



EMPLOYMENT TRIBUNALS

Claimant Mr C Shancar

Respondent British Telecommunications Plc

HEARD AT: Bury St Edmunds ET **ON:** 20th February 2017

BEFORE: Employment Judge G P Sigsworth

REPRESENTATION

For the Claimant: Mr T Oxtan (Counsel)

For the Respondent: Mr S Proffitt (Counsel)

RESERVED JUDGMENT

1. The Judgment of the Tribunal is that:

- (1) The claims of race discrimination and associative disability discrimination arising prior to the Claimant's dismissal are struck out, as they are brought out of time and the Tribunal has no jurisdiction to hear and determine them.
- (2) The claims of unfair and discriminatory dismissal will proceed to be determined at a Hearing. No deposit order is made.

RESERVED REASONS

1. This preliminary hearing was listed to determine the following issues:

- (i) Whether the Claimant's claims for race discrimination/associative disability discrimination are single or continuing acts;
- (ii) Whether some or all of such claims are therefore out of time;

- (iii) Whether it would be just and equitable to extend time;
 - (iv) Whether some or all of such claims ought to be the subject of a deposit order on the grounds that they have little reasonable prospect of success.
2. The Tribunal heard oral evidence from the Claimant. There was a bundle of documents of some 200 pages which the Tribunal was referred to. The parties' representatives provided written submissions and made oral submissions. There being insufficient time at the end of the hearing day for the Tribunal to reach a determination in the case and deliver a Judgment, the decision was reserved.

CONTINUING ACT

3. The pleaded claim appears in the claim form of 17th August 2016 and in the further and better particulars of claim of 3rd October 2016. The associative discrimination claim is based on the Claimant having caring responsibility for his disabled daughter, in the context of the claims relating to working hours and working patterns. The Claimant alleges that he suffered direct race discrimination because of his colour, in the following respects:
- (i) He was not allowed to work from home from October 2015 until the termination of his employment.
 - (ii) He was forced to make early starts on a full time basis, which started in December 2015 and continued until the termination of his employment.
 - (iii) He was the subject of unjustified criticism of his written skills – report writing, emails etc – relating to his grammar, vocabulary and style.
 - (iv) His employer omitted to increase his pay incrementally in June 2009 through to June 2015, or pay him a bonus in each year.
 - (v) Ms Janet Knox, the Claimant's manager, refused to prosecute his complaints regarding bullying that he says he suffered during the period April 2014 to February 2016, whereas she did prosecute complaints made by white colleagues.
4. The Claimant last attended for work on 4 February 2016, before he was imprisoned (see below) then suspended by the Respondent on 16 February. On 14 April 2016 he was summarily dismissed for alleged gross misconduct. He started ACAS conciliation on 1 July, which ended on 1 August 2016. The claim form/ET1 was presented to the Tribunal on 17 August. It is common ground that, as stand-alone complaints, all the allegations of discrimination (save for the dismissal itself) are brought out of time. They are only brought into time if they are part of 'conduct extending over a period', that period ending with the dismissal. The claims of unfair and discriminatory dismissal are brought in time.
5. The Claimant gave evidence in accordance with his witness statement about the pleaded allegations of discrimination and other matters prior to his

dismissal. Prima facie out of time complaints relate to his performance at work and are capability matters. The managers allegedly involved in these complaints were David Ayton, Robert Grant, Josh Jones and Janet Knox.

On 16th February 2016, the Respondent held an initial investigation meeting with the Claimant, at which he confirmed that; he had been arrested in July 2015; he had been in court on 5th February 2016 and had been convicted of the offence of harassment without violence; he had been sentenced to 6 weeks imprisonment; he had been in prison between 5th and 12th February 2016, and he had not informed anyone at the Respondent of this situation although his lawyer had advised him to do so; his sentence had been reduced to one week and he was appealing the verdict. The Claimant was then suspended pending a disciplinary hearing, in accordance with the Respondent's disciplinary policy. He then faced a number of disciplinary allegations, including dishonesty, failing to comply with company procedures in respect of informing the Respondent that he had been charged with a criminal offence, providing false statements leaving out information as to his whereabouts, absence without authorisation, and failing to comply with absence reporting procedure. The disciplinary process then followed in accordance with the Respondent's procedure, and ultimately the Claimant was dismissed. His appeal against dismissal was not upheld. The managers involved in the dismissal hearing and the appeal, Martin Green and Jim Dempsey, are both senior managers of the Respondent. The dismissal on the face of it was conduct related, and had nothing to do with the Claimant's capability and performance.

The Respondent argues that the Claimant must establish some clear connection between the allegedly discriminatory acts of Ms Knox and others before February 2016 in respect of performance and work arrangements, and the actions of Mr Green and Mr Dempsey. There is on the face of it no or little connection between Mr Green and Mr Dempsey with Ms Knox or any of the others, save that Mr Dempsey takes overall management responsibility at a very senior level for everybody in Ms Knox's team. He is based in Glasgow, and had never met the Claimant until the appeal hearing. Similarly, Mr Green had not met the Claimant before becoming involved in his disciplinary process at the dismissal hearing. The Claimant's team, including Ms Knox, moved over to the line management of a Mr Andy White (whose line manager is Mr Dempsey) from December 2015. Before that time, Mr Dempsey and Mr Green had not had any connection with Ms Knox or the Claimant. Mr Green has never had any line management responsibility for Ms Knox or the Claimant. He has never met Ms Knox.

The Claimant alleges that he requested Mr Dempsey at his appeal to consider his grievance of February 2016 which was raised in respect of the discrimination that he now alleges. The Claimant says that Mr Dempsey was under the misapprehension that his last grievance was presented in 2010, when this was not the case, and Mr Dempsey did not investigate his recent grievance. His written grievances are in the bundle of documents, and date from 18th January 2016 and 15th February 2016.

6. Section 123 of Equality Act 2010 provides that proceedings on a complaint to the Employment Tribunal must not be brought after the end of, (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the Employment Tribunal thinks just and equitable.

Section 123(3) provides that, 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.

I was referred to a number of authorities. In *Hendricks v Commissioner of the Metropolitan Police* [2003] IRLR 96, CA, it was held that in determining whether there was “an act extending over a period”, as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed, the focus should be on the substance of the complaints that the employer is responsible for an ongoing situation or a continuing state of affairs. The Claimant has the burden of establishing such a continuing act or state of affairs.

In *Aziz v FDA* [2010] EWCA CIV 304, CA, it was said that another way of formulating the test to be applied at a PHR is that the Claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs.

In *Moseka v Sheffield Teaching NHS Foundation Trust*, UKEAT/057/13, it was said that to the extent that the complainant complained of a particular line manager’s treatment of her from 2009 to 2010, there might be an argument that that period in time saw a continuing course of conduct or an ongoing discriminatory situation (assuming the Claimant’s allegations were true), but once it had come to an end the subsequent handling of a grievance into that period did not, without more, become part of the conduct.

In *CLFIS (UK) Ltd v Reynolds* [2015] EWCA CIV 439, CA, Underhill LJ said that a composite approach to discriminatory motivation was unacceptable in principle. The Judge was referring to a situation where one manager’s discriminatory motivation could be treated as the ground or part of the ground for the Claimant’s dismissal, albeit that the actual decision maker was another manager. Lord Justice Underhill said that it was fundamental to the scheme of the legislation that liability can only attach to an employer where an individual employee for whose act he is responsible has done an act which satisfies the definition of discrimination. That means that the individual employee who did the act complained of must himself have been motivated by the protected characteristic. The judge saw no basis on which his act could be said to be discriminatory on the basis of someone else’s motivation. If it were otherwise very unfair consequences would follow.

In *Owusu v London Fire and Civil Defence Authority* [1995] IRLR 574, EAT, it was held that in alleging a failure by the employer over a number of years to re-grade him and a failure to give him an opportunity to act up when such opportunities arose, the Claimant was alleging a continuing act in the form of maintaining a practice which resulted in consistent discriminatory decisions.

In *Barclays Bank plc v Kapur* [1991] ICR 208, HL, a relevant factor was whether the Respondent tolerated alleged racist comments/direct disability discrimination, which would be consistent with the existence of a discriminatory regime, practice or principle.

7. Having considered the facts identified and the pleaded case, and the law applicable to these, I conclude that there is no continuing act by reference to the acts of discrimination arising before February 2016 and the dismissal. Prima facie out of time matters relate to performance and capability. The dismissal was for alleged gross misconduct, and concerned a matter of a totally different nature to the performance/capability issues that had arisen earlier. Personnel involved in the alleged earlier discrimination were not the same as those involved in the dismissal and the appeal, and really there is no connection between them except by reference to the overall management chain of this big organisation. The reality was that there was no regular or day to day contact between the disciplinary hearing and appeal managers and the others. Mr Dempsey may have met Ms Knox but only as her ultimate line manager and only after December 2015. Mr Green had never met Ms Knox. If Mr Green and Mr Dempsey were aware, or should have been aware, of the performance issues and the grievances of the Claimant, their failure to look into these or consider or deal with them was clearly not part of any continuing act – see *Moseka*. Further, they clearly had entirely independent reasons and separate justification for taking disciplinary action, in the context of the Claimant's criminal proceedings and his failure to tell them about these proceedings. The case of *Reynolds* holds that the discriminatory conduct of one manager cannot be imputed to another without more. There is simply no or an insufficient link between the actions of Ms Knott and her colleagues and Messrs Green and Dempsey. The non-dismissal allegations of discrimination are therefore not part of 'conduct extending over a period' (in the *Hendricks* sense) capable of linking them forward to the dismissal.

JUST AND EQUITABLE EXTENSION

8. I look at each of the discrimination claims in turn. The claim of failure to increase pay or pay bonus occurred in June 2015, and in the years before that, and therefore that claim is way out of time. Other claims are between two months and six months out of time. The reasons given by the Claimant for his delay in bringing proceedings were that the alleged failings in past performance management of him by Mr Ayton caused him stress, anxiety and mental health issues, and that was a reason why he was not able to bring the claims earlier. He also suffered bullying and harassment, he says, which caused him mental health. He had been off sick from time to time with work related stress from 2013 onwards. There was a delay in the dismissal appeal and a failure to investigate the grievance from February 2016. The Claimant said that he consulted employment solicitors just before he put his claim in to the Tribunal on 17th August 2016, following his receipt of the appeal decision from Mr Dempsey on 16th August. He had already contacted ACAS on 1st July and time had stopped at that point. He had looked at the Employment Tribunal website on 1st July and seen that he could bring claims for disability discrimination and race discrimination, and that was the first

time he says that he was aware that he could make such claims. He also became aware of the time limits for bringing such claims. There is a long letter from his GP, summarising the medical position. The Claimant had time off for work related stress in 2013, and then again in mid to late 2014. There was some time off in 2015, but this was related to family matters, and not work related. In November 2015, the Claimant returned to work and had no further time off.

9. In *Robertson v Bexley Community Centre* [2003] IRLR 434, CA, it was held that there is no presumption that a Tribunal should exercise its discretion unless they can justify failure to exercise it. Quite the reverse. The Tribunal cannot hear a complaint unless the Claimant convinces it that it is just and equitable to extend time, so that the exercise of the discretion is the exception rather than the rule. The onus is therefore on the Claimant to convince the Tribunal that it is just and equitable to extend the time limit.

In *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327, CA, it was held that when considering whether the Tribunal was entitled to find it just and equitable to extend time, the question that must be asked is whether there was material on which the Tribunal could probably exercise its discretion.

In *British Coal Corporation v Keeble* [1997] IRLR 336, EAT, it was suggested that tribunals would be assisted by considering the factors listed in section 33 of Limitation Act 1980. That section requires the court to consider the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case; in particular, 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 co-operated with any requests for information; the promptness with which the Claimant acted once he knew the facts giving rise to the cause of action; and the steps taken by the Claimant to obtain appropriate advice once he knew the possibility of taking action.

Ignorance of rights will only save the Claimant where the Claimant's ignorance is reasonable.

The fact that the Claimant has waited for the outcome of an internal grievance procedure before making a complaint is just one matter to be taken into account by a Tribunal considering the late presentation of a discrimination claim.

10. I conclude that, generally, the Claimant has not provided cogent evidence for the reasons for the delay in presenting his non dismissal discrimination claims. He was not so ill at any given time as not to be able to consider his position with the Respondent, as he was blaming them for his stress and anxiety. There were long periods of time when he was not ill at all, and in particular there was no absence from work because of illness from November 2015. So far as his complaint of ignorance of rights is concerned, the fact is that he was able to research his position on the internet in July 2016, and there is no reason why he could not have done this before that date. He was able to instruct a criminal lawyer, and therefore there seems to

be no reason why he could not also have instructed an employment lawyer. There is prejudice to the Respondent and to the evidence because of the delay, as the complaints on the pleaded case go back to April 2014 and it is understood that some relevant personnel have left the business. There is no or little evidence of the Respondent trying to manage the Claimant out of the business over a long period of time. There is, of course, prejudice to the Claimant if the historic discrimination complaints are struck out, but much less so than otherwise, because the main part of his case is the alleged discriminatory and unfair dismissal which is in time. The other complaints are somewhat added on, and only brought because the Claimant was dismissed. It is very doubtful that they would have been brought to the Tribunal if there had been no dismissal.

11. I therefore strike out the complaints of discrimination (save for the discriminatory dismissal) as being out of time. I have not been persuaded by the Claimant, and the onus is on him, that it would be just and equitable to extend time.

12. I am asked to make a deposit order in respect of the discriminatory dismissal case. I decline to do so. Until the evidence is heard, it is not possible to make any decision on what was the reason for the dismissal, and it is for the Respondent to establish this (for the unfair dismissal claim). On the face of it, the dismissal was for the conduct in the context of the criminal proceedings against the Claimant. However, it will be for the tribunal to determine on the evidence whether there is any taint of discrimination here. It is likely that the Claimant will seek to rely on the historic allegations as background when presenting his claim for unfair and discriminatory dismissal at the Hearing.

Employment Judge G P Sigsworth, Huntingdon

Date: 28th April 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS