was a Preliminary Hearing before Employment Judge Pearl, who reviewed the issues and made the case management directions. The claimant was represented at this hearing by Mr Brookes. The orders included an order for consecutive disclosure of documents to be completed by 22 February. I am told that this took place. There was also an order that the parties liaise about producing a joint hearing bundle, but with no date attached for this, followed by an order for exchange of witness statements on 28 March 2017.

21. The claim was already listed for a hearing over 6 days, between the 18 and 25 April 2017. This was done on acceptance of the claim in November 2016.

22. At today's hearing I asked about compliance with orders, and in particular the witness statements. Mr Brookes said in reply that witness statements were not exchanged on 28 March because he was "still waiting for the Respondent to reply with documents that had been requested on more than one occasion". I asked what documents had been requested, and was shown an

email requesting documents, though an attachment listing what documents were being requested was missing.

23. The Respondent then pointed out that the first request for specific documents was made at the Preliminary Hearing at which Employment Judge Pearl made the order for general discovery and said that the parties could apply to each other if items were considered missing. The Claimant's second request for specific documents was made on 13 March 2017, after general disclosure had taken place. Mr Brookes did not dispute this.

24. The Respondent, hearing this explanation why the claimant was not ready to proceed to exchange of witness statements on 28 March, said they had replied to the 13 March request on 20 March 2017, stating that they enclosed "documents and tape records". Having produced this email in the hearing it was shown to Mr Brookes, who agreed that he had received it, and did not dispute that the documents and tape records had been attached.

25. In the light of that, it is hard to understand why Mr Brookes says that he was not able to prepare witness statements for exchange by 28 March because he was waiting for more documents. He had already been asked if there had been correspondence with the Respondent about agreeing to extend the time for exchange of witness statements in view of any delayed disclosure, and he had said no, as he thought it had been implied by the fact that he was repeating a request to see extra documents. In fact the latest request for documents was on 20 March, and it was 6 minutes later that the Respondent replied with the documents. It must be presumed that these were what was wanted, because Mr Brookes has not disputed then or now that there is anything else he needs to see. So, eight days before the date for exchange of witness statements, the claimant's representative had the documents he had asked for.

26. Mr Brookes told the tribunal that a long witness statement had been prepared, and he was in the process of "finalising" it with the Claimant when the Claimant at that point conducted a search of his emails and discovered,

in his junk email folder, an email of 23 March 2017, saying that the claim had been dismissed. He said the claimant had then searched his junk mail folder further, and found the email of 16 March 2017 (the "unless" email), and a number of earlier emails from London Central and the fees office.

27. The claimant then sent the tribunal a letter, drafted by Mr Brookes, asking for the claim to be reinstated. It is the application of which this is a hearing.

28. The letter recites the chronology of his correspondence with the ET fees office, and added that following his email of 1 December about universal credit, he had an email in reply saying that EX160 had been replaced and he did not need to provide evidence with his application form, followed by another email on 2 December, telling him that information was required, and a further form was required from him. He says that this email went to his junk folder and he did not see it. On 6 December, he said he had received an email from London Central (not in his junk folder) advising that claims against the Second and Third Respondents had been accepted and joined to the original claim. He therefore understood that he did not need to pursue the remission application in respect of the second issue fee of £250.

29. I have reviewed the bundle of material from the claimant's inbox and junk mailbox, as provided by the Claimant's representative. I was unable to find anything which told the Claimant that he no longer needed to provide information about receipt of benefits and his income. The letters from the fees office are clear, and in standard form. They say that the office was not satisfied that he had universal credit as the DWP benefit database did not show this.

30. In answer to a question, Mr Brookes said that the Claimant had not followed up the fact that he had been told that remission of the hearing fee had been refused as he was engaged in preparation for the Preliminary Hearing in February. Only when the claimant searched the emails on 28 March in connection with preparation of the witness statement due for exchange that day did he discover the material in his junk folder. By this stage the material

in the junk folder not only included a letter of 11 January 2017 saying that more information was needed to confirm that he was in receipt of universal credit, otherwise he must provide details of his current income, but there was also a letter from the Employment Tribunal of 16 March 2017, saying that unless he paid the fee in 7 days his claim would be struck out. Nor did he see, until he searched on 28 March, the notice of dismissal for non-payment of the fee.

31. In the letter of 28 March, Mr Brookes, on the Claimant's behalf and in his name, complained that the sequence of correspondence from the fees office about the issue fee of £250.00 for the second claim was confusing, but also states that this correspondence did not come to the Claimant's attention until he found missing material in his junk email on 28 March.

32. The letter went on to say that the Claimant had done everything possible to respond to the Tribunal efficiently and move this claim forward as is required. The "confusing and contradictory nature of the communications that I was required to deal with" would not serve the interests of justice and equity for his claim to be dismissed. In particular, dismissing the claim was entirely contradictory to the principle that a party can represent themselves in the Employment Tribunal, and "even an experienced legal representative would have difficulty in understanding what was expected of them".

Relevant Law

33. The Employment Tribunal Fees Order 2013 provides for fees to be paid on issue and before final hearing, and in the case of this category the appropriate fees have been notified to the Claimant.

34. Rule 40 of the Employment Tribunal Rules of Procedure 2013 states:-

    (1) "Subject to Rule 11" (which is about rejection of claims not accompanied by a Tribunal fee or remission application) "where a party has not paid a relevant Tribunal fee or presented a

remission application in respect of that fee, the Tribunal will send the party a notice specifying a date for payment of the Tribunal fee or presentation of a remission application.

35. If at the date specified in a notice sent under paragraph (1), the party has not paid the Tribunal fee and no remission application in respect of that fee has been presented:

– "(c) where the Tribunal fee is payable in relation to an application, the application shall be dismissed without further order".

36. Rule 40 (3) provides that where a remission application is refused, the Tribunal shall send the Claimant a notice specifying a date for payment of the fee and if payment is not made by that date "the consequences shall be those referred to" in 40 (2) – i.e. strike out.

37. Finally, rule 40 (5) provides:

"In the event of a dismissal under paragraph (2) or (4), a party may apply for the claim or response or part of it which was dismissed to be reinstated and the Tribunal may order a reinstatement. A reinstatement shall be effective only if the Tribunal fee is paid, or a remission application is presented and accepted, by the date specified in the order".

38. Decisions made under the Employment Tribunal Rules of Procedure 2013 are subject to the overriding objective, which is set out in Rule 2, to deal with cases fairly and justly, which includes, so far as practicable, "dealing with cases in ways which are proportionate to the complexity and importance of the issues", "avoiding unnecessary formality and seeking flexibility in the proceedings", avoiding delay and saving expense.

39. An application under Rule 40 (5) is in effect an application for relief against sanction, but the Court of Appeal made plain in **Neary v Governing Body of St Albans Girls School (2010) ICR 473** that Tribunals need not consider

each and every item in the Civil Procedure Rules rule 39 (1); although that might be a helpful checklist, it was not necessary to set out the tribunal's views on every factor. In giving reasons: "it would be necessary for the Judge to demonstrate that he has weighed the factors affecting proportionality and reached a tenable decision about it". "It must be possible to see that the Judge has asked himself whether in the circumstances the sanction had been just." The decision is "an exercise of judgment", taking relevant factors or circumstance into account, and avoiding taking irrelevant factors into account.

Discussion and Conclusion

40. With that guidance in mind I turn to the facts of this application. The Claimant is a litigant in person, but has had access throughout to advice from Mr Brookes. Mr Brookes drafted the grounds of claim, attended the preliminary hearing, corresponded with the respondent about documents, and told us he had drafted a lengthy witness statement for the claimant. Mr Brookes has qualified that by explaining that when advising the claimant, he did not concern himself with administrative matters such as the payment of fees, but only the substance of the claim. Mr Brookes explained to the tribunal that he is not a solicitor or barrister, although he had been a solicitor. He is not a registered claims manager. On the professional networking website Linked-In he holds himself out as a "TUPE, Workforce Change Management and Employment Law Consultant". He professes therefore some expertise. He told the tribunal that he provides his services to the claimant on a paying basis.

41. Anyone who has had to deal with bureaucracy, particularly of the type that relies heavily on standard letters, must have some sympathy with the Claimant receiving strands of correspondence relating to different matters, which in this case included the Claimant having had his claim accepted in part, and and then having to re-present the claim against against two further

Respondents, necessitating the second issue fee, but not a second hearing fee.

42. The Claimant represented in his letter drafted by Mr Brookes that he was no longer required to provide documentary evidence to support his claim for remission, but this is not apparent in the correspondence before the Tribunal, in which the letters, although in standard form, make it plain to him that it was not accepted that he was in fact in receipt of benefit as he said. The Claimant responded with the universal credit screen shot, asking if he needed to re-apply.

43. If it is accepted that any correspondence with the fees office in Leicester after that date, and the correspondence from London Central Employment Tribunal about fees sent on 16 and 23 March, all went into his junk mail direct and were not found by him until 28 March, then, as of December 2016, his state of mind was that he knew (1) he had not been granted remission of the hearing fee, (2) he was disputing that decision, (3) he had not replied received a reply to his email disputing that decision (4) he believed he did not have to pay a second issue fee, because the claim had been accepted second time round, but (5) it is not clear why he thought he did not need to pay the hearing fee. The tribunal has not been told whether or when the claimant did get universal credit, or some other means tested benefit.

44. It is a matter of concern that the Claimant appears not to have followed up this up.

45. It is also a matter of concern as to whether all this material, whether from Leicester or London Central, did in fact go into the Claimant's junk mail. It is of course *possible* that this occurred, if they were sent from a different case worker's email address. Most of us know these days that sometimes email correspondence we would wish to see, occasionally even email addresses to which we have ourselves written, can be trapped in a spam filter and appear in junk mail, and that therefore it is wise to check the spam filter from time to time. Commercial organisations sometimes point this out. As well as that, the

Respondent, by Mr Yadam, pointed out that the Claimant was not an email novice. He had worked as a reservations clerk in a hotel, and had, they say, been trained by them to check the spam box everyday in case something from a customer or would-be customer had gone astray. Even if, as Mr Brookes asserted, there is no evidence, other from Mr Yadam, that the Claimant was so trained, most people familiar with email, even if not experts in information technology, know that matters can be lost in junk mail and will check it. It is hard to understand why, knowing that there was some uncertainty about whether he had been granted remission or not, the Claimant should not follow this up or check.

46. I also bear in mind that the assertion that all correspondence after 1 50 December was caught in his junk mail comes from Mr Brookes who drafted the letter, and on the evidence of today's hearing Mr Brookes is not always meticulous about detail, as when he represented that the Claimant was not able to exchange witness statements on the 28th March because he was waiting for further documents, when, as seen, on 28th March he had been sent the documents he had requested 8 days earlier. It is unfortunate therefore that the Claimant has not attended today and so cannot be questioned.

47. Nor is it clear to the Employment Tribunal that he would have been granted remission. For example, it would have been possible to produce today bank statements showing payments of universal credit, if he received them, and whether it is continuing or has since ceased. This would have helped as regards his state of mind on the remission issue, and would also have been relevant to the justice of whether he should be struck out for not paying a fee when he was entitled to remission of it. He is said to be currently working full time at a comparable annual salary (£20,000). Without knowing the detail of the means test applied for remission in the absence of benefits, it is not clear that he would have been granted remission of hearing fee in December, or in January, or in February.

48. Striking out for failure to pay a fee is a draconian measure, and it is better that cases are heard on their merits. That must be taken into account when considering the application of rule 40.

49. Other than the delay in exchanging witness statements, the Claimant had been ready for the hearing in April. The hearing has not gone ahead because he did not pay the fee. It was listed for a 6 day hearing, requiring a full panel, and the next occasion when London Central tribunal could list such a case is mid November 2017 at the earliest. The Respondent complains that they had, at some considerable difficulty and cost to the business, prepared and arranged for the attendance of 10 witnesses at this April hearing, two of whom no longer work for them.

50. One of the concerns about the lengthy postponement that will be necessary if the claim is reinstated is that the allegations of homophobic bullying are unparticularised, whether as to personnel, content or date. It appears to have occurred between 2014, when the claimant was promoted to Duty Manager, and ended on whatever date in 2015 he was transferred to the reservations clerk job as maternity leave cover. Evidence about this bullying is weakened by delay. He did not complain or make a grievance about it at the time, which means there is no contemporary documentary evidence. The evidence for and against therefore will rely on the witnesses' memories. Nothing is said in the Claimant's lengthy grounds of claim document about any complaint or grievance he made about his treatment at the time, or after transfer to maternity leave cover, or in the currency of his employment. There is only a reference to a discussion with Mr Yadam sometime in 2015, possibly February 2015, after another employee's exit interview which mentioned the Claimant was being troubled by colleagues. It seems to be implied that this discussion led to the claimant's transfer to maternity cover post.

51. In the interests of justice I consider the prospects of success in this claim. On the face of the grounds of claim document, any difficulty with colleagues while Duty Manager ended when he was transferred to the maternity cover

post in 2015. Acts of harassment or discrimination are likely to be out of time, and it would be a stretch, though not of course impossible, to extend time on grounds that it would be just and equitable to do so, though it is not clear at present what those grounds might be. There is little detail, other than the fact of dismissal, of the claimant being subjected to detriment, let alone that his sexual orientation was the reason for that. Subject of course to findings on the evidence, at this stage the case on sexual orientation discrimination appears weak. The evidence to support or refute it concerns matters long gone, and not recorded or investigated at the time.

52. In weighing the balancing of factors in the interest of justice, the Respondent has difficulty in responding to a claim notified so long after the specific events referred to, and the Claimant would lose a claim that will always have been difficult to prove, though that is not to say that it was hopeless.

53. I have considered whether the hearing of this application should be postponed a second time, so that the Claimant can attend to give evidence. He could however have applied for postponement if there were difficulties getting time off, and it is the second time this matter before the Tribunal for hearing. He had an experienced adviser, in Mr Brookes, who could have applied for postponement so he could give evidence.

54. I have also considered whether the matter could be remedied by a preparation time order for the Respondent, for the lost hearing in April, as it might well be argued that the Claimant had acted unreasonably in failing to check his junk mail. A preparation time order however would not make up for the difficulties caused to the evidence by the length of delay now made necessary.

55. Overall, the Claimant knew in December that he had not paid the fee and had not been granted remission either. He does not appear to have followed this up. He seems to have relied on a letter (which the Tribunal has not seen), saying he no longer needed to provide documents on EX120, but he did not receive a letter saying that the fees office were satisfied that he was

in receipt of benefit or entitled to remission. He knew that he had not paid the fee by the due date. He knew that he had not been granted remission. If it is right that the London Central warning letter of 16 March went to his junk mail, he would still have known that the hearing was coming up and that a fee was payable. Also, he is not an novice in IT: it is not unreasonable to expect when viewing his email, to check spam from time to time, but not to do so at all, as the Claimant says, for a full four months from 2 December to 28 March, against the background of no communication from the fees office about the outstanding remission issue, is neglectful. I add to this, that a factor that does weigh in the balance is that I am not comfortable that that Mr Brookes' assertion that junk mail was the problem at all times can be relied on. Firstly, he has demonstrated today that he may make an untrue excuse for failing to do something on time. Secondly, the assertions in the letter that the correspondence was confusing are odd if the claimant was saying that he had not seen the correspondence at all, not that he had seen it, but did not follow it.

56. Weighing up what the Claimant knew, or should have known, and what was done by him, about paying the hearing fee, against the interests of justice in proceeding to a hearing where the issues can properly be heard, with cogent evidence available to either side, I am concerned that the claim of homophobic bullying is well out of time, and that despite a lengthy claim document the claimant has not given particulars of it, such that the claim of detriment prior to dismissal appears weak. Even if the detriment claim is set aside, it remains that to succeed in a claim that homophobia was the reason for dismissal, or for failing to find an alternative vacancy at the end of the maternity cover period, the claimant will have to rely on this old and non-particularised bullying, because in his grounds of claim document nothing is said about anything else that would indicate that the claimant's sexual orientation was the reason. Without particulars, and with old evidence, the delay caused by the claimant's non-payment of a fee damages the respondent's prospects of advancing a positive defence. Finally, there is the unfair dismissal claim. The claimant is at a disadvantage in that respondent has given particulars why redundancy was the reason, redundancy is a

potentially fair reason for dismissal, and on the claimant's case there was some consultation. The unfair dismissal claim therefore is not especially strong either.

57. At the conclusion of this balancing exercise, I decline to reinstate the claim.

Employment Judge Goodman
6 June 2017