EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr M Liepa	AND	Polystar Plastics Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard: Southampton **On:** 25 August 2022

Before: Employment Judge Gray

Appearances
For the Claimant: In person
For the Respondent: Mr B Large (Counsel)

JUDGMENT

The judgment of the tribunal is that:

- **Claim 1404329/2021 (the first claim) is not a validly presented claim.**
- **Claim 1401934/2022 (the second claim) was validly presented on the 1 June 2022. This was submitted by post.**
- **It is just and equitable to extend time in respect of the second claim.**

REASONS

1. Following the above judgment being delivered orally the Respondent requested written reasons which are now included with this Judgment.

2. This preliminary hearing was listed to determine:

    a. Whether the claim form under the present claim no. [being 1404329/2021] is defective by reason of non-compliance with the ACAS certification rules.

b. Whether the present claim, or the forthcoming claim [being 1401934/2022] have been presented out-of-time.

c. If so, whether it is just and equitable to extend time.

3. For reference at this hearing, the Tribunal was provided with:

a. A witness statement of the Claimant.

b. A witness statement of Mr Toby on behalf of the Respondent.

c. A bundle consisting of 189 pages.

d. Respondent's skeleton argument with copy authorities.

4. The matters to be determined at this hearing were discussed with the parties at the outset. During that process the Claimant accepted that the first claim was not validly presented. The Claimant confirmed that he could not prove that the Respondent had contacted ACAS (which is the exception he relied upon in not providing an ACAS certificate). It was also acknowledged that the recent decision of the Employment Appeal Tribunal in ***J. Pryce v Baxterstorey Limited [2022] EAT 61*** applied and that a subsequently produced ACAS certificate could not correct the original defect of there being no ACAS certificate when the first claim was presented.

5. Also, because of these preliminary discussions and review of the Tribunal file for the second claim the Respondent accepted that the second claim was validly presented by post on the 1 June 2022.

6. Because of this it was noted that judgment could be made on the validity of the two claims and that the only issue to be determined by way of evidence and submissions was whether it was just and equitable to extend time in respect of the second claim.

7. Evidence was heard from the Claimant and Mr Toby. Oral submissions were then presented by both parties.

8. The Tribunal found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after considering the factual and legal submissions made by and on behalf of the respective parties.

THE FACTS

9. The first claim was submitted on the 9 November 2021. The Claimant asserted in his claim form (see page 12 of the bundle) that he had to work in an

environment he found difficult because he did not understand his Indian colleagues and they refused to speak English. He says he complained about that and was then dismissed for not fitting in, being replaced by a colleague who was Indian. This appears to assert a complaint of race discrimination and possibly victimisation. It relates to matters in September and October 2021, so a claim validly issued on the 9 November 2021 would be in time in respect of those complaints.

10. The first claim did not have an ACAS early conciliation number because the Claimant submitted that his employer had already been in touch with ACAS, so no ACAS early conciliation number was provided (see page 7).

11. The Respondent denied this in its ET3 response to the first claim.

12. By ET correspondence dated 7 March 2022 the parties were informed (page 29) …

    "The Claimant has not provided an ACAS number or certificate to the Tribunal and relied upon an exemption, namely that the employer had already been in touch with ACAS. The Employer disputes that this is the case, in their ET3 which is provided by way of information.

    The claimant must now reply ***within 7 days*** *with his comments on the respondent's assertion, providing any evidence he has of the respondent having been in touch with ACAS.*

    If the claimant is unable to do this, his claim will be referred back to an Employment Judge to consider whether or not his claim should be rejected under regulation 12(2) (d) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013."

13. The Claimant replies by email dated 7 March 2020 (page 30) saying … "I am sorry but I had thought Polystar Plastics had communicated with ACAS. I have spoken to ACAS this morning and they have given me this reference number as I did speak to ACAS and it was agreed to go to the Tribunal only.".

14. It is understood that the ACAS certificate obtained at this time was dated 7 March 2022 to 9 March 2022.

15. The Respondent requested disclosure of the ACAS certificate and by correspondence dated 25 April 2022 the Tribunal wrote (page 45) … "The Correspondence from the respondent is noted. The Claimant must now provide a copy of the early conciliation certificate to the respondent with a copy to the Employment Tribunal by the 3rd of May 2022. If he does not have the copy, he must obtain it from ACAS.".

16. A copy was provided of an ACAS certificate which is understood to be the one dated 25 April 2022 to 27 April 2022.

17. Employment Judge Rayner then accepted the claim as at the 29 April 2022 on the basis that the defect was corrected (see Tribunal correspondence dated 5 May 2022 at pages 47 to 48).

18. There is then a case management preliminary hearing before Employment Judge Smail on the 12 May 2022 (although his case management order refers to the hearing being on the 13 May 2022 this would appear to be a typographical error based on the evidence of the Claimant as to the date; and the submissions of Respondent's Counsel who attended the hearing). The case management orders from that hearing are then sent to the parties on the 16 May 2022 (see pages 49 to 51).

19. It was at that hearing that this preliminary hearing was ordered to take place in view of the recent decision of the Employment Appeals Tribunal. As stated at the commencement of that case management order … "In the light of the decision in J. Pryce v Baxterstorey Limited [2022] EAT 61, published this week, there is an issue about the rectification of the ACAS certificate number in this case. The Claimant has promised to issue a fresh claim form today.".

20. The case management order refers to the existing claim and any new claim being consolidated.

21. The case management orders made at that hearing also required the Claimant to submit a schedule of loss and to email to the Respondent a witness statement, with all documents relied upon about the ACAS matters and why it is just and equitable to extend time for the presentation of the claim(s).

22. The Claimant confirmed in oral evidence that he understood from the case management hearing that he was being asked to email all his papers to the Tribunal including the new claim form.

23. The Claimant then emails the Tribunal on the 12 May 2022 with those papers including a new claim form.

24. There is then the email dated 25 May 2022 containing a direction from Employment Judge Dawson in response to the Claimant's email (see page 84):

    "Employment Judge Dawson directs me to relay the following:

    The order of Employment Judge Smail recorded that the Claimant had promised to issue a fresh claim form. It is understood, by that, that the Claimant had agreed to present a fresh claim form. Although, by his email dated 12 May 2022, the Claimant has sent a new claim form to the tribunal, that is not the

same as presenting it. The process for validly presenting a claim form set out in the practice direction which can be found at this link

Presidential-Practice-Direction-Presentation-of-Claims-Engalnd-Wales.pdf (judiciary.uk)

Sending the claim form in the way that the Claimant has done does not issue or present a claim form."

25. The Claimant replies to this on the same date … "I am really confused with this, as this was what Judge Smail requested me to do, this was so the employment tribunal could merge both ET1 together. Also present in this email was all the other documents that he required me to send.".

26. The Claimant confirmed in his oral evidence that he printed the papers and posted them the next day.

27. A copy of the ET1 is then received by post on the 1 June 2022 and this is then accepted becoming the second claim.

28. The Respondent files a further ET3 in response to this second claim.

29. Up to this point there has been no case management of the claims in identifying the actual complaints of race discrimination made and what issues arise.

30. It is clear considering the trajectories of the first and second claim forms that the process has not been straightforward for anybody.

31. Considering then the Claimant's explanation for why he did what he did when he did it, which is his explanation for the delay of the second claim.

32. The Claimant states in his witness statement that he had a phone call from Mr Toby (who heard the Claimant's dismissal appeal) to discuss why he changed the reasons why the Claimant was dismissed. The Claimant says Mr Toby explained that Polystar had spoken to ACAS and would not be interested in early conciliation and that the Claimant needed to take them straight to the employment tribunal.

33. In his oral evidence the Claimant confirmed that this call would have been around the 8 or 9 November 2021 just before he submitted the first claim, the appeal outcome having been emailed to him on the 8 November 2021 (see page 114).

34. Mr Toby denies such a call took place. He has produced phone records of his outgoing calls for this period and the Claimant accepted that those records do not show a call to the Claimant from that phone number at that time. Of note is

the records do not show incoming calls to that number, and no records have been produced for the land line number detailed in Mr Toby's email footer (see page 98 for example). However, Mr Toby confirmed in his oral evidence that he was working from home on the 8th and in the AM on the 9th November 2021 before then going on holiday. He did not recall there being any call with the Claimant at that time.

35. The Claimant has not been able to prove at this hearing on the balance of probability that such a call took place.

36. However, the Claimant's belief that the Respondent contacted ACAS as formed at that time does appear to be genuine. His understanding (albeit it is unclear how it was formed) has not been disproved on the balance of probability.

37. The way the Claimant completed the claim form for the first claim supports that. As he explained at this hearing (both in his written witness statement and orally), he ticked the ACAS exemption box he believed applied at that time. This is also consistent with what he says in his email on the 7 March 2022.

38. Up to the hearing with Employment Judge Smail on the 12 May 2022 the Claimant had reasonable cause to believe his first claim had been accepted.

39. As to the Claimant's conduct after the hearing on the 12 May 2022, again his belief as to what is expected of him does appear to be genuine. He emails the papers to the Tribunal on the same day. He then expresses his confusion in his email dated 25 May 2022 about this not being what he was asked to do. He then posts the material (as he confirmed in his oral evidence, he understood he could not email it) the next day and that claim is received on the 1 June 2022.

40. It was put to the Claimant in cross examination that it would have been reasonable for him to obtain legal advice or seek the assistance of his mother who had helped him with a previous Tribunal claim against another employer. The Claimant did not accept that this would be reasonable. He explained that he had completed the first claim form as he understood matters at the time and had then acted as he understood the Tribunal were directing him. The first claim was not submitted out of time and the Claimant believed he knew what he was doing. I accept that the Claimant acted reasonably in this matter. The Employment Tribunal system does not require parties to be legally advised or represented.

THE LAW

41. In view of the concessions made at this hearing and the agreed position about the case of ***J. Pryce v Baxterstorey Limited [2022] EAT 61***, this legal summary focuses on the law concerning whether it is just and equitable to extend time.

42. Section 120 of the Equality Act 2010 confers jurisdiction on claims to employment tribunals, and section 123(1) provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three 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.

43. Previously, the Employment Appeals Tribunal suggested that in determining whether to exercise their discretion to allow the late submission of a discrimination claim, tribunals would be assisted by considering the factors listed in section 33(3) of the Limitation Act 1980, ***British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT***. That section deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular:

    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 has cooperated 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;

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

44. Subsequently, however, the Court of Appeal in ***Southwark London Borough Council v Afolabi 2003 ICR 800, CA***, confirmed that, while the checklist in section 33 of the Limitation Act 1980 provides a useful guide for tribunals, it need not be adhered to slavishly. The Court suggested that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time:

    a. the length of, and reasons for, the delay;

    b. and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

45. The Court of Appeal in ***Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA***, pointed to the fact that it was plain from the language used in section 123 of the Equality Act 2010 that Parliament chose to give employment tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision or to interpret it as if it contains such a list. The Court of Appeal decided that the discretion under section 123 of the Equality Act 2010 for an employment tribunal to decide what

it 'thinks just and equitable' is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation for the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard. However, there is no requirement for a tribunal to be satisfied that there was a good reason for the delay before it can conclude that it is just and equitable to extend time.

46. As is also referred to in the skeleton argument of Respondent's Counsel … "a claimant bears a persuasive burden to show it is 'just & equitable' to extend time (Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0320/15 Harvey [280])". … also "In Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23, the Court of Appeal cautioned against tribunals relying on a Limitation Act checklist. It is said- 'The best approach for a tribunal in considering the exercise of the discretion under s 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"' Underhill LJ considered in Adedeji that whilst the Section 33 list contained factors which might well be relevant to the exercise of the just and equitable discretion, too often it was being used as a framework… (per authors of Harvey [281]).". Further … "The Authors of Harvey nevertheless explain at 281.1 – "… certain issues will commonly be relevant to that decision. (1) the length of and reasons for the delay; (2) the prejudice which each party would suffer as a result of granting, or refusing to grant, an extension; and (3) the potential merits of the claim."".

THE DECISION

47. It is not in dispute between the parties that the first claim is not validly presented. This is based on the Claimant accepting he cannot prove on the balance of probability at this hearing that the Respondent had already been in touch with ACAS when he submitted his first claim form and with reference to the recent Employment Appeal Tribunal's decision of Pryce v Baxterstorey.

48. Claim 1404329/2021 (the first claim) is therefore not a validly presented claim.

49. It is not in dispute that claim 1401934/2022 (the second claim) was validly presented on the 1 June 2022. This was submitted by post.

50. The second claim (as the first) relates to complaints of race discrimination that predate and surround a dismissal in October 2021. These complaints have not yet been case managed to confirm what the specific complaints of race discrimination are and what issues arise to be determined from those.

51. There are two ACAS certificates relied upon for the second claim one dated 7 to 9 March 2022 and the other dated 25 April 2022 to 27 April 2022.

52. It is not in dispute that the second claim is out of time. Using the first ACAS certificate (which lasted for a period of 3 days) and a claim received on the 1 June 2022, this would mean matters complained about from the end of February 2022 would be in time. Matters before that would be potentially out of time.

53. The Tribunal has therefore to determine in this case whether to exercise its discretion to find that it is just and equitable to extend time for the second claim.

54. To assist that decision, I have considered matters by reference to the potential factors raised in case law and as flagged by Respondent's Counsel in his submissions. Taking each in turn:

    a. ***The length of, and reasons for, the delay***; - The first claim was not delayed. The matters complained about relate to issues the Claimant identifies as happening in September / October 2021. That claim is submitted on the 9 November 2021. The Respondent submits a response to that claim. The Claimant is made aware as to the full extent of the issues with the potential validity of that claim at the case management hearing on the 12 May 2022. He acts that day in the way he understood he had to act by emailing the second claim to the Tribunal along with the other requested documents. He is then informed by the Tribunal on the 25 May 2022 of an issue with the way the second claim form has been submitted. He then acts the next day by submitting the same by post. It is clear and I accept that the reason for the delay in this matter is the course of the first claim form through the Tribunal process, and a lack of understanding by the Claimant as to what he is then being asked to do on the 12 May 2022. Although there is a delay of around 4 months in the valid submission of the second claim from the acts complained of it cannot be ignored that it is not until now that it has been determined the first claim is invalid. I do not find that it has been proven on the balance of probability that the Claimant has acted unreasonably in this matter.

    b. ***the extent to which the cogency of the evidence is likely to be affected by the delay***; - No evidence or submissions have been presented to suggest this is an issue for either side.

    c. ***the extent to which the party sued has cooperated with any requests for information***; - This is not relevant as no such requests have been made of the Respondent.

d. ***the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action***; - As detailed above I accept this is prompt as the Claimant issued his first claim in time, and then acted to correct matters promptly following direction from the Tribunal.

e. ***and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action***. – The Claimant thought he knew what he was doing so did not seek advice, and the first claim is submitted within time. It is the path of his first claim after submission that complicates matters, and it is fair to say the Tribunal process has not been straight forward in respect of these proceedings. I accept that the Claimant acted reasonably in this matter. The Employment Tribunal system does not require parties to be legally advised or represented.

f. ***Prejudice to the parties*** – If the extension is not granted the Claimant loses his right of claim. If it is granted the Respondent will, if it wishes to do so, need to respond to it. No other prejudice is asserted by either side, for example, that the delay has prevented or inhibited the Respondent from investigating the claim while matters were fresh. This is understandable as the Respondent has been in position to present a response to the claim since the first claim was submitted and at that time accepted, and it did do so. For these reasons there would be a greater prejudice to the Claimant if time is not extended.

g. ***As to the merits*** – the Respondent has submitted that the claim does not have merit, although it does acknowledge that this is put very much in an overview way. This is understandable as there has been no case management in this matter to confirm the complaints and the issues. The Claimant has asserted in his claim form that he had to work in an environment he found difficult because he did not understand his Indian colleagues and they refused to speak English. He says he complained about that and was then dismissed for not fitting in, being replaced by a colleague who was Indian. This asserts a complaint of race discrimination and possibly victimisation. I have not been presented evidence or submissions at this hearing that demonstrate at this time that such allegations have no merit.

55. For all these reasons I find that it is just and equitable to extend time in respect of the second claim.

_____
Employment Judge Gray
Date: 26 August 2022

Case No. 1404329/2021 and 1401934/2022

Judgment sent to Parties on
8 September 2022 by Miss J Hopes

FOR THE TRIBUNAL OFFICE