EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Mahl	v	**Secretary of State for Work and Pensions**

HEARING

Heard at: London South **On: 26 July 2022**

Before: Employment Judge Truscott QC

Appearances:

For the Claimant: **Mr R Supiya TU representative**
For the Respondent: **Ms V Brown of Counsel**

JUDGMENT on PRELIMINARY HEARING

1. The claim of unfair dismissal was presented outside the primary time limit contained in section 111(2) of the Employment Rights Act 1996 and it was reasonably practicable for the claim to be presented within the primary time limit. The claim of unfair dismissal is dismissed.

2. The claims of race and disability discrimination, victimisation and harassment were presented outside the primary time limit contained in section 123(1)(a) of the Equality Act 2010 and it is not just and equitable to extend the period within which the claims fall to be lodged. The claims of race and disability discrimination, victimisation and harassment are dismissed.

3. The hearing fixed for 20-24 February 2023 is discharged.

REASONS

Preliminary

1. The claimant makes claims of:
   (a) A failure to Make Reasonable adjustments;
   (b) Discrimination by reason of disability;

(c) Direct discrimination on the grounds of race;
(d) Harassment on the grounds of disability and race;
(e) Victimisation on the grounds of disability and race; and
(f) Unfair dismissal

2. This preliminary hearing was fixed on 20 July 2021 in order to consider whether the time for lodging the claim should be extended to allow the claim to proceed. No case management Orders were made [B1 42-44].

3. The Tribunal had two bundles available to it, the first one [B1] contained documents relevant to the procedure at and after dismissal. The second one [B2] again contained additional documentation in relation to procedure at and after the dismissal and letters concerning his eye problems. Separately, there were documents relating the claimant's back and shoulder. The claimant confirmed that the material relating to his back and shoulder were with a view to establishing disability and were not relevant to this hearing. The claimant also provided a witness statement but only paragraphs 19, 20 and 21 were relevant to this hearing. The claimant was permitted to provide oral evidence some of which, such as the evidence about the advice from his trade union representative, the respondent had no notice of. The claimant was subject to cross examination. The relevant oral evidence together with the relevant parts of the written statement are included in the chronology. The evidence is commented on in the final section.

Chronology

1. The claimant was employed by the respondent as a Business Analyst from 12 August 2012 until dismissed for alleged gross misconduct on 4 September 2019.

2. In consequence of suffering from levator scapulae syndrome, he first asked for a laptop from Peter Taylor his line manager as a reasonable adjustment in November 2018. This was to enable him to do some home working before coming to the office as my back pain was worst early in the morning. This was however rejected and he made the same request several times including appealing to the Counter signing manager Nick Stabeler in February 2019, 21 and 25 March 2019.

3. He also requested to be allowed to book travel to meetings sufficiently early so as to be able to secure seating and to travel a day earlier than an event where that travel is likely to exceed 90 minutes each way as he found it extremely painful to stand for more than 5 minutes. He requested this several times but he specifically remembers December 2018.

4. These requests were rejected by Peter Taylor again following a response from OHS dated 18 February 2019 and by Nick Stabeler by way of several emails amongst which were dated 20 and 25 March 2019.

5. On 25 and again on 28 March 2019, he was refused permission to travel to a Team meeting in Manchester a day earlier; which had been scheduled for 28-29 March 2019.

6. On 10 April 2019, Nick Stabeler referred matters to the Government Internal Audit Agency saying:

> "We have suspicions now around supporting expenses and flexi time entries on days when travel has taken place. Some recent medical appointments have also raised concerns in respect of the lack of written confirmation of appointments and the content of the Reports received from medical professionals seem constructed to support requests to work from home and provide a laptop based on health."

7. The claimant having raised a grievance, at the Grievance Investigation on 11 April 2019, he was harassed by Ruth Kelly who dismissed his grievance against Peter Taylor without proper investigation.

8. On 14 June 2019, when he asked what the investigation was about Nick Stabeler told him that he did not know what the subject of the Investigation was when it was he who had referred the matter to Government Internal Audit Agency.

9. On 19 June 2019, he was harassed by Karen Pearson during the Grievance Appeal. The Appeal was dismissed on 28 June 2019.

10. On 4 July 2019, he was harassed by Kim Eveleigh during the investigation meeting.

11. During his dismissal meeting on 4 September 2019, he was harassed by Patrice Mulligan in that he was rushed and spoken to in a rude manner. He was informed of his dismissal by letter dated 10 July 2019.

12. On 14 September 2019, he was refused permission by Patrice Mulligan to go home get his vehicle and return to collect his personal belongings as he could not carry them due to his disability.

13. On 27 September 2019, the claimant raised grievances against his Line Manager, Nick Stabeler and Patrice Mulligan, who had conducted the Disciplinary Hearing.

14. On 2 October 2019, the claimant provides full supporting documentation for his appeal.

15. On 29 October 2019, he was harassed by Chris Clark during the investigation meeting of his grievance against Nick Stabeler.

16. The refusal of his appeal was intimated on 20 July 2020 [B2 42-47].

17. Christopher Clack, CFCD Operations Quality Lead, was appointed to hear the claimant's grievance against Nick Stabeler. Mr Clack considered all of the evidence before him and advised him on 5 March 2020 that his grievance against Nick Stabeler was not upheld. As the grievance against Patrice Mulligan was closely interlinked with the claimant's dismissal, it was decided that the Julie Wiggins would also hear this particular grievance.

18. Ms Wiggins reviewed all of the evidence provided to her and, on 11 August 2020, she wrote to the claimant to advise that his grievance against Patrice Mulligan had not been upheld [B2 48 & 35].

19. Mr Supiya contacted ACAS on 23 September 2020 and received an Early Conciliation certificate on 15 October 2020.

20. The ET1 was lodged on 13 November 2020.

Submissions

21. The Tribunal received oral submissions from both parties.

Law

22. Section 111(2) of the Employment Rights Act 1996 (ERA 1996) provides:

> "an Employment Tribunal shall not consider a complaint…unless it is presented to the Tribunal before the end of the period of three months beginning with the effective date of termination."

23. A Tribunal may only extend time for presenting a claim where it is satisfied of the following:

> "It was "not reasonably practicable" for the complaint to be presented in time. The claim was nevertheless presented "within such further period as the Tribunal considers reasonable" (Section 111(2)(b), ERA 1996.)

24. There are two limbs to this formula. First, the employee must show that it was not reasonably practicable to present the claim in time. The burden of proving this rests on the Claimant (**Porter v. Bandridge Ltd** [1978] ICR 943 CA). Second, if she succeeds in doing so, the Tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.

25. In **Dedman v. British Building Engineering Appliances Ltd.** [1974] ICR 53 Lord Denning held that ignorance of legal rights, or ignorance of the time limit, is not just cause or excuse unless it appears that the employee or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences. Scarman LJ indicated that practicability is not necessarily to be equated with knowledge, nor impracticability with lack of knowledge. If the applicant is saying that he did not know of his rights, relevant questions would be:

> 'What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing in ignorance of the existence of his rights, it would be inappropriate to disregard it, relying on the maxim "ignorance of the law is no excuse".

The word "practicable" is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance'

26. This approach was endorsed in **Walls Meat Co. Ltd. v. Khan** [1979] ICR 52. Brandon LJ dealt with the matter as follows:

> 'The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him'.

27. **Palmer & Saunders v. Southend-on-Sea Borough Council** [1984] ICR 372 CA followed this line and talked in terms of reasonable possibility at page 384-385.

28. The issue was considered more recently in **Marks & Spencer plc v. Williams-Ryan** [2005] ICR 1293 CA, where Lord Phillips MR, having reviewed the authorities, upheld the **Dedman** principle as a proposition of law (at para 31):

> *'[In Dedman] the* employee had retained a solicitor to act for him and failed to meet the time limit because of the solicitor's negligence. In such circumstances it is clear that the adviser's fault will defeat any attempt to argue that it was not reasonably practicable to make a timely complaint to an employment tribunal.'

29. The question in **Williams-Ryan** was whether a claimant could rely on the escape clause where she had received advice from a CAB. Holding that there was no binding authority equating advice from a CAB with advice from a solicitor, Lord Phillips MR stated (at para 32):

> 'I would hesitate to say that an employee can never pray in aid the fact that he was misled by advice from someone at a CAB. It seems to me that this may well depend on who it was who gave the advice and in what circumstances. Certainly, the mere fact of seeking advice from a CAB cannot, as a matter of law, rule out the possibility of demonstrating that it was not reasonably practicable to make a timely application to an employment tribunal.'

17. The Equality Act 2010 provides:

> 123 Time limits
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> (1) [Subject to section 140A and 140B] proceedings on a complaint within section 120 may not be brought after the end of—
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> (*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.

30. The Tribunal has reminded itself of the developed case-law in relation to what is now section 123 of the Equality Act 2010. That has included a group of well-known judgments setting out the underlying principles to be applied in this area, together with

recent occasions on which those principles have been applied and approved by later courts and tribunals. Particular attention has been paid to the historical line of cases emerging in the wake of the case of **Hutchinson v. Westwood Television** [1977] ICR 279, the comments in **Robinson v. The Post Office** [2000] IRLR 804, the detailed consideration of the Employment Appeal Tribunal in **Virdi v. Commissioner of Police of the Metropolis et al** [2007] IRLR 24, and, in particular, the observations of Elias J. in that case, as well as the decision of the same body in **Chikwe v. Mouchel Group plc** [2012] All ER (D) 1.

31. The Tribunal also notes the guidance offered by the Court of Appeal in the case of **Apelogun-Gabriels v. London Borough of Lambeth & Anr** [2002] ICR 713 at 719 D that the pursuit by a claimant of an internal grievance or appeal procedure will not normally constitute sufficient ground for delaying the presentation of a claim: and observations made by Mummery LJ in the case of **Ma v. Merck Sharp and Dohme** [2008] All ER (D) 158.

32. The Tribunal noted in particular that it has been held that 'the time limits are exercised strictly in employment … cases', and that there is no presumption that a tribunal should exercise its discretion to extend time on the 'just and equitable' ground unless it can justify failure to exercise the discretion; as the onus is always on the claimant to convince the tribunal that it is just and equitable to extend time, 'the exercise of discretion is the exception rather than the rule' (**Robertson v. Bexley Community Centre** [2003] IRLR 434, at para 25, per Auld LJ); **Department of Constitutional Affairs v. Jones** [2008] IRLR 128, at paras 14–15, per Pill LJ) but LJ Sedley in **Chief Constable of Lincolnshire Police v. Caston** said in relation to what LJ Auld said "there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised."

33. The Tribunal's discretion is as wide as that of the civil courts under section 33 of the Limitation Act 1980; **British Coal Corporation v. Keeble** [1997] IRLR 336; **DPP v. Marshall** [1998] IRLR 494. Section 33 of the Limitation Act 1980 requires courts to consider factors relevant to the prejudice that each party would suffer if an extension was refused, including:

the length and reasons for the delay;
the extent to which the cogency of the evidence is likely to be affected by the delay;
the extent to which the party sued had co-operated with any requests for information;
the promptness with which the claimant acted once she knew of the possibility of taking action; and
the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

34. Although these are relevant factors to be considered, there is no legal obligation on the Tribunal to go through the list, providing that no significant factor is left out; **London Borough of Southwark v. Afolabi** [2003] IRLR 220.

35. Incorrect legal advice may be a valid reason for delay in bringing a claim but will depend on the facts of the case: **Hawkins v Ball & Barclays** [1996] IRLR 258 and **Chohan v Derby Law Centre** [2004] IRLR 685. In answering the question as to

whether to extend time, the Tribunal needs to decide why the time limit was not met and why, after the expiry of the primary time limit, the claim was not brought sooner than it was; see **Abertawe Bro Morgannwg University Local Health Board v Morgan [**2014] UKEAT/0305/13 unreported per Langstaff J. However, in determining whether or not to grant an extension of time, all the factors in the case should be considered; see **Rathakrishnan v Pizza Express (Restaurants) Ltd** (2016) IRLR 278.

36. The Tribunal has additionally taken note of the fact that what is now the modern section 123 provision contains some linguistic differences from its predecessors – which were to be found in various earlier statutes and regulations – concerning the presentation of claims alleging discrimination in the employment field. However, the case law which has developed in relation to what is now described as "the just and equitable power" has been consistent and remains valid. The Tribunal has therefore taken those authorities directly into account in its consideration.

37. It is also a generally received starting proposition that it is for the claimant who has presented his or her claims out of time to establish to the satisfaction of the Tribunal that the "just and equitable" discretion should be exercised in the particular case.

38. The Tribunal took the claimant's case at its highest.

Discussion and decision

39. The claimant makes complaints of race and disability discrimination, harassment and victimisation. He argued that they were continuing acts and consequently time did not run until the last one. Whilst the acts of his managers Peter Taylor and Nick Stabeler up to 11 April and 14 June 2019 might have been continuing acts until they ceased, the subsequent complaints against Karen Pearson, Kim Eveleigh and Patrice Mulligan do not appear to be. The time for complaining against the managers, Peter Taylor and Nick Stabeler, started to run, at the latest, from 14 June 2019.

40. Even if the claimant's submission is correct, which it is not, the continuing acts of the direct line managers and the other managers leading to his dismissal ceased on the termination of employment where the complaint is of rudeness of the manager Patrice Mulligan.

41. The letter of dismissal is very clear about his final day of employment and the implications for future employment within the civil service. The Tribunal did not accept the claimant's evidence about the reasons he lodged his claim late. In particular, he said in relation to his dismissal that he was advised by his trade union representative Mr Adrian Morris to wait until after the internal procedure was completed. The claimant was plainly concerned about the acts of his managers in early 2019 and raised a grievance and was assisted by his trade union representative at that stage. It may be that the advice of the TU representative was directed at those complaints. After dismissal, there was a discussion about the Employment Tribunal. The Tribunal does not accept that there was no discussion about time limits at this stage as he was greatly aggrieved by what had taken place and could not be confident that the respondent would change position. Further, it is not accepted that Mr Morris was unaware of

tribunal time limits. Nor is it accepted that the claimant did no research on the options himself. The time limits are generally well known.

42. It was reasonably practicable for the claimant to lodge his complaint of unfair dismissal within the requisite time limit. His operation of the internal appeal procedure does not render it otherwise.

43. The claimant raised an appeal against his dismissal on 2 October 2020. The refusal of his appeal against his dismissal was intimated on 10 July 2020. The claimant said he received the letter about a week later. He said it was at this point he sought further advice and was told by the trade union that the internal procedure had been completed. He was in two minds whether to take the matter further. If he wished to raise a claim about the actions of his managers up to dismissal, he should have acted immediately after receipt of the 10 July letter.

44. The component of his grievance against Patrice Mulligan was addressed by Julie Wiggins as it related to the handling of the dismissal meeting and not the actions of the line managers. She rejected the grievance by letter dated 11 August 2020. The claimant received the outcome of the grievance and said it was at this point the internal procedure was over and he considered his position. The grievance does not address the issues of conduct of his line managers in 2019 and his evidence is not accepted.

45. In relation to whether it is just and equitable to extend time for the complaint, the Tribunal considered the sequence of events in the chronology. The Tribunal did consider whether section 108 of the Equality Act might be engaged because of post dismissal discrimination but concluded that it was not. There is no allegation of race discrimination. There was no other allegation which if it had occurred during employment would constitute discrimination.

46. The Tribunal does not repeat its position in relation to the evidence of the claimant at the time of dismissal. The Tribunal accepts that the claimant went blind in one eye in early July 2020 and consequently got eye strain in his left eye but consider he went too far when he said he was confined to his bed. By mid July, he and his adviser must have known that time was of the essence if he was to make a claim. The Tribunal did not accept that his issues with his eyes prevented him dealing with the claim.

47. The claimant was not clear in his evidence about when he did get advice from the trade union in 2020, he said Mr Morris delayed providing him with the telephone number of Mr Supiya for a week or two. The Tribunal could not identify when Mr Supiya started assisting him although he did say he thought this was when Mr Supiya was in Zimbabwe on holiday. He could not recall if Mr Supiya mentioned the time limit but the Tribunal is in no doubt that he did.

48. In considering the matter overall, the basis of the claimant's claims arose in 2018 and continued into early 2019 and are brought to the Tribunal along with a number of other complaints in late 2020. There was no basis apparent to the Tribunal why it is just and equitable to extend the time for any of the complaints to be addressed by the Tribunal.

49. The claims of unfair dismissal, discrimination, harassment and victimisation are dismissed and the hearing is discharged.

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Employment Judge Truscott QC

Date 2 August 2022