



EMPLOYMENT TRIBUNALS

Claimant: Mr Lee Cotgreave

Respondent: Food Standards Agency

Heard at: Cardiff, by video **On:** 25 September 2024

Before: Employment Judge S Jenkins

Representation

Claimant: In person

Respondent: Mr G Probert (Counsel)

JUDGMENT

1. The Claimant's application to amend his claim to add a complaint of harassment related to disability is refused.
2. The Claimant's unfair dismissal complaint was not brought within the period of three months beginning with the effective date of termination of his employment, when it was reasonably practicable for the complaint to have been brought within that period. The complaint is therefore dismissed.
3. The Claimant's complaint of failure to make reasonable adjustments was not brought within the period of three months beginning with the date of the latest act to which his complaints related, and it is not just and equitable to extend time. The complaint is therefore dismissed.
4. The Respondent's application for a costs order is refused.

REASONS

Background

1. The Claimant brought complaints of constructive unfair dismissal and of failure to make reasonable adjustments, by way of a Claim Form issued on 1 February 2024, following early conciliation with ACAS between 14 December 2023 and 18 January 2024.
2. The Respondent contended in its Response that the Claimant's complaints had been brought outside the applicable time limits and should be struck out, and, at a preliminary hearing before Employment Judge Povey on 26

April 2024, he directed that a public preliminary hearing should be held to consider the time limit issue.

3. That preliminary hearing was scheduled for 12 July 2024 before Employment Judge Brace. However, during opening discussions in that hearing to clarify the Claimant's complaints, he indicated that he also wished to raise an issue regarding the actions of the Respondent after his employment ended, which he contended were acts of disability-related harassment. Judge Brace pointed out that those matters had not been raised in the Claimant's Claim Form, nor had they been discussed at the preliminary hearing before Judge Povey.
4. Judge Brace directed the Claimant to confirm, by 26 July 2024, whether he considered that his Claim Form included all the complaints he sought to bring, and, if not, whether he applied to amend his claim, providing details of any such amendment.
5. Anticipating that an application to amend would be made, Judge Brace then scheduled this hearing to deal with the following matters:
 1. *Whether the Claimant requires permission to amend his claim.*
 2. *If so, whether the Claimant has permission to amend his claim.*
 3. *Was the unfair dismissal complaint made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination (section 111 of the Employment Rights Act 1996)?*
 - (i) *Was it reasonably practicable for the unfair dismissal claim to be made to the Tribunal within the time limit?*
 - (ii) *If it was not reasonably practicable for the unfair dismissal claim to be made to the Tribunal within the time limit, was it made within a reasonable period?*
 4. *Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010?*
 - (i) *Were the discrimination claims made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?*
 - (ii) *If not, was there conduct extending over a period?*
 - (iii) *If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?*
 - (iv) *If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:*
 - (a) *Why with the complaints not made to the tribunal in time?*
 - (b) *In any event, is it just and equitable in all the circumstances to extend time?*
6. The Claimant produced a document as directed, confirming that he

considered that his reasonable adjustments complaint that he had raised in his Claim Form continued up to 27 October 2023, and that he sought to amend his claim to add a complaint of disability-related harassment, relating to actions of the Respondent after his resignation on 14 July 2023, up to 27 October 2023.

7. The Respondent confirmed that it did not consent to that amendment, and therefore this hearing proceeded to consider all the matters set out by Judge Brace.
8. In addition to those matters, prior to this hearing the Respondent submitted an application for a costs order, relating to what it contended had been unreasonable conduct on the part of the Claimant in not raising his harassment complaint before the hearing on 12 July 2024, which it contended led to it incurring unnecessary costs.
9. I heard evidence from the Claimant in relation to the time limit issues by way of a written witness statement and answers to oral questions, and I considered the documents in a preliminary hearing bundle spanning 225 pages. I also considered the parties' submissions on all the issues to be addressed.

Law

Amendments

10. The Employment Appeal Tribunal ("EAT") noted in **Chandok v Tirkey [2015] ICR 527**, at paragraph 16, that:

"The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made - meaning, under the Rules of Procedure 2013, the claim as set out in the ET1."

11. With regard to amendments, the test to be applied involves the assessment of the balance of injustice and hardship of allowing or refusing the amendment. The EAT, in **Selkent Bus Co Ltd v Moore [1996] ICR 836**, reiterated that point, which had previously been made in **Cocking v Sandhurst (Stationers) Limited [1974] ICR 650**, and noted a non-exhaustive list of relevant circumstances which would need to be taken into account in the balancing exercise, namely; the nature of the amendment, the applicability of time limits, and the timing and manner of the application to amend. Those points were subsequently encapsulated within the Employment Tribunals (England & Wales) Presidential Guidance on General Case Management (2018), Guidance Note 1, which noted, at paragraph 6 that:

"6. The Tribunal draws a distinction between amendments as follows:

- 6.1 those that seek to add or substitute a new claim arising out of the same facts as the original claim; and*

6.2 *those that add a new claim entirely unconnected with the original claim.*”

12. The EAT, more recently, in ***Vaughan v Modality Partnership [2021] ICR 535***, gave detailed guidance on applications to amend tribunal pleadings. That confirmed that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application, but noted that the focus should be on the real practical consequences of allowing or refusing the amendment, considering whether the Claimant has a need for the amendment to be granted as opposed to a desire that it be granted.
13. The circumstances set out in ***Selkent*** were specifically referred to as being non-exhaustive, and other factors can be taken account in the balancing exercise. That may include the merits of the claim being sought to be added. The EAT, in ***Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132***, noted that the assessment of the merits formed at a preliminary hearing must have been properly reached by reference to identifiable factors that are apparent at the preliminary hearing, and taking proper account, particularly where the claim is one of discrimination, of the fact that the tribunal does not have all the evidence before it and is not conducting the trial.

Time Limits

Unfair dismissal

14. Section 111 of the Employment Rights Act 1996 (“ERA”) provides that an Employment Tribunal should not consider a complaint unless it is presented before the end of the period of three months beginning with the effective date of termination, or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to have been presented before the end of that three month period.
15. The three-month period is to be extended by virtue of any time spent pursuing early conciliation with ACAS, which essentially means that a claimant must make contact with ACAS for the purposes of early conciliation during that three months.
16. There has been a considerable amount of case law on this point over the years, and one point that has been made clear is that it is a strict test. It is for a Claimant to justify the conclusion that the claim was not able to be reasonably practicably brought within time, and that it was then brought within a reasonable time thereafter.
17. The appellate cases have made clear that a number of reasons for delay can arise in assessing the reasonable practicability question, including whether the Claimant was aware of the right to pursue matters before the Tribunal.
18. The issue of reasonable practicability includes an assessment of the Claimant’s ignorance of rights, but any ignorance must be reasonable. Scarman LJ (as he then was), in ***Dedman -v- British Building***

Engineering Appliances Limited [1974] 1 WLR 171, noted that a Tribunal must ask the questions of, “*What were [the Claimant’s] opportunities for finding out that [they] had rights? Did [they] take them? If not, why not?*”

19. The Court of Appeal also noted, in **Porter -v- Bandrige Limited [1978] ICR 943**, that the test was not whether the Claimant knew of his or her rights, but whether he or she ought to have known of them.
20. The appellate courts have also made clear that where a Claimant is generally aware of their rights, ignorance of a time limit will rarely be acceptable as a reason for delay.
21. If the decision is that it was not reasonably practicable for the claim to have been brought in time then the EAT confirmed, in **Cullinan -v- Balfour Beatty (UKEAT/0537/20)**, that consideration of whether the claim is brought within a further reasonable period will require an objective consideration of the relevant factors causing the delay and what period should reasonably be allowed in the circumstances having regard to the strong public interest in claims being brought in time.

Discrimination

22. The provisions relating to time limits in discrimination cases, are set out in section 123 of the Equality Act 2010 (“EqA”). That provides that discrimination complaints within section 120 may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable.
23. Sub-sections (3) and (4) of section 123 provide further as follows:
 - “(3) *For the purposes of this section –*
 - (a) *conduct extending over a period is to be treated as done at the end of the period;*
 - (b) *failure to do something is to be treated as occurring when the person in question decided on it.*
 - (4) *In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –*
 - (a) *when P does an act inconsistent with doing it, or*
 - (b) *if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.”*
24. With regard to the date of any failure to act, the Court of Appeal, in **Matuszowicz v Kingston-upon-Hull City Council [2009] IRLR 288**, confirmed that where the allegation related to an omission, in that case a failure to make reasonable adjustments, the limitation period operates in the same way irrespective of whether the omission was deliberate or inadvertent. In both cases the period will run from when the adjustment should have been made.

25. There have been a number of appellate court decisions on the issue of extending time in discrimination cases over the years. The Court of Appeal, in ***Robertson v Bexley Community Centre* [2003] IRLR 434**, noted that, whilst the test is not as strict as that for the reasonable practicability test for unfair dismissal, there is nevertheless no presumption in favour of extending time in discrimination claims and it is for the claimant to convince the Tribunal that it is indeed just and equitable to extend time.
26. The EAT, in ***British Coal Corporation v Keeble* [1997] IRLR 336**, noted that the provisions of section 33 of the Limitation Act 1980, which apply to civil claims, should also be applied in relation to tribunal claims. That involves an assessment of the prejudice to each party and an assessment of all the circumstances of the case which include: the length of and reasons for the delay, the extent to which the cogency of evidence is likely to be affected, the extent to which the party sued has cooperated with requests for information, the promptness with which the Claimant acted once he knew of the facts and the steps taken by the Claimant to obtain advice. It is clear however that an assessment of all the circumstances is to be undertaken.
27. The Court of Appeal provided further guidance, in ***Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23**, that the guidance provided in the ***Keeble*** case should not be treated as a checklist, as that would lead to a mechanistic approach to what is meant to be a very broad general discretion. The Court of Appeal's guidance was that the best approach for a Tribunal in considering the exercise of its discretion 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, the length of, and the reasons for, the delay.
28. The Court of Appeal had also previously noted, in ***Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194**, that factors which are almost always relevant to consider when considering the discretion are the length of and reasons for the delay, and whether the delay has prejudiced the Respondent.

Costs

29. Rule 76(1)(a) of the Employment Tribunals Rules of Procedure provides that a costs order may be made, and that the Tribunal shall consider whether to do so where it considers that -

“(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;”

30. The general approach to be applied by Tribunals when considering costs applications has been clarified by the appellate courts on several occasions. In ***Gee v Shell UK Ltd* [2003] IRLR 82**, Sedley LJ said:

"It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to ordinary people without the need of lawyers, and that, in sharp distinction from ordinary litigation in the United Kingdom, losing does not ordinarily mean paying the other side's costs."

31. The Court of Appeal reiterated, in ***Yerrakalva v Barnsley Metropolitan Borough Council and anor* [2012] ICR 420**, that costs in the employment tribunal are still the exception rather than the rule. It commented that the tribunal's power to order costs is more sparingly exercised and is more circumscribed than that of the ordinary courts, where the general rule is that costs follow the event and the unsuccessful litigant normally has to foot the legal bill for the litigation. In most cases the employment tribunal does not make any order for costs. If it does, it must act within rules that expressly confine the tribunals power to specified circumstances, notably unreasonableness in the bringing or conduct of the proceedings. The tribunal manages, hears and decides the case and is normally the best judge of how to exercise its discretion.
32. In ***Millan v Capstick Solicitors LLP and others* (UKEAT/0093/14)**, Langstaff J, the then President of the EAT, described the exercise to be undertaken by the Tribunal as a three-stage exercise, which can be paraphrased as follows:
1. Has the putative paying party behaved in the manner proscribed by the Rules?
 2. If so, the Tribunal must then exercise its discretion as to whether or not it is appropriate to make a costs order. It may take into account ability to pay in making that decision.
 3. If the Tribunal decides that a costs order should be made, it must decide what amount should be paid or whether the matter should be referred for assessment. The tribunal may take into account the paying party's ability to pay.
33. The appellate courts have also made clear that a litigant in person should not be judged by the same standards as a professional representative, as the self-representing may lack the objectivity and knowledge of law and practice that a professional representative will (or ought to) bring to bear. In ***AQ Ltd v Holden* [2012] IRLR 648**, HHJ Richardson noted:

"The threshold tests in rule 40(3)¹ are the same whether a litigant is or is not professionally represented. The application of those tests should, however, take into account whether a litigant is professionally represented. A tribunal cannot and should not judge a litigant in person, by the standards of a professional representative ... Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life ... lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. Tribunals must bear this in mind when assessing the threshold tests in rule 40(3). Further, even if the threshold tests for an order for costs are met, the tribunal has discretion whether to make an order. This discretion will be exercised, having regard to all the circumstances. It is not irrelevant that a layperson may have brought proceedings with little or no access to specialist help and advice.

"This is not to say that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have

¹ The costs rule in the predecessor rules to the current Rules.

behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity...".

34. The Respondent put its application on the basis that the Respondent had acted "unreasonably" in its conduct of the proceedings. The EAT, in ***National Oilwell Varco (UK) Limited v Van de Ruit (UKEATS/006/14)***, noted that the EAT, in the unreported case of ***Dyer v the Secretary of State for Employment (UKEAT/183/83)***, had concluded that "unreasonable" is to be construed in the normal English construction of that word, and that it does not take colour from the words which appear before it in the rule which are "vexatiously, abusively, disruptively".

Findings

35. My findings relevant to the time limit issues, reached on the balance of probability where there was any dispute, are as follows. I make reference, in passing, to issues forming part of the Claimant's complaints, but I heard no direct evidence on them. My comments in relation to them should not therefore be taken as formal findings of fact which bind any subsequent Employment Tribunal in any way.
36. The Claimant was a meat hygiene inspector, working for the Respondent undertaking inspections from a base in Wrexham. His continuous service in the Civil Service goes back to December 1997, and he started working for the Respondent on 1 April 2010.
37. The Claimant suffers from an historical spinal condition, which the Respondent accepts amounts to a disability for the purposes of section 6 EqA.
38. The Claimant was absent from work because of that condition for just short of eight months, between 25 February 2022 and 17 October 2022. In relation to that period of absence, the Claimant was issued with a formal warning under the Respondent's absence management procedures. That led to the Claimant bringing an Employment Tribunal claim against the Respondent on 27 November 2022, alleging discrimination arising from disability and a failure to make reasonable adjustments. At a hearing between 16 and 18 August 2023, the former complaint was successful, but the latter was not.
39. An occupational health report in relation to the Claimant was produced on 25 October 2022, noting that he was capable of returning to work as soon as possible. (The documents in the bundle suggest that, although the Claimant formally returned to work, i.e. ended his sickness absence, on 17 October 2022, he did not physically return until the end of that month.) The report noted that the Claimant would benefit from: a phased return over four weeks, the provision of a neck-supported chair, and the ability to work closer to home on a regular basis. The Claimant had a regular commute of just over 30 miles at that point.
40. The Claimant met his manager on 2 November 2022 for a return to work meeting. The phased return was discussed, and it was noted that a specialist chair would be provided, together with a digital display. It was also noted that, on an occasional basis, the Claimant could work closer to home, by mutual agreement.

41. In January 2023, the Claimant raised concerns that the requested adjustments had not been put in place. A meeting then took place between the Claimant and his managers on 1 February 2023. An email, produced by the Claimant as a minute of the meeting, noted that it had been identified that he would benefit from workplace adjustments as follows:
- “1. Neck Supported Chair – To Minimise Discomfort At Work
2. Work Occasionally Closer To Home – To Reduce Driving Time.
3. A Platform To Carry Out My Work Duties – Due To The Height Of The Line.”*
42. The Claimant noted that he had returned to work on 17 October 2022, and had been working full-time since 5 December 2022. He noted that, since returning to full-time duties 61 days had elapsed, with no workplace adjustments to assist with managing his medical condition.
43. The action points from the meeting were that the Claimant's team leader would; enquire about working closer to home, engage with a specific Food Business Operator (“FBO”) with regard to a platform for inspection, and discuss accessibility in relation to the office in which the Claimant worked together with the required equipment, with the Claimant's requirements being discussed and agreed in relation to chair measurements. A meeting was scheduled for 10 February 2023 in relation to that.
44. The required chair was ordered on 17 March 2023, and was delivered on 4 April 2023, although issues remained as to whether it was correctly fitted for the Claimant. The Claimant also had concerns that, due to the general untidiness of the office, his difficulties remained.
45. On 19 April 2023 the Claimant sent a further email to his managers. In that, he noted the occupational health recommendations that had been made, and that, as of 19 April 2023, approximately six months had elapsed and there were no reasonable adjustments in place to assist with his condition. He noted that the, *"inordinate amount of time to process and implement the required additional Employer support is a substantial cause of great stress and anxiety"*.
46. The Claimant sent a further email to his managers on 9 May 2023, making very much the same points. He noted that, whilst some discussions about working closer to his home had taken place, no arrangements had been confirmed. He also noted that, whilst he had been told that discussions regarding a stand had taken place, it had not been provided, and that, as of 19 April 2023, 61 days had elapsed with that adjustment still awaiting implementation. He again reiterated that the inordinate amount of time to implement the stand was extremely concerning.
47. In the meantime however, issues had arisen regarding the Claimant's conduct. It was alleged that he had removed a leg from an ovine carcass with a saw, which should only have been done by an FBO, on 17 February 2023. Concerns were also raised about alleged incorrect misuse of timesheets in the same month.
48. As a result of those concerns, the Claimant was suspended on 31 May 2023 pending an investigation. As a result of this suspension, the

Claimant's access to the Respondent's systems was removed. On 6 June 2023, the Claimant raised a Data Subject Access Request ("DSAR") with the Respondent in order to obtain documentation.

49. On 23 June 2023, the Claimant was invited to attend a disciplinary investigation meeting on 14 July 2023, with John Stephen, the Respondent's area manager. The Claimant asked for the meeting to be rearranged to allow for the DSAR to be replied to, which was anticipated to be done by 6 August 2023. That request was however, refused, with Mr Stephen noting that he would provide the relevant documents to the Claimant at the investigation meeting for his comments and responses.
50. The meeting went ahead, and the documentation in the bundle indicated that the Claimant focused on reading from a prepared statement. When asked questions, the Claimant generally answered, *"I am unable to provide you with an answer to your question as the information lies within my emails and other correspondence which I currently don't have access to."*
51. When shown CCTV footage of the incident regarding the removal of the leg, the Claimant continued to read from his statement and said, *"During this period, I was suffering from chronic fatigue, this impacted on my concentration levels and my decision making during my work. During this period of time, my employer was aware of my condition and medical status. During this period, the FSA failed to carry out and implement reasonable adjustments which has had a major impact on my ability and decision making."*
52. Following the meeting on 14 July 2023, the Claimant tendered his resignation. He referred to the allegations made against him, and noted that those were directly linked to his disability and the lack of support in relation to implementing workplace adjustments.
53. The Claimant went on to say that those failures placed him at a substantial disadvantage due to his disability, and he made specific references to sections 20 and section 21 EqA. He noted that he therefore believed that his employer had failed to comply with a duty to make reasonable adjustments. The Claimant also referenced concerns regarding the line management support he had received around his well-being at the time of the allegations.
54. The Claimant concluded that he considered that his employer's conduct had been a fundamental breach of his employment contract, and that he believed that his employer's lack of action impacted on his ability to carry out his role. He noted that he was resigning as a result of the fundamental breach of his employment contract as a result of disability discrimination and constructive dismissal.
55. A member of the Respondent's HR team wrote to the Claimant on 17 July 2023, confirming receipt of his resignation and noting that he had resigned with immediate effect on 14 July 2023. The letter confirmed that the Claimant's resignation had been accepted on the same day.
56. However, Mark Davis, Head of the Respondent's Delivery Support Unit and the person appointed to be the decision maker in relation to the disciplinary allegations against the Claimant, sent an email to the Claimant on the same

day. In that, he noted that he understood from HR that the Claimant had resigned from the Respondent on 14 July, that he had no further information in relation to the Claimant's decision to resign, but wanted to advise him that, irrespective of that, the investigation that he had outlined in his letter to the Claimant on 5 June 2023 would continue. He noted that Mr Stephen and himself, as the investigating officer and decision manager respectively, would continue to be in touch with the Claimant as the investigation progressed.

57. The Claimant did not respond to that email, and nor did he respond to any subsequent communications from the Respondent which were as follows.
 1. An email from Mr Stephen on 20 July 2023, attaching a typed statement from the meeting on 14 July 2023, and asking the Claimant to read it and amend it, or add comments.
 2. An email from Mr Davis on 13 September 2023, attaching a letter inviting the Claimant to a disciplinary hearing by video on 4 October 2023.
 3. A further email from Mr Davis on 29 September 2023, noting that the Claimant had not responded to the email of 13 September, and had not confirmed his attendance at the disciplinary hearing. Mr Davis asked the Claimant if he could let him know whether he would be attending the hearing, and noted that if the Claimant failed to attend then he would consider the outcome of the disciplinary case on the basis of the available information set out in evidence sent to the Claimant with the 13 September 2023 letter.
 4. An email from Mr Davis on 4 October 2023, noting that the disciplinary hearing had gone ahead in the Claimant's absence, and that the Claimant would be provided with the outcome by 20 October 2023.
 5. A final email from Mr Davis on 27 October 2023, attaching the outcome letter.
58. In that letter, Mr Davis concluded that the Claimant had committed an act of gross misconduct by removing a leg from an ovine carcass with a saw on 17 February 2023. He noted that the Respondent's operating procedures state that "*FSA staff must not carry out any type of meat rectification work, including for quality reasons, as this is the responsibility of the FBO.*".
59. Mr Davis concluded his letter by saying, "*I am aware that during the course of the investigation you have tendered your resignation from the Food Standards Agency (FSA), with effect from 14 July 2023. However, for completeness I wish to confirm that as a result of the conclusion of gross misconduct it has been decided that your employment with the FSA has been terminated, effective immediately.*". He noted that the Claimant had the right to appeal his decision, which the Claimant did not do.
60. As I have already noted, the Claimant contacted ACAS in relation to his claim for the purposes of early conciliation on 14 December 2023, and the early conciliation certificate was issued on 18 January 2024. The Claimant then submitted his Claim Form on 1 February 2024. In that, the Claimant

noted that his employment ended on 14 July 2023 and that he was pursuing claims of unfair dismissal and disability discrimination.

61. The Claimant provided details of his claim in an attachment to his Claim Form. In that, he recorded his medical condition, the identified adjustments, and the occasions on which he had raised concerns with the Respondent that the adjustments had not been implemented. He then noted his suspension on 31 May 2023, and the investigation meeting on 14 July 2023.
62. The Claimant further noted that, during that meeting, the allegations had been discussed and he had been shown video footage. He stated that he provided information regarding his disability, and how the lack of workplace reasonable adjustments had contributed to the allegations against him. He further noted that key information regarding his disability and lack of adjustments had not been accessible due to the Respondent withdrawing access to his email account, which he stated blocked highly important information from being documented during the investigatory process.
63. The Claimant stated that, as a result, he resigned from his position with immediate effect, stating that the allegations were directly linked to his disability and the lack of support in relation to implementing workplace reasonable adjustments. He noted that his employer accepted the resignation.
64. The Claimant then noted that he had received correspondence from Mr Davis on 27 October 2023, and that he wished for the decision for dismissal for gross misconduct to be overturned and for his resignation letter dated 14 July 2023 to be upheld.

Conclusions

65. Taking into account my findings of fact in relation to the time limit issues, and the relevant legal principles in relation to all the matters I had to consider, my conclusions in relation to the issues I had to determine were as follows.

Amendment

66. I noted the core requirement of the **Vaughan** guidance, applying **Selkent** and **Cocking**, which was to consider the balance of injustice and hardship in allowing or refusing the application, the focus being on the real practical consequences of allowing or refusing the amendment. I noted however that the **Selkent** non-exhaustive list of relevant circumstances remains relevant.
67. Looking at those circumstances, I concluded that the amendment was substantial, involving a complaint not previously advanced. In addition, several of the factual matters advanced in relation to the proposed amendment had not been raised in the Claim Form.
68. I also noted that the complaint, if allowed by way of amendment, had been brought significantly out of time. Even working from the latest possible date of 27 October 2023, and allowing for the adjustment relating to ACAS early conciliation, any complaint arising from that date should have been brought by 1 March 2024, but was not raised until the preliminary hearing before

Judge Brace on 12 July 2024, over four months out of time.

69. With regard to the manner in which the application to amend was made, I noted that the complaint had not been raised in the Claim Form, nor had it been raised before Judge Povey at the preliminary hearing on 26 April 2024. Indeed, I noted that it had only been raised once the Claimant was aware that the claims brought in his Claim Form were facing the prospect of being struck out due to having been brought out of time.
70. With regard to time limits, Underhill J (as he then was) noted, in ***Transport and General Workers Union v Safeway Stores Ltd (UKEAT/0092/07)*** that the Tribunal should have regard to time limits when considering amendment applications, and, if out of time, should consider whether time should be extended. It was noted however that this is "*only a factor, albeit an important and potentially decisive one*".
71. It was also made clear, by the EAT in ***Galilee v Commissioner of Police of the Metropolis [2018] ICR 634***, that, where a new claim is permitted by way of amendment, it takes effect for limitation purposes from the date on which permission to amend is given, and does not "relate back" to the date when the original claim was presented.
72. In that regard, even if a little further leeway is granted to the Claimant, and the date on which the amendment application was raised for the first time is considered as opposed to the date when permission to amend may be given, i.e. the date of this hearing, the matter was still being raised significantly out of time. As I have noted, it was first raised by the Claimant at the preliminary hearing before Judge Brace on 12 July 2024, and even by reference to the last possible date of any act of harassment, was significantly out of time.
73. Also relevant, to my mind, were the prospects of success of any complaint of disability-related harassment. The substance of the Claimant's application related to the continuation of the disciplinary investigation after his resignation on 14 July 2023, and the contact made with him in relation to that up to 27 October 2023. Such a claim is brought under section 26 EqA, which notes:

"(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;

(b) *the other circumstances of the case;*

(c) *whether it is reasonable for the conduct to have that effect."*

74. In his submissions, the Claimant focused his concerns on the Respondent's knowledge that he was disabled at the time, and on Mr Stephen's reference in his report to the Claimant having referred to his disabilities as "*alleged disabilities*".

75. In that regard, the specific comment in Mr Stevens report was as follows.

"During the interview, Lee Cotgreave was focused on reading from his prepared statement. He was determined to inform me of his alleged disabilities, stating that he was a disabled employee with no work place adjustments."

76. In my view, any such claim would have limited prospects of success. Whilst "related" is to be interpreted broadly, there appears nothing to suggest that the Respondent's decision to continue the disciplinary process, notwithstanding the Claimant's resignation, had any connection to his disability. To put it another way, there seems nothing to suggest that the Respondent would have acted any differently in relation to a non-disabled employee in the same circumstances. It is not uncommon, where an employee resigns whilst facing disciplinary action, that the employer will continue its proceedings and will form a conclusion on them, particularly where, as here, there were broader public health issues potentially at issue.

77. I also did not consider that any material criticism would be likely to be established of Mr Stephen referring to the Claimant's "*alleged disabilities*". All Mr Stephen was doing was recording what the Claimant had put to him during the investigatory interview. He was an independent manager who was not in a position to confirm that the Claimant was disabled at that time, and he was simply recording the points the Claimant had put to him during the meeting.

78. Overall, taking into account all the circumstances, I did not consider it appropriate to allow the Claimant's application to amend his claim by adding in a complaint of disability-related harassment, as, in my view, the balance of prejudice lay in favour of refusing the application to amend to add what can only be described as a weak claim.

Time limits

79. The Claimant raised the following broad matters relating to the question of whether his claims had been brought in time, or, if not, the question of whether time should be extended.

80. First, he contended that the Respondent's communications with him regarding the continuation of the investigation led him to believe that his resignation was not legally binding, and that the Respondent had the right to continue his employment.

81. Secondly, he contended that he believed that he was not in a position to present his claim at the time, as the investigation had not been concluded

and he believed that the time limit would have started to run once the investigation reached its end, i.e. on 27 October 2023.

82. Thirdly, that his other Employment Tribunal claim against the Respondent was still proceeding. In that regard, he noted that although judgment was delivered at the conclusion of the hearing on 18 August 2023, the Respondent requested written reasons, which were provided on 26 September 2023. The Claimant then observed that the Respondent had 42 days from then to appeal, which took matters up to 7 November 2023.
83. With regard to those matters, the Respondent's letter of 27 October 2023, was, at its conclusion, confusing, as Mr Probert, on the Respondent's behalf accepted. The reference to the Claimant's employment being "*terminated, effective immediately*" did not reflect the reality of the Claimant's employment having ended on 14 July 2023.
84. However, it was only that communication that was in any way confusing. All other communications with the Claimant after his resignation noted that it had been effective, and that the disciplinary investigation was continuing, notwithstanding that the resignation had been effective.
85. I also noted that the Claimant himself, in his Claim Form, stated that his employment ended on 14 July 2023. Judge Povey also noted in his summary of the case in his record of the preliminary hearing on 26 April 2024, that, "*It is not in dispute that the Claimant has presented his claim out of time*".
86. In my view therefore, notwithstanding any confusion caused by the Respondent's letter of 27 October 2023, it was clear that the Claimant's employment had ended on 14 July 2023, and that time had started to run from that date.
87. I did not consider that the Claimant's other contentions, that he did not think he was in a position to pursue his claims until the disciplinary process had concluded, i.e. 27 October 2023, or until the time for any appeal in relation to his first Tribunal claim had concluded, i.e. 7 November 2023, bore much scrutiny. The Claimant had noted in his resignation letter that he felt that there had been a failure to make reasonable adjustments and that he had been constructively unfairly dismissed, and made specific references to the relevant sections in the Equality Act. He had also previously brought claims under both sections 15 and 21 of that Act.
88. In my view, the Claimant must therefore have been aware that time starts to run in discrimination claims from the date of the act complained of, or, if more than one, the last in a series of acts. Similarly, it is common knowledge that, and, in my view, the Claimant must have been aware that, the time limit for unfair dismissal claims runs from the date of dismissal.
89. With regard to the Claimant's reasonable adjustments claim, as I have noted, section 123(4) EqA notes that, in the absence of evidence to the contrary, a person is to be taken to decide on a failure to do something when either they do an act inconsistent with doing it, or, if they do no inconsistent act, on the expiry of the period in which they might reasonably have been expected to do it.

90. As I have also noted, the Court of Appeal in **Matuszowicz**, concluded that, where an allegation relates to an omission, such as a failure to make reasonable adjustments, the limitation periods operates in the same way, irrespective of whether the omission was deliberate or inadvertent. In both cases, the period runs from when the adjustment should have been made.
91. In that regard, the Claimant noted that the Respondent was aware of the need to make reasonable adjustments at the meeting on 2 November 2022. However, he fairly accepted that the Respondent would not have been expected to have implemented the adjustments there and then. The Claimant did however raise concerns about the failure to make the required adjustments towards the end of January 2023, and noted, at the meeting on 1 February 2023, that the adjustments had not been implemented. He then further complained about the failure to make the adjustments in emails on 19 April 2023 and 9 May 2023. He was then not in work after 31 May 2023 and, as I have noted, his employment ended on 14 July 2023.
92. I considered it likely that, by the start of February 2023, the Respondent would be taken to have failed to make any required reasonable adjustments, and that time should be taken to run from then. If that view is too narrow, I would consider that the failure must have crystallised by 31 May 2024, the Claimant's last day in work, or at the absolute latest, on 14 July 2024, the Claimant's effective date of termination of employment. Even taking the last of those dates, the Claimant's claim was some way out of time.
93. With regard to unfair dismissal, the question is whether it had been reasonably practicable for the Claimant to have pursued his claim in time. I have already discounted the Claimant's explanations for not pursuing his claim at an earlier stage, and the Claimant did not advance any alternative argument that it had not been reasonably practicable for him to submit his claim.
94. The Claimant referenced a fundamental breach of contract and that he had been constructively unfairly dismissed in his resignation letter, and he had already issued proceedings, albeit for discrimination, against the Respondent. In my view, applying **Dedman** and **Porter**, the Claimant knew of his right to pursue a complaint of unfair dismissal, and knew, or certainly ought to have known, of the time limit for pursuing such a complaint.
95. I therefore concluded that it had been reasonably practicable for the Claimant to have pursued his unfair dismissal claim in time, he did not do so, and therefore his claim fell to be dismissed.
96. With regard to the Claimant's discrimination complaint, the Equality Act provides a different test for the extension of time, i.e. whether it is just and equitable to extend. I noted the direction provided by the **Robertson** case; I also focused on the length of and the reason for the delay.
97. As I have noted, my view is that the reasonable adjustments failure crystallised in early February, perhaps the latest by the middle of February, following the Claimant's criticisms of the delays prior to that. The Claimant was well aware of the EqA time limits, having pursued complaints of discrimination arising from disability and failure to make reasonable adjustments against the Respondent in 2022. In my view, he would have

been aware of the need to pursue matters at that stage.

98. Even if the very latest possible date is used, i.e. 14 July 2023, the Claimant's complaint was still pursued significantly out of time.
99. Again, I have already discounted the reasons advanced by the Claimant for not pursuing his claim at an earlier stage, and, apart from those discounted reasons, the Claimant did not advance any other explanation for the delay.
100. In my view, overall the balance of prejudice lay in favour of the Respondent and in not extending time. The delay was significant and the reasons for delay were not compelling. It was therefore, in my view, appropriate not to excuse the Claimant's failure to pursue the reasonable adjustments complaint out of time, and it should therefore be dismissed.

Costs

101. I noted the approach that should be taken in relation to considering applications for costs orders and, as directed by the EAT in Millan, focused first on whether the putative paying party, i.e. the Claimant, had behaved in the manner proscribed by the rules. In this case, that involved consideration of whether the Claimant had been unreasonable in the way he had conducted the proceedings, by not raising the prospect of a disability-related harassment complaint at an earlier stage.
102. In my view, the Claimant did conduct the proceedings unreasonably, in the ordinary sense of that word, by not raising his complaint at an earlier stage. He clearly had a sense, as far back as July 2013, that the Respondent's actions up to then involved, in his view, disability discrimination. Any concerns he had about the post-resignation actions of the Respondent would, in turn, have crystallised by, at the latest, 27 October 2023. He did not however make any reference to those matters, or to any complaint arising from them, in his Claim Form, and he did not raise them at the preliminary hearing before Judge Povey, when the extent of the Claimant's complaints was discussed.
103. However, with regard to the second step required by **Millan**, I was not satisfied that I should exercise my discretion to impose a costs order in this case. I was conscious that the Claimant is a litigant-in-person, and took into account the guidance of HHJ Richardson in the **Holden** case, in which he noted that a self-representing person may lack the objectivity and knowledge of law and practice that a professional representative may bring to bear.
104. In this case, had the Claimant taken advice, he may either have advanced all his claims in his Claim Form, or he may have been dissuaded from pursuing a complaint which, as I have indicated, I did not think had much by way of prospects of success. However, the Claimant did not take legal advice, and I did not consider that he should be punished by way of a costs order in circumstances where, through no fault of his own, he lacked the appropriate knowledge of law and practice.
105. The Respondent's costs application was therefore refused.

Employment Judge S Jenkins
Date: 8 October 2024

JUDGMENT SENT TO THE PARTIES ON 9 October 2024

FOR THE TRIBUNAL OFFICE Mr N Roche

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>