



EMPLOYMENT TRIBUNALS

Claimant: Mr S Paluch
Respondent (1): Seaves Farming Company Limited
Respondent (2): Jacqueline Robinson
Heard at: Hull **On:** 25 May 2017
Before: Employment Judge Rogerson
Members:
Representation
Claimant: Mr A Mugliston, Counsel
Respondent: Mr A Sugarman, Counsel

RESERVED JUDGMENT

1. The Claimant's complaints of unfair dismissal, unlawful deductions of wages, a failure to issue a statement of initial employment particulars and itemised pay statements, breach of contract (notice pay), breach of the Working Time Regulations 1998 (Rest Breaks and Working Time) and failure to pay national minimum wage, are out of time. It was reasonably practicable for those complaints to be presented in time and those complaints are accordingly dismissed.
2. The Claimant's complaints of direct race discrimination, harassment related to race and victimisation are also out of time. It was not just and equitable to extend time and those complaints are also dismissed.
3. The Claimant is to provide information about his ability to pay a deposit in relation to the complaint of victimisation that is in time within 14 days of the date the judgement is sent out to the parties or request a preliminary hearing to provide that information.

REASONS

Applicable law

1. Mr Sugarman has accurately set out the applicable law in his skeleton argument in the section headed "Primary Time Limits and Early Conciliation" at paragraphs 3 to 12.

2. The Early Conciliation and Rules of Procedure are found in the Employment Tribunals (Early Conciliation Exemptions and Rules of Procedure) Regulations 2014 SI 2014/254.
3. It was not disputed that all of the Claimant's complaints were covered by the early conciliation scheme. As a consequence, for the Claim presented on the 6th February 2017 at the Leeds Employment Tribunal by hand, the three month time limit contained in the various different relevant statutory provisions relied upon for the complaints made, is extended by the time allowed for conciliation (section 140B of the Equality Act 2010 for the race discrimination and victimisation complaints and section 207B Employment Rights Act 1996 Article 8B of the ET Extension of Jurisdiction Order 1994 and Regulation 30 B of the Working Time Regulations 1998 for the 'other complaints').
4. In relation to complaints made against the First Respondent (the Company) ACAS were notified on 4.10.2016 (Day A) and the EC certificate was sent to the Claimant on 4.11.2016 (Day B). The period between Day A and Day B is 31 days. The Claim form was presented on 6 February 2017. The latest the extended limitation period could expire would be the normal period of 3 months and the full 31 day conciliation period so limitation would expire at the latest on 3 February 2017 and the claim was presented 3 days out of time.
5. In relation to the Second Respondent (Jacqueline Robinson) Day A was 4.11.2016 and Day B was 4.11.2016. The period between Day A and Day B was 0 days. As there are 0 days to extend the ordinary limitation period, the ordinary 3 month limitation period applies which for the dismissal complaints expired on the 6th January 2017 and was 31 days out of time.
6. The EAT in **Tanveer v East London Bus and Coach Company Ltd UK** EAT/0022/16 (8 February 2016, unreported), have held that one month after DayB means the corresponding date in the following month. If there is no corresponding day because the following day has fewer days, one takes the latest date in that month ie one month after 31 May is 30 June.
7. If a claimant contacts ACAS before the limitation period has commenced the latest case law suggests that it is only that part of the conciliation period which post dates the date on which the clock starts running that is added on to the normal limitation, not the whole conciliation period (see two recent ET decisions in **Fergusson v Combat Stress** (case number 4105592/16) (3 March 2017) and **Ullah v Hownslow London Borough Council** (case number 2302599/15) (28 March 2017). Mr Sugarman submits that makes perfect sense given the statutory provisions are "stop the clock" provisions and the clock cannot be stopped if it has not yet started. One further case was submitted by the Respondent's representatives following the Preliminary Hearing which is the recent EAT decision of **Revenue and Customs Commissioners v Garau** UKEAT/0348/16 which is consistent with that proposition. That case also decided that the early conciliation certificate provisions do not allow for more than one certificate of early conciliation per "matter" to be issued by ACAS. If more than one such certificate is issued a second or subsequent certificate is outside the statutory scheme and has no impact on the limitation period.
8. Mr Mugliston did not dispute the applicable law as set out by Mr Sugarman in his submissions but does seek to rely on the case of **Schultz v Esso Petroleum Company Limited** Court of Appeal 1999 ICR 1202 that "*in determining whether it*

was reasonably practicable for an applicant to present his complaint within the limitation period, a Tribunal had to consider the surrounding circumstances and the aim to be achieved, including whether the applicant was hoping to avoid litigation by pursuing other remedies, in which context attention would normally focus on the closing rather than the early stages of the period of limitation. Also that, where illness was relied on, although its effects had to be assessed in relation to the overall period of limitation, the weight to be attached to a period of disabling illness varied according to whether it occurred in the earlier weeks or the far more critical weeks leading up to the expiry of the limitation period". He also relies on **Asda Stores Ltd v Mrs S Kauser** UKEAT/0165/07 which provides guidance on the meaning of 'reasonably practicable' which means "was it reasonably feasible to present the complaint" in time?

9. The onus of establishing that it was not reasonably practicable to commence proceedings within the time limit lies on the Claimant (**Porter v Bainbridge Ltd** [1978] ICR 372). It was for the Tribunal on the facts of the case as found to decide whether it was reasonable to expect that which was possible to have been done. The two questions are has the Claimant established that it was not reasonably feasible for him to present his complaint timeously? If so was the claim presented within a reasonable period thereafter?
10. Looking at the Claimant's complaints against the employer (First Respondent) the 'other complaints' (not the Equality Act 2010 complains of direct race discrimination, harassment and victimisation) are the complaints to which the test of reasonable practicability applies. For the Equality Act 2010 complaints I could extend time if I was persuaded there were just and equitable grounds for doing so (section 123(1) (b)).
11. At the hearing I heard evidence from the Claimant's solicitor Mrs G Wilkinson. I heard evidence from the Claimant and was provided with some documents during the course of the Preliminary Hearing.
12. The findings of fact that I have made based on the evidence I heard and saw are as follows:
 - 13.1. The Claimant's knowledge and understanding of spoken English was better than his understanding of written English. He demonstrated this at the hearing by his ability to understand and answer questions in English without the aid of the interpreter on more than one occasion during cross-examination. That evidence was also consistent with the evidence from Mrs Wilkinson and from the notes of attendances which record that spoken English was not a problem for the Claimant.
 - 13.2. The Claimant was required to provide a witness statement for the purposes of this Preliminary Hearing. He knew the issue the Tribunal had to determine was whether this claim or any part of it was lodged out of time and secondly if it was whether time should be extended on the grounds either that it was not reasonably practicable to lodge the claim within time or, where appropriate that it would be just and equitable to do so. It was for the Claimant to provide that information to support any extension of time that he sought.

- 13.3. Furthermore, Employment Judge Burton's Order of 11 April 2017 made it clear at paragraph 2 that "if the Claimant seeks to persuade the Tribunal to extend time on or before 4 May 2017 he shall serve upon the Respondent's solicitors a witness statement setting out all the matters relied upon.
- 13.4. The Claimant has been represented and assisted before and at this hearing by his solicitor.
- 13.5. The matters the Claimant has relied upon are set out in his witness statement. He also relies upon a doctor's letter. His solicitor has also provided a witness statement and some disclosure during the course of this hearing.
- 13.6. The Claimant in his very brief witness statement states that after his dismissal on 7 October 2016 he was homeless and had no money and his back was hurting. He was staying with his friend Mr Rangeley and in November 2016, he rented a flat in Easingwold where he was working. He saw his GP and was prescribed anti-depressants and he says was helped by social services who placed him under a safeguarding order. He relies on his friend Mr Rangeley who has assisted him throughout this situation. Mr Rangeley helped him to deal with things like social services, the council, his mail, his solicitor and arranged an English course for him to attend to assist him. In his witness statement he also refers to a visit to Poland for 10 days from 29 January 2017 when he says he was un-contactable. The purpose of the visit was to visit his mother and aunt who had cancer.
- 13.7. The Claimant provided a report from Dr A Huber GP dated 24 May which states:
- "Mr Sebastian Paluch attended on several occasions between September 2016 and May 2017 at the GP surgery. He presented with several issues including back pain and feeling anxious and low during this period. He reported lower back pain and was therefore referred to the physiotherapy team on 27 September 2016.*
- He felt not able to work and required a statement of fitness to work from 07 October 2016. He reported that he worked up to seven days a week and felt tensed up and depressed, therefore he was started on an anti-depressant medication. He attended with physical and mental health problems and tried to address these during the follow up consultations".*
- 13.8. Mrs Wilkinson gave evidence at this hearing. She is an experienced employment solicitor who qualified in July 2009.
- 13.9. At paragraph 2 of her witness statement she states "the Claimant was dismissed on 7 October 2016 **so the deadline for his claim was 6 January 2017.**
- 13.10. Her involvement began on 20 September 2016 when she spoke to Mr Rangeley who wanted some preliminary employment law advice for the Claimant specifically in relation to "unpaid wages and holiday pay".

- 13.11. She advised Mr Rangeley to tell Mr Paluch to submit a formal grievance to his employer in relation to the unpaid wages and holiday pay and contact ACAS. That was consistent with the ACAS contact on the 4 October 2017 in relation to the company(R1)
- 13.12. A meeting was arranged for a free initial consultation with Mrs Wilkinson's colleague, Juliette Walker on 26 September 2016. Ms Walker advised the Claimant in relation to compensation for unfair dismissal, race discrimination and unpaid wages and holiday pay. An attendance note dated 26 September 2016 was disclosed to me during the course of these proceedings which records as follows:
- "Sebastian has a good grasp of English and John (Mr Rangeley) says he understands what is being said".*
- "I explained the concept of unfair dismissal identifying the heads of compensation for race discrimination, holiday pay, working time and unfair dismissal. We discussed joining Jacqueline Kitson as a party to these proceedings. I have seen him on the basis I do employment law".*
- Mrs Wilkinson said that Ms Walker was not an employment lawyer so in that regard the attendance note contradicts the oral evidence. Furthermore there is a reference to time limits but no specific dates were given to the Claimant at that meeting.
- 13.13. On 6 October 2016, Mr Rangeley and the Claimant met Mrs Wilkinson. Mrs Wilkinson could not find the attendance note of that meeting and I was not shown it. In her witness statement she states that the Claimant was provided with "free advice on his potential claim and assistance in drafting a grievance letter to the employer". She recalls that the meeting was predominantly about the unlawful deductions claim and that he was able to give her instructions and he was able to understand the advice that she was giving him.
- 13.14. On 7 October 2016, Mrs Wilkinson had a telephone call with Mr Rangeley. The note records that Mr Rangeley was telling her that the Claimant had allegedly been told on 7 October to *"fuck off and remove his property from the caravan in which he was staying on the Respondent's property"*. The caravan was the accommodation that the Second Respondent provided to the Claimant whilst he was an employee of the company to enable him to carry out his duties.
- 13.15. It was accepted the caravan was the property of the Second Respondent. If the Second Respondent had in fact dismissed the Claimant he would have had no right to stay in the caravan provided by the Second Respondent for work purposes. In any event Mrs Wilkinson advised Mr Rangeley to contact ACAS to explain this potential dismissal and to include it as a claim that he was pursuing. She considered whether the words used amounted to a dismissal and her discussion is recorded in her note of the call which was provided.

- 13.16. Ms Wilkinson agreed to amend the grievance letter she had drafted so that it referred to the dismissal. She obtained an authority from Mr Paluch for Mr Rangeley to provide instructions on his behalf and to communicate with Mrs Wilkinson on his behalf. The draft letter of formal grievance was dated 7 October 2016 and refers to the alleged dismissal and to the fact that the Claimant was taking legal advice.
- 13.17. On 11 October 2016, Mrs Wilkinson sent the Claimant a letter confirming the instructions he had given her. The letter is headed "*The Employment Tribunal Claim*". It thanks the Claimant for instructing the firm "*to assist him in bringing the following claims in the Employment Tribunal*". The claims listed are "*unfair dismissal, unlawful deduction from wages, holiday pay, failure to issue section one statement in terms and conditions, notice pay, failure to issue itemised pay slips, race discrimination and breach of working time regulations*".
- 13.18. The letter provides a deadline for submitting the claim. The paragraph says "**your claims (on a Form ET1) need to be received by the Tribunal on or around 6 January 2017 (depending on ACAS early conciliation). In most cases the deadline will be extended by up to a further four weeks by the conciliation process. I will advise you of the deadline once ACAS early conciliation has concluded**". There is a section about 'preparing your claim' which refers to the fact that the Claimant had already provided Mrs Wilkinson with a lever arch file of documents and that if she needed any further documentation she would advise him.
- 13.19. In relation to the documentation provided she explained that the Claimant had detailed information, detailed handwritten records and an 'awful lot of information' regarding the pay claims.
- 13.20. The letter of instruction also confirms the position regarding the ET3 response it explains the steps to the final hearing it deals with evidence, mitigation evidence, the hearing, the Tribunal's decision, legal costs, the 'no win no fee' agreement and settlement.
- 13.21. Mrs Wilkinson confirmed that the claim had been taken on by the firm on a 'no win no fee' agreement from 11 October 2016. She confirmed that the Claimant's schedule of loss sent to ACAS was claiming in excess of £100,000 in compensation.
- 13.22. The letter did not contain any warning of any potential consequence if a claim was submitted out of time because Mrs Wilkinson said that that was not the normal practice of the firm. The implication from the letter is that a firm date for submission would be provided once the ACAS process had been concluded.
- 13.23. It was clear from the early conciliation certificates that the process of conciliation concluded on 4 November 2011. It does not appear that any further letter was provided regarding time limits.

- 13.24. In cross-examination Mrs Wilkinson was asked whether she had told the Claimant about time limits. She said she had as well as referring to time limits in her letter.
- 13.25. The next step was for the ET1 to be prepared by Mrs Wilkinson. She knew that there was an EC certificate for the First Respondent from 4 October to 11th October and she said it was not apparent until receipt of the certificate on 4 November that the Second Respondent had not been included as a Respondent in these proceedings. She advised Mr Rangeley to do this.
- 13.26. She recalls that the Claimant's early focus was on settlement, predominantly in relation to the unlawful deductions complaint which was why a detailed schedule of loss was prepared by Mrs Wilkinson and sent to ACAS. It was clear therefore that the firm were in negotiations and in contact with ACAS on behalf of the Claimant and were participating in that early conciliation process.
- 13.27. On 4 November 2016 Mrs Wilkinson prepared the first draft of the ET1. She describes some difficulties in getting instructions from the Claimant between 4 November 2016 and 17 January 2017. She says that at this stage the only thing missing from the draft ET1 were the particulars of the discrimination complaint. She says that the Claimant was stressed during this period dealing with the police and potential offences under the Modern Slavery Act and also dealing with social services. She says that the Claimant was "unable to make any informed choice about how to proceed with his claim at that time".
- 13.28. The Claimant does not mention any difficulties he had in understanding the advice that he was being given or being unable to deal with matters or make an informed choice. He was actively engaging with ACAS discussions regarding settlement and at that time able to provide detailed information about the amount he was claiming in relation to the unlawful deduction complaints.
- 13.29. Mrs Wilkinson describes how she had virtually no details of the discrimination complaint and no dates provided. She felt there was nothing provided to substantiate a discrimination complaint at that point. She was asked if the Claimant had given her anything and she said he had not.
- 13.30. Mrs Wilkinson sent a further draft of the ET1 form to the Claimant requesting further particulars of the race discrimination. She didn't receive a reply to her request until 17 January 2017 when Mr Rangeley sent an email which said "are you waiting for anything from us?" She requested further particulars and received a reply on 19 January 2017 from Mr Rangeley saying "ok he is away visiting his mum with cancer until 28 January so will get to you then".
- 13.31. The Claimant was in Poland from 18 January 2017 to 28 January 2017 and says that whilst he was visiting his mother, he was not contactable. He made no attempt to contact Ms Wilkinson during this period.

- 13.32. On 31 January 2017, Mr Rangeley contacted Mrs Wilkinson providing some details of the discrimination claim. There was no evidence before me to explain why that information could not have been provided earlier. In fact the information that is provided in the claim form is very brief regarding the complaint of race discrimination. The Claimant mentions three incidents other than dismissal, which were alleged racial abuse by the Second Respondent, Miss Robinson which are at paragraph 9 of the ET1.
- “9.7.1. Verbal abuse “you stupid Polish man” began in August 2006.
- 9.7.2. On 2 June 2012 I went to the house at Seaves Farm to explain that I had hurt my back unloading beef carcasses and Miss Robinson shouted at me called me “you stupid Polish idiot”.
- 9.7.3. On 12 September 2016, during the Burley Horse Trials I heard Miss Robinson who was standing behind the counter on our stand say to Caroline Hayle (a worker) “stupid Polish idiot. He doesn’t know the time of day” along with various other forms of verbal abuse connected to my English Language issues.
- 9.7.4. On 7 October 2016 when she dismissed me.
- 13.33. One act of alleged victimisation is pleaded at paragraph 12 of the claim form where the Claimant alleges the Second Respondent victimised him **“by standing outside my place of work and staring in at me and on Tuesday 31st January 2017 I opened my flat door to find her standing only 10 yards away looking directly at me and laughing”.**
- 13.34. On 3 February 2017, in an email to Mr Rangeley sent at 09.18 Mrs Wilkinson states *“I am intending to submit Sebastian’s claim today in order to meet the Tribunal deadline. Please can you send the information to me as soon as possible?”*
- 13.35. Mrs Wilkinson received an email reply at 9.23 from Mr Rangeley on 3 February stating that it was hard for Mr Paluch to record dates and places of incidents.
- 13.36. She describes how the Claimant was submitting amendments to the draft ET1 late afternoon on Friday 3 February 2017 and a final draft was emailed to the Claimant via Mr Rangeley at 12.52 on Friday 3 February 2017. She received an email from Mr Rangeley with an amended ET1 attached at 15.36. She said it was not possible to submit the claim online that afternoon because the claim was to be accompanied by a fee remission form.
- 13.37. Mrs Wilkinson was questioned about this by Mr Sugarman. Firstly why the ET1 was not sent without those particulars which could have been provided later. Mrs Wilkinson said she did not think that she could send the claim form without the particulars of the race discrimination. Secondly why the claim form could not have been submitted on line indicating a remission application would follow or completing fee remission electronically. Mrs Wilkinson indicated that she did not think

these were options. She realised the ACAS certificate in relation to R2 was recoding the end of conciliation as 4th October not 4 November 2016. She said she had tried to contact ACAS to correct this but did not manage to speak to the ACAS officer and this matter then got overtaken by events. She has not sought to correct this certificate for this hearing.

- 13.38. Having made some enquiries with the administration team before making my decision it was clear there were no difficulties with the online application process at the time the claim was presented in February 2017 and a claim can be presented online without a remission application. If Mrs Wilkinson had ticked the box on the online application indicating a remission application would be made the claim would have been accepted. If an attempt had been made to submit the claim form online it would be apparent that was the case. Thirdly when the claim was submitted by hand on 6 February there was no reference made in the ET1 to any attempts made to submit the ET1 the previous week. The remission application attached was signed by the Claimant and dated 10 November 2016. There appeared to be nothing to prevent an application being made on 3 February 2017 or earlier.
- 13.39. Mrs Wilkinson said she submitted the claim by hand at ET on the morning of 6 February which she believed was reasonably practicable because the Tribunal closed on 4 and 5 February and for all of the reasons given in her witness statement she says it was not reasonably practicable to submit the claim any earlier.
- 13.40. The Claimant in cross-examination was asked “do you know when it was that you were told about time limits”. He immediately responded in English ‘nobody told me’. He repeatedly said “I didn’t know about any time frames”. He was asked “did Mr Rangely make you aware of the time limit of claim”. His immediate response in English was “I don’t remember”. He was asked when he was aware it was an issue and answered “I got to know recently it’s not my fault my solicitor submitted the claim too late” He could not explain what had prevented him from providing the information about his race discrimination complaint requested by his solicitor any earlier. He did not recollect the letter dated 11 October 2016 which referred to a deadline of 6 January 2017. He was working 4/5 days a week from November 2017 to date working in 2 jobs as a butcher and in the kitchens at a hotel. He was able to give instructions and revise documents (grievance letter/schedule of loss) He said “of course I was able I have documents for 13 years”. He was asked why the claim was not presented until 6 February 2017. His answer was “I don’t know what the reason was I adhered to everything I know nothing about any papers or what should have been submitted”
- 13.41. He could not explain in re-examination why he could not have acted before his trip to Poland. He confirmed Mr Rangely was available to help him all the time between October 2016 and February 2017.
- 13.42. In relation to the race discrimination complaint Mrs Wilkinson sought an extension of time on 4 grounds:

- a. The abusive and offensive nature of the comments made by the Claimant's employer;
- b. The extended length of time over which the Claimant was subjected to discrimination;
- c. His vulnerability given his ability to understand English and his poor mental state;
- d. The fact ACAS put the same date on the EC certificate against Miss Robinson for both notification and issue so the extension of time was erroneously zero.

Submissions

14. Mr Mugliston contends that this was a case where there was ample scope for the advice given to the Claimant to be 'lost in translation'. There was a clear conflict of evidence as to whether the Claimant was expressly told about time limits. Any lack of understanding would have to be 'reasonable' for the Tribunal to exercise its discretion. Here the Claimant was dependent on a friend who was not a qualified legal adviser. He was at the time prescribed antidepressant medication. His trip to Poland was not pre-planned and there were 10 days in January 2017 when he was not contactable. He was dealing with police investigations social services and ongoing harassment by the Second Respondent. It was submitted that it was not reasonably practicable to submit the claim in time. It would not be just and equitable if the serious behaviour of the Respondent was not addressed offering the Respondent a windfall which is wholly contrary to the interests of justice. The prejudice to the Claimant is vast if he cannot pursue the claim whereas there is no prejudice to the Respondent in the late presentation of the claim.
15. Mr Sugarman submits every claim except the victimisation complaint one is out of time. That complaint is not arguable and has no reasonable prospects of success. It has nothing to do with any earlier alleged acts of discrimination. The Claimant relies on the grievance of 7 October 2016 as the protected act for which he alleges victimisation in January 2017. He also asserts that the true reason for his dismissal on 7 October was his grievance of 7 October which cannot be right as the alleged dismissal took place before the grievance was presented. The Claimant has had professional advice from September 2016. He has had the assistance of a friend available all the time. He understands English when spoken to him and the solicitor's letters were read out to him. The highest the Claimant puts it is that he does not remember discussing time limits. He was not homeless. He was staying with his friend and then renting a flat. He was working in 2 jobs and had an income. The medical evidence of the effects of depression did not demonstrate any incapacity that prevented him from giving instructions in relation to this claim. He had demonstrated an active input in a number of ways (schedule of loss/ bundle of documents/grievance/amending ET1). He was able to give instructions and understand advice. The legal advisers should have submitted the claim in time. If it is left to the last minute the Claimant/advisers run the risk of what has happened. Time limits are there

to be followed. The Respondent will be prejudiced having to defend complaints going back to 2006 with no merit and based on scant details which had to be chased. The Claimant was unable to provide details in the same way he was able to with his monetary claims where he kept detailed records. It was reasonably practicable to submit the Claim in time and it was not just and equitable to extend time.

Conclusions

16. In relation to the first question was it reasonably practicable to submit the claim in time? The Claimant was in receipt of legal advice from September 2016. He was advised about the time limit in writing on 11 October 2016. He was actively engaging in the early conciliation process in October and was treating himself as dismissed from 7 October 2016. After this date his focus was on litigation he was not pursuing any other internal process with the Respondent. He was presenting a schedule of loss claiming 100,000 based on detailed records he had kept for 13 years. He was proactive in that process. He was working in 2 different jobs after his dismissal and renting accommodation in November 2016 and was not 'homeless' or without income. He clearly could understand spoken English and was assisted with any written English letters etc by Mr Rangely. The medical evidence provided and the Claimant's evidence to me does not describe any incapacity as a result of depression or any inability to give instructions or to provide the information requested by Mrs Wilkinson. In fact the Claimant approves and amends the draft ET1 on a number of occasions before it is presented with the assistance of Mr Rangeley. There was no evidence presented to me to persuade me that it was not reasonable feasible to present the claim before the date Mrs Wilkinson was working to of 3 February 2017.
17. In this case the Claimant engaged solicitors to act for him in presenting his claim and it was reasonably practicable for them to have presented the claim in time (*Dedman –v- British Building and Engineering Appliances Ltd* 1974 ICR 53. Unfortunately by leaving it so late the consequence was that the claim was presented late and was out of time. I was not persuaded that it was not reasonably feasible to have presented the Claim in time.
18. Turning to the Equality Act 2010 complaints the question is whether it is just and equitable to extend time, in accordance with section 123(1)(a) of the Equality Act 2010. It is for the Claimant to convince me that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule. (*Robertson-v- Bexley Community Leisure Link* 2013 IRLR 434 CA). In determining whether to exercise discretion to allow the late submission of a discrimination claim the factors I can consider are the prejudice each part would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular, the length of 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 has cooperated with any requests for information, the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate advice once he

knew of the possibility of taking action (British Coal Corporation-v- Keeble 1997 IRLR 336 EAT).

19. Only one act of alleged victimisation is made 'in time' relating to the 31st January 2017. This was not a matter on which there was any early conciliation with the First or Second Respondent. No attempt was made to contact ACAS in relation to this alleged victimisation. The last attempt made to contact ACAS appears to be Mrs Wilkinson trying to contact ACAS sometime after the 4th November 2016 to correct the certificate date in relation to the 2nd Respondent. The certificate was not corrected and is dated 4th November 2016.
20. In relation to the victimisation complaint it is alleged that the Second Respondent subjected the Claimant to a detriment by staring in to his place of work and laughing 10 yards outside his flat. It is alleged this 'staring and laughing' on 31st January 2017 by the Second Respondent is done because the Claimant had raised a grievance on 7 October 2016. It was not clear how the Second Respondent 'laughing or staring' is contended to be closely connected to the working relationship with the First Respondent that ended on 7 October 2017, more than 3 months previously, or how that treatment was closely connected to his employment, in the way a job reference to a prospective employer might be. This complaint, although it is in time, has in my view, little prospects of success based on the contentions advanced by the Claimant. Unfortunately I am unable to make a deposit order without having some representations from the Claimant on the amount of deposit he can pay as a condition of pursuing that complaint. He is working and earning an income but needs to provide information about his income and outgoings if he wants me to consider that before deciding the amount he can pay. The Claimant is to provide further information about his ability to pay if he wants me to consider, it within 14 days of this judgement being sent to the parties.
21. In relation to the 'out of time' complaints I had to consider the just and equitable grounds the claimant has asked me to consider and Mrs Wilkinson has referred to on his behalf which are a) the abusive and offensive nature of the comments made by the Claimant's employer; b) the extended length of time over which the Claimant was subjected to discrimination; c) His vulnerability given his ability to understand English and his poor mental state) d) the fact ACAS put the same date on the EC certificate against Miss Robinson for both notification and issue so the extension of time was erroneously zero.
22. Starting with the ACAS certificate no correction was made or sought for this hearing if it was 'erroneously zero'. The only dates I have are the dates ACAS have recorded.
23. Dealing next with the Claimant's 'vulnerability' with regards to his ability to understand English and his poor mental state and the argument that matters were 'lost in translation'. Unfortunately my findings do not support this argument for the reasons I have set out in my findings of fact.
24. Dealing then with "the abusive and offensive comments and the extended time he was subjected to discrimination". The particulars the Claimant was

eventually able to provide Mrs Wilkinson, refer to 3 comments in August 2006, September 2012 and September 2016 and the dismissal on 7 October 2016. Those were the 4 occasions over 13 years for which the Claimant was able to provide details of alleged discrimination in contrast to the detailed records and information he was able to provide to support his 'pay' complaints. The pay was the main issue for the Claimant (as his solicitor understood at the time) and she struggled to get the Claimant to substantiate the 'race' complaint to her. He has not explained why he was unable to provide the particulars earlier than he did. I was not persuaded based on the details of the case advanced by the Claimant in his claim form that this was a reason to extend time beyond the normal time limit on just and equitable grounds.

25. Finally in relation to the arguments made by Mr Mugliston about the potential windfall a decision dismissing the complaint offers for the Respondent and the greater prejudice caused to the Claimant. The Respondent has not misled the Claimant or created the situation it could benefit from by not providing information sought or delaying internal proceedings. The Claimant had decided to pursue the litigation course from the outset and had instructed solicitors to pursue that course on his behalf from the 11 October 2016. He completed a fee remission form in November 2016 and was amending the draft ET1 before it was presented. That claim could have been presented in time. It is true that the Claimant is prejudiced by the out of time complaints not continuing but he was able to understand the advice he was given and had assistance throughout from his legal advisers and his friend. In fact his friend had express authority from the Claimant to communicate/provide instructions to his solicitors on his behalf. There were 'equal' resources to legal assistance between the parties in bringing or defending these proceedings. Having regard, to all of the circumstances and my findings of fact, I am not persuaded that it is not just and equitable to extend time. Accordingly the Tribunal has no jurisdiction and all the complaints are dismissed in this claim except the victimisation complaint which will be subject to a deposit order once the claimant provides further information on his ability to pay.
26. If the Claimant wishes for a preliminary hearing to be listed to deal with the deposit issue he should make that application within 14 day of the date judgement is sent out to the parties. If no application is made by that date the deposit will be decided based on the information and written representations provided.

Employment Judge Rogerson

Date: 6 July 2017