EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr. J. Menns	v	**Hotel Du Vin Trading Limited**

Heard at: **Birmingham** **On:** **1 July 2022**

Before: **Employment Judge Wedderspoon**

Representation:

Claimant: **In Person**

Respondents: **Mr. S. Profitt, Counsel**

JUDGMENT

1. The application to amend the claim to add a claim of constructive unfair dismissal is refused.
2. The application to strike out or order a deposit of the claims is refused.

REASONS

1. This matter previously came before Employment Judge Gaskell on 13 May 2022. The preliminary hearing is listed today to determine the following
(a)the respondent's application for the claim to be struck out pursuant to Rule 37 of the Employment Tribunal Rules of Procedure 2013 on the grounds that the claim has no reasonable prospect of success;
(b)in the alternative and as a condition of proceeding with any element of the claim that the claimant should be ordered to pay a deposit pursuant to Rule 39 on the grounds that the claim has little reasonable prospect of success;
(c)the claimant's application to amend his claim to include a claim of constructive unfair dismissal.

Background

2. The claimant entered ACAS conciliation on 4 March 2021 and received a certificate on 15 April 2021. By claim form dated 13 May 2021, the claimant brought a claim of race discrimination against his employer. The claimant is a black Caribbean man.

Pleadings

3. The claimant has been employed by the respondent as a night porter from 1 November 2002. In his claim form the claimant makes complaints of less favourable treatment related to race. The claims have not been categorised by the claimant but it is agreed by the respondent that the narrative contained in the claim form is indicative of complaints of direct race discrimination, harassment related to race and victimisation.

4. In respect of harassment related to race the claimant alleges in the summer of 2017, he was informed that a group of white fellow workers referred to black members of staff as “monkey boys”; he complained to his manager and general manager, Tony Elvin and this was not investigated.

5. In respect of a direct claim of race discrimination the claimant complains that
(a)in October 2020 the claimant was prevented from taking a pre-arranged holiday on health grounds;
(b)On 22 December 2020 the claimant was dismissed for failing to respond to emails.
(c)He was subject to 15 disciplinary hearings or received letters of concern over the years. He has not provided any details about these claims in his amendment application.

6. The claimant also alleges he was victimised following doing a protected act (complaining about race discrimination in the summer of 2017) as follows :

   (a)In August 2017 he was falsely accused of swearing at a colleague and faced a disciplinary hearing; the claimant’s case is that the complainant was encouraged to make a false claim against the claimant by reason of the claimant’s complaint of race discrimination to management;
   (b)In October 2020 the claimant was prevented from taking a pre-arranged holiday on health grounds;
   (c)On 22 December 2020 the claimant was dismissed for failing to respond to emails.

7. In its response the respondent contends that the claims are out of time and should be struck out as having no reasonable prospect of success or subject to a deposit order as having little reasonable prospect of success. It raises the issue of time; contending any act of discrimination which arose before 5 December 2020 is potentially out of time.

8. Further, it disputes that the respondent racially discriminated or victimised the claimant. Its case is that the claimant failed to follow the process of seeking general management approval for leave set out in the employee handbook. From 12 October 2020 the claimant was signed off sick from work. He failed to respond to an invitation to attend a welfare meeting on 23 October 2020 and on expiry of his sick note on 1 November 2020 his sick note expired and he failed to provide the respondent with a further sick note until 6 November when his son delivered one. Contact to the claimant on 6 and 7 November 2020 was unsuccessful. The claimant was requested to attend a welfare meeting for 20 November 2020 but he did not respond to this request. The claimant’s sick note expired on 29 November 2020. On 4 December 2020 the respondent requested that the claimant contact the respondent and he failed to do so by 11 December 2020 his absence would be treated AWOL. A disciplinary process would be instigated. The claimant did not respond. On 14 December 2020 the claimant was invited to attend a disciplinary hearing on 17 December 2020. The claimant did not attend on 17 December 2020 so the respondent informed the claimant it would reschedule the hearing for 22 December 2020. The claimant failed to attend

the hearing and was dismissed. On appeal the sanction was replaced by a written warning.

The updated position

9. The claimant appealed his dismissal and was reinstated in April 2021. However, he did not return to work and resigned on 22 July 2021. He considers himself constructively unfairly dismissed.

Amendment application

10. The claimant applied to amend his claim on 27 September 2021. The claimant seeks to amend his case to include a claim for constructive unfair dismissal. His case is that he has no legal background. The legal adviser who assisted him in completing the claim form failed to follow his instructions that he sought to claim harassment, bullying and victimisation. He says that he has been advised that he can make an application for permission to amend his ET1 claim form. He alleges that he would be severely prejudiced if he is not allowed to pursue his constructive unfair dismissal which arose from harassment, bullying and victimisation.

11. The respondent resists the application to amend.

The evidence of the claimant

12. The claimant stated that he considered that the direct dismissal in December 2020 had been contrived; that was his understanding of "constructive dismissal." He accepted that he had lodged an appeal against his dismissal. He had been advised to do so and felt this was not good advice but felt he had to do so because his compensation may be reduced if he did not.
13. An appeal hearing was held on 12 April 2020 and the outcome letter dated 20 April 2020 reinstated the claimant's employment with back pay. He says he did not want to return to work because of the way the respondent had treated him namely denied him a holiday, said untruths about him at the disciplinary hearing; pressured him to attend the disciplinary when he was stressed and had high blood pressure and did not have a companion to attend with him, dismissed him and then having been reinstated the respondent threatened him with disciplinary action thereafter when he failed to return to work after some months so he resigned with effect on 22 July 2021.
14. The claimant has sought legal advice about his claims. He has sought advice from the trade union and from a charity, people history and a solicitors firm. He was aware of time limits at all material times of submitting claims to the Employment Tribunal and before this time. He was assisted in drafting his ET1 claim form and his amendment application by legal advisers. He was disappointed that his claim form had not included a dismissal claim and wished he had not been advised to appeal the dismissal.
15. In respect of the allegations Mr. Elvin failed to investigate his complaint about racial harassment in 2017. In late 2017 Mr. Elvin left the respondent's employment. He knew about the time limit to bring a claim then but enjoyed working for the respondent and did not wish to make a claim. In August

2017 he was falsely accused of swearing at a colleague and faced a disciplinary hearing; the claimant's case is that the complainant was encouraged to make a false claim against the claimant by reason of the claimant's complaint of race discrimination to Mr. Elvin.

16. In respect of leave for Jamaica for a period of 4 weeks, at first he said he does not believe he was informed his leave was not approved before going on holiday. He describes a custom and practice of employees taking leave and identified another employee who had taken a long period of leave. He later stated that the leave was not approved but he went away anyway.

17. He alleges that his dismissal was an act of race discrimination.

18. He is in receipt of a pension of £928. He shares a home with his wife who is also of pensionable wage He has loans in the region of £15,000. At the end of the month following the payment of household bills and loans, there is little money left.

Principles to be applied

19. The case of **Kaur v Leeds Teaching Hospitals NHS Trust and Patel and Folkestone** held that if an appeal overturns the dismissal there is no dismissal. This is the case even if the employee makes it explicitly clear they have no intention of returning to their job whatever the outcome. By invoking the appeal process the employee necessarily treats the contractual relationship as continuing to exist.

20. Breaches of the implied term of trust and confidence may continue depending upon the employer's conduct of the appeal process. A claimant may be able to rely upon the totality of the employer's acts as part of a series amounting to a repudiation of trust and confidence.

21. Where a party applies to amend their case, the application sought should be set out clearly. In **Harvey v Port of Tilbury (London) Limited 1999 ICR 1030** it was stated
"As a matter of guidance going beyond the facts of this particular case we cannot over emphasise that where an amendment is sought it behoves the applicant for such an amendment clearly to set out verbatim the terms and explain the intended effect if the amendment which he seeks."

22. In considering the claimant's application to amend the Tribunal takes into account the Presidential Guidance on case management and the overriding objective.

23. In the case of **Selkent** (the principles which should not be treated as a checklist) the following guidance was given to the exercise of the Employment Tribunal's discretion and the factors that might be taken into account :-
    (a) The nature of the amendment. Applications to amend are of many different kinds, ranging from on the one hand from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition and substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual

allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action;

(b) The applicability of time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that application is out of time and if so whether the time limit should be extended under the applicable statutory provisions.

(c) The timing and manner of the application. An application should not be refused solely because there has been a delay in making it. There are no time limits laid down ..for the making of amendments. The amendments may be made at any time..before at or even after the hearing of the case. Delay in making the application is however a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made; for example the discovery of new facts or new information appearing from documents disclosed on discovery.

24. In the recent EAT decision of HHJ Tayler **Vaughan v Modality Limited** it was emphasised that consideration should be given to the practical consequences of allowing or refusing the amendments. Questions of delay as a result of adjournments, any additional costs particularly if they are unlikely to be recovered by the unsuccessful party are relevant in reaching a decision. The core test to be applied is the relative injustice and hardship involved in refusing or granting of an amendment.

25. Time limits arise as a factor only in cases where the amendment sought would add a new cause of action. If a new claim form was presented to the tribunal out of time, the tribunal would consider whether time should be extended either on the basis of the “not reasonably Practicable test” for unfair dismissal or on the basis of just and equitable test for discrimination claims. The relevant time limits are an important factor in the exercise of discretion but they are not decisive.

26. In the case of **Prakash v Wolverhampton C.C.** whereby a Tribunal has a discretion to amend a claim with events giving rise to a further claim which occurred after the original claim had been made.

27. The Tribunal also takes account of the ETBB paragraph 26 page 19 namely the practical difficulties faced by litigants in person presenting accurate and complete statement of cases.

28. Pursuant to Rule 37 of the Employment Tribunal Rules of Procedure a tribunal has a discretion to strike out a claim where it is considered it has no reasonable prospect of success.

29. Pursuant to Rule 39 where the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party’) to pay a deposit not exceeding £1,000 as a condition to advance that allegation or argument.

30. In **Anyanwu v South Bank Students Union (2001) ICR 391** highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact sensitive and require a formal examination of the evidence to make a proper determination. In **Ezsias v North Glamorgan NHS Trust (2007) ICR 1126** the Court of appeal held that it will only be in exceptional cases that an application will be struck out as having no reasonable prospect of success when central facts are in dispute. Such an exception could include facts asserted by the claimant are completely inconsistent with undisputed contemporaneous documentation **Shestak v RCN EAT 0270/08.** In the case of **Balls v Downham Market High School and College (2011) IRLR 217** it was held that the Tribunal must take the claimant's case at its highest.

31. A deposit order pursuant to rule 39 of the rules can be made where the Tribunal concludes there is little reasonable prospect of success. This involves the tribunal in making a broad assessment of the merits but the tribunal must have a proper basis for doubting the likelihood of the party able to establish facts essential to the claim. The tribunal should make reasonable enquiries about the paying parties ability to pay the deposit and have regard to that when deciding the amount of the deposit (see **Hemdam and Ishmail UKEAT/0021/16**).

Submissions

32. The respondent submitted that the amendment to add a complaint of constructive unfair dismissal should not be permitted. The claimant was aware of time limits; to permit it would allow a significant increase in the scope of the claim requiring more evidence and more time for the case to be heard. He submitted his claim on receipt of the decision to reinstate him. His case is that the respondent has breached the implied term of trust and confidence and relies upon the last act of asking for him to return to the workplace (having been reinstated in April 2021) or he would be disciplined; that could not be a last straw or form any part of a cumulative series of acts.
33. There was no reasonable prospect in the allegations dating back to 2017 involving Mr. Elvin. They are out of time and no reasonable prospect of establishing they form any part of a continuing act. Mr. Elvin was out of the business at the end of 2017. It would be fanciful to suggest they could form part of a continuing act for a decision made by a separate manager in 2020.
34. In respect of the refusal to take extended leave; this claim has no reasonable or little reasonable prospect of success. The claimant failed to follow a process that is why he was refused leave. He was disciplined because he took the leave anyway and failed to communicate with his employer when the respondent invited him to attend disciplinary hearings. This has nothing to do with race or the fact that the claimant (as he contends) complained in 2017 about race.
35. The "discriminatory dismissal" is in time but has no reasonable or little reasonable prospects of success. To dismiss an employee for a failure to follow procedure has nothing to do with race. The claimant could not satisfy the burden of proof.

36. If the Tribunal determines not to strike out but make a deposit order it should be meaningful, namely in the region of £100 per allegation.
37. The claimant submitted he had a number of emails and he had conversations with the respondent; surely the respondent had footage of the swearing incident. He had extended holiday leave before so does the chef; colleagues covered for one another. His holiday leave was approved already. He has evidence.

Conclusions

38. The parties were asked to note that although the claimant asserted in the narrative of his claim form one line that he had been subject to about 15 disciplinary hearings/letters of concern he had not provided any detail of these today.

Amendment application

39. The claimant has no claim in law for unfair dismissal for the direct dismissal in December 2020. The case law is clear that no dismissal occurs where an appeal overturns the dismissal.

40. The claimant's constructive unfair dismissal claim provides an update to the claim be lodged on 13 May 2021. It was not until with effect 21 July 2021 that the claimant resigned claiming he has been constructively dismissed. If the claimant had lodged a second claim at the time of his proposed amendment application on 27 September 2021 the claim would have been in time. Although the case of **Galilee** states that the Tribunal should consider the date of the application to amend as of the date it is heard, the claimant did apply within primary limitation period to make the claim.

41. The claim of constructive unfair dismissal is a new claim but is by way of an update of the employment situation similar to the factual context of the case of **Prakash v Wolverhampton**. The events are current; the respondent has retained evidential material concerning the events of the dismissal and reinstatement. The respondent is likely to have to call a witness concerning the dismissal and demand for the claimant to return to work but the tribunal does not consider there would be a significant increase in time to hear about these events and his resignation would not increase the hearing significantly.

42. The Tribunal determines the balance of injustice weighs heavily against the claimant if he could not have the opportunity to bring this claim before the tribunal.

43. However, the Tribunal considers that this claim has little reasonable prospect of success. In a claim for constructive unfair dismissal the claimant has the burden of establishing on the balance of probabilities that the respondent committed a repudiatory (serious) breach of contract such as breached the implied term of trust and confidence. The claimant seeks to rely upon his treatment including the disciplinary process and dismissal by reason of taking a holiday in absence of express permission; a successful

appeal, reinstatement to employment and then the last straw as a threat of disciplinary action to return to work following reinstatement.

44. The Tribunal considers that such a claim is frivolous. The attendance of an employee at work is a fundamental and integral part of the duties of an employee. Once the contract continued by reason of the successful appeal the claimant was required to be in work. An employer is entitled to demand so. It simply cannot be credibly suggested that an employer's demand for an employee to attend the workplace and if an employee does not do so they would be disciplined could get anywhere close to establishing part of a cumulative series of acts or a last straw to a breach of the implied term of trust and confidence. The act of requesting someone to attend work for a job they are paid to do or they could be disciplined could not be considered to be calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Nor could it feasibly be considered to "add" anything to list of a series of acts. In any event an employer has just cause to request an employee to attend work.

45. The Tribunal determines that the core test to be applied is the relative injustice and hardship involved in refusing or granting of an amendment. To permit a claim to be amended which has no reasonable prospect of success weighs prejudicially against a respondent who has the time and expense to defend a frivolous claim. In the circumstances balancing the prejudice of the claimant being refused to amend to add a frivolous claim and the prejudice to the respondent of defending a frivolous claim with increased time and costs, the Tribunal concludes that the prejudice is greater to the respondent so that the claim to amend to include a claim for constructive unfair dismissal is refused.

Strike out/deposit

46. The case of **E v X L v Z** Mrs. Justice Ellenbogen has cautioned against striking out claims where a continuing act is claimed extending over a period save in exceptional circumstances; **Aziz v FDA** establishes all evidence should be heard before confirming whether an act extends over a period of time. In the **E v X** case it was permissible to strike out the claim concerned with a continuing act because of a clear division between decision makers who could then be released from the claim.

47. The claim made in respect of racial harassment in 2017 was reported by the claimant to Mr. Elvin which was not investigated by him is significantly out of time. The claimant was aware of time limits but chose not to pursue an employment tribunal claim. Similarly the false allegation of swearing is said to have been instigated by Mr. Elvin. Mr. Elvin left the respondent's employment at the end of 2017. The next act complained of by the claimant is the issue in late 2020 some 3 years later concerning his holiday leave. Mr. Elvin was not involved in this decision.

48. The tribunal determines that the claimant was aware of his right to bring a tribunal claim for discrimination and chose not to bring a claim. Further he

had knowledge of time limits to bring a claim. He made the conscious decision not to pursue a discrimination claim in 2017. Mr. Elvin left the respondent's employment in late 2017 and the claimant agrees had not further involvement in his employment situation.

49. Taking these matters into account, the claimant has no reasonable prospect of establishing that it is just and equitable to extend time. He knew of a right to claim, he knew there was a potential claim; he knew about time limits but chose not to make a claim. Discrimination claims by their nature are fact sensitive and should be heard promptly; memories easily fade over time and there is significant evidential prejudice by the delay in time. In the context of Mr. Elvin no longer being in the organisation the respondent is prejudiced in defending such a claim.

50. Further the Tribunal determines in the exceptional circumstances that the claimant accepts this issue concerned only Mr. Elvin who left the respondent's employment in 2017 and who had no further involvement in the claimant's employment from that date, the tribunal determines that there is no reasonable prospect of establishing that the allegations dated 2017 form any continuing act of discrimination with the next incident he complains about in 2020 which concerned the decision made by Ms. Lees. The decision makers are completely different and concern a difference in time of some three years.

51. The Tribunal concludes that this claim will be struck out as there is no reasonable prospect of the tribunal finding it has jurisdiction to hear such a claim.

52. In respect of the claimant's allegation of being refused holiday leave (taking the claimant's claim at its highest); this occurred in October 2020. His case is that another employee was granted leave and there was a custom and practice that he and his colleagues would cover each other over when each took a holiday. His holiday was refused by Ms. Lees. On the face of it this allegation appears to be out of time because it predates 5 December 2020.

53. However arguably if forms part of the disciplinary process because it triggers a disciplinary hearing when the respondent contends the claimant fails to respond to its enquiries. On this basis it could be argued that the events of the refusal to grant the holiday leave could form part of a continuing act of discriminatory conduct namely the dismissal. Following **Aziz v FDA** evidence needs to be heard as to whether this does form a continuing act and the Tribunal determines that it cannot be said that no reasonable prospect of even little reasonable prospect of establishing this; this must be left to a substantive hearing to determine with the benefit of all the evidence.

54. The act of dismissal on 22 December 2020 is also argued to be an act of direct discrimination or victimisation. It is within time. The respondent

contends that this claim has no reasonable or little reasonable prospect of success because the claimant accepts his leave was not approved and he took it anyway. He was consequently dismissed for it.

55. Although the claimant accepts that his holiday leave was not approved; he states that there has been a custom and practice of leave being approved for him and his colleagues in the past and identifies another employee who has received approval for long leave. The Tribunal determines that it cannot be said that the claim has no reasonable prospect of success. The claim is fact sensitive and requires proper adjudication at a substantive hearing. Further the Tribunal does not find it can be said to have little reasonable prospect of establishing this; if the claimant's case tis that there was a continuing state of affairs of refusing his leave when he had usually obtained it and disciplining him for taking what he considered to be his customary leave period this does not have little reasonable prospect of success. It must be left to a substantive hearing to determine the claim with the benefit of all the evidence.

56. The case will be listed for a final hearing.

Employment Judge Wedderspoon

1 July 2022