THE EMPLOYMENT TRIBUNAL

BETWEEN:

Mr T Sibly

Claimant

-and-

Epsom and St Helier University Hospitals NHS Trust

Respondent

PRELIMINARY HEARING

SITTING AT: **LONDON SOUTH (CROYDON)**

BEFORE: **EMPLOYMENT JUDGE John Crosfill**

ON: **6 June 2017**

APPEARANCES:

For the Claimant: **In person assisted by Ms G McCann**

For the Respondent: **Ms D Nathan in house Solicitor**

JUDGMENT

1. The Respondent's application to strike out the Claimant's claims of direct discrimination is dismissed.

REASONS

2. Ms Nathan on behalf of the Respondent invited me to find that the claims of direct discrimination presented by the Claimant were outside of the time limit set out in Section 123 of the Equality Act 2010. She put her case on the basis that the Claimant relied on 4 incidents as amounting to race discrimination. That the incidents were said to have taken place between July 2014 and 8 February 2015. That last incident relating to a disagreement with a permanent member of staff Shaun O'Brian. She argued that there was no pleaded case that these events formed part of an act extending over a period. She said that the events that gave rise to the Claimant leaving work in July 2017, and formed the basis of claims which she accepted were in time, were so manifestly different both as to their nature and in respect of the individuals concerned that I could safely proceed on the basis that there was no sufficient connection capable of amounting to an act extending over a period.

3. Ms McCann on behalf of the Claimant said that Ms Nathan's submissions were based on a complete misunderstanding of the Claimant's case set out in his ET1 and Further and Better Particulars supplied pursuant to an order of Employment Judge Sage. She accepted that the latter acts were of a different nature to the earlier acts that were described as acts of direct discrimination in the ET1. Her submission was that it was tolerably clear from the pleaded case, read with the further information, that what the Claimant was saying was that his disagreement with Shaun O'Brian and various other white members of staff had not simply arisen and ceased but had given rise to a state of affairs whereby, as and when the Claimant came across these individuals, they would be hostile to him and that the basis of that hostility was race.

4. Ms Nathan rightly pointed out that that at first blush amounted to an expansion of the Claimant's case leaving the Respondent unsure about who exactly it was being said acted as part of the group of white porters hostile to the Claimant. Ms McCann accepted that there was an absence of detail but had assumed that this was the sort of matter that would be dealt with in witness statements. She was however able to identify one paragraph of the Further and Better Particulars which with a benign reading could support her description of the Claimant's case.

5. Clearly if, as a matter of fact there was continuing hostility between a group of white employees and the Claimant and that hostility was because of race then there could be an act extending over a period for as long as that state of affairs continued.

6. The proper approach to an assessment at a preliminary hearing of whether there is or is not an act extending over a period is that set out in ***Aziz v FDA*** **[2010] EWCA Civ 304** in which it was said:

> "34. *One issue of considerable practical importance is the extent to which it is appropriate to resolve issues of time bar before a main hearing. Obviously there will be a saving of costs if matters outside the jurisdiction of the ET are disposed of at an early stage. On the other hand a claimant must not be barred from presenting his or her claim on any issue where there is an arguable case.*

> *35. The Court of Appeal considered the correct approach to this matter in Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548. In that case the claimant complained of 17 incidents of racial discrimination over a period of many months. The question of time bar was dealt with at a pre-hearing review. The claimant gave oral evidence on that occasion. Having heard the claimant's evidence, the ET allowed five of the claimant's complaints to proceed but dismissed the other 12 complaints as being out of time. The EAT and the Court of Appeal both upheld that decision. Hooper LJ gave the leading judgment, with which Hughes LJ and Thorpe LJ agreed. Hooper LJ stated that the test to be applied at the pre-hearing review was to consider whether the claimant had established a prima facie case. Hooper LJ accepted counsel's submission that the ET must ask itself whether the complaints were capable of being part of an act extending over a period.*
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> *36. Another way of formulating the test to be applied at the pre-hearing review is this: 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: see Ma v Merck Sharpe and Dohme Ltd [2008] EWCA Civ 1426 at paragraph 17."*

7. It is implicit in the decision of the Court of Appeal that where an employee surpasses the "reasonably arguable" threshold at a preliminary hearing then it remains open to a Respondent to revisit the point once all of the evidence is presented at the full hearing.

8. I was invited to strike out the direct discrimination claims on the basis that they were out of time and therefore had no reasonable prospects of success. In the alternative I was asked to make deposit orders on the basis that the claims had little reasonable prospects of success. I consider that the question of whether the Claimant can establish that there was ongoing acts motivated by race perpetrated by the group of white porters is essentially an issue of fact. I was faced with an assertion that this was the case. Neither party had prepared for the preliminary hearing on the basis that I would hear evidence and determine facts. I therefore approach the matter as I would any other application for a strike out and take the Claimant's case at its highest. Whether the Claimant can make good this assertion is a matter for the full hearing. At this stage and without hearing the Claimant and his witnesses I am unable to say that he has no, or little reasonable prospects of establishing the facts that he has alluded to in his further and better particulars or that his case that there was a continuing act is not reasonably arguable. I therefore do not strike out the claims nor do I make any deposit orders.

9. I do however agree with the Respondent that it is not fair to simply allow the Claimant to give the details of his claim in witness statements. If the normal practice of simultaneous exchange is followed the Respondent might be severely prejudiced. I considered whether I should make a further order for further information but I consider that that might lead to less rather than more clarity. I therefore below depart from the usual practice of mutual exchange of witness statements and below I have made provision for sequential exchange of witness statements. I should make it quite clear that I do not give the Claimant permission to amend his claim beyond the case advanced in his ET1 and further Information thus far provided.

CASE MANAGEMENT SUMMARY

Listing the hearing

1. After all the matters set out below had been discussed, we agreed that the hearing in this claim would be completed within 10 days. It has been listed at Croydon Employment Tribunal, Montague Court, 101 London Rd, Croydon CR0 2RF to start at 10am or so soon thereafter as possible on 16 to 27 July 2018. The parties are to attend by 9.30 am. The hearing may go short, but this allocation is based on the on the Claimant's intention to give evidence and call up to 5 further witnesses and the Respondent's to call up to 10 witnesses.
2. The hearing shall deal only with issues of liability and any question of whether the Claimant would or might have been dismissed in any event or caused or contributed to his dismissal. It is agreed that unless the Tribunal at the final hearing orders otherwise the Claimant shall give his evidence first.

Discussion and issues

3. The matter had been listed for a Preliminary Hearing in order clarify the issues in the light of the further information provided by the Claimant in response to the Order of Employment Judge Sage and to deal with the time limit point set out above and finally to make Case Management directions to prepare the matter for trial.
4. At the first Preliminary hearing on 11 April 2017 Employment Judge Sage had sought to clarify some of the issues but was unable to do so without ordering the Claimant to provide further information. I had the benefit of that further information and was able to discuss with the parties what issues were to be decided at the final hearing. Accordingly, subject to any decision by the judge at the final hearing the following are the issues to be determined. These were agreed between the parties but the language used is my own.

Unfair dismissal Section 94/98 ERA 1996 claim ("ordinary unfair dismissal")

5. The Respondent disputes that the Claimant was an employee and says that he is a "bank worker". The issues that will have to be determined by the Tribunal are therefore:
    5.1. Whether the Claimant's bank worker status gives rise to a contract of employment governing the entire relationship (an umbrella contract) or
    5.2. Whether the individual occasions of work are themselves done under a contract of employment and; in either case
    5.3. Whether the Claimant can establish that he has the necessary 2-years continuity of service to bring his claim.
6. The Respondent disputes that there has been any dismissal for the purposes of section 95 ERA 1996. The burden of proof is on the Claimant to establish that he has been dismissed.
7. If the Claimant establishes the points above, then the Respondent must show a potentially fair reason for the dismissal. The Respondent relies upon its need to

introduce a fingerprint scanning system which it says gives rise to a potentially fair reason for any dismissal (which it denies).

8. If a potentially fair reason for any dismissal is established the Tribunal will apply the test of fairness set out in Section 98(4) of the ERA 1996.

9. There is no dispute that this claim was presented in time.

Public Interest Disclosure claims

10. The Claimant says that he was dismissed, or his work was withdrawn, for making protected disclosures. Again there is no dispute that this claim was presented in time. He brings this claim under sections 94 and 103A of the Employment Rights Act 1996 on the basis that his primary case is that he was an employee. His alternative position is that if he is not an employee he is a worker as defined in Section 230(3)(b) of the ERA 1996 for the purposes of Part IVA of that act and maintains the same claims under Section 47B and 48 of the ERA 1996.

11. The Claimant says that on 23 June 2016 orally and on 29 June 2016 in an e-mail he disclosed information concerning the treatment of ethnic minority porters being denied opportunities within the Respondent Trust AND being disadvantaged by the installation of a fingerprint scanning device.

12. It will be an issue for the Tribunal, in deciding whether the disclosures fell within Section 43B of the ERA 1996:

    12.1. whether or not that information was disclosed as alleged

    12.2. whether or not the Claimant had a reasonable belief that it tended to show that the Respondent had or was likely to breach the legal obligations imposed by the Equality Act 2010; and

    12.3. whether the Claimant had a reasonable belief that his disclosure was in the public interest.

13. It will be necessary to determine whether the Claimant was an employee and/or worker.

14. It will be necessary to determine whether the Claimant was dismissed or subjected to a detriment of having his work withdrawn as he alleges.

15. If the Claimant was an employee, and was dismissed, it will be necessary to decide whether the reason, or if more than one, the principle reason for the dismissal was because the Claimant had made any protected disclosure.

16. If the Claimant was not an employee but was a worker, and he had his work withdrawn it will be for the Respondent to establish the reason for this pursuant to Section 48(2) of the ERA 1996. If the Tribunal will need to determine whether any decision to withdraw work was on the ground that the Claimant had made a protected disclosure. That is, was the protected disclosure a material influence?

Section 27 of the Equality Act 2010 - Victimisation

17. The Claimant relies upon the same matters as he alleges in his Public Interest Disclosure claims as amounting to protected acts for the purposes of his Section 27 Victimisation claims.

18. The detriment relied upon by the Claimant is the alleged withdrawal of work. It will be an issue for the Tribunal whether as a matter of fact this is made out.

19. The tribunal will need to determine whether or not any withdrawal of work was "because of" any protected act it finds established applying the burden of proof set out in Section 136 of the Equality Act 2010.

Section 13 of the Equality Act 2010 – Direct Discrimination

20. The Claimant relies upon the following acts as amounting to less favourable treatment:

    20.1. Around July to August 2014 a supervisor Julie Walters gave the Claimant and other ethnic minority porters more and more onerous tasks than white porters. The Claimant says that this unfair distribution of work was because of race and he refers to Shaun O'Brian and Ricky Fieldsend as actual comparators; and

    20.2. On 2 August 2014 Tracy Boothroyd said words to the effect that "all muslims are terrorists" and she mocked the manner in which Muslims pray. The Claimant relies on the protected characteristic of religion and compares himself to another employee "Leon" who is a Christian or a hypothetical comparator; and

    20.3. In August 2014 another supervisor, Ms Santos said to the Claimant words to the effect that "if you want to keep your job you need to keep away from these [white] guys". The Claimant says that this was because of race and religion and relies upon a hypothetical comparator.

    20.4. On 8 February 2015 Shaun O'Brian one of the group of white Porters said words to the effect "Tame get the fuck out of my face" and threatened to "Fuck me up". It is the Claimant's case that this incident was part of a course of hostility between this white porter together with others, including the incidents above, which continued until the end of the employment relationship. The Claimant says that this was because of race and compares his treatment to a white employee Ricky Fieldsend or a hypothetical comparator.

21. The issues for the Tribunal will be:

    21.1. Whether the treatment happened as alleged; and

    21.2. Whether any treatment found proven was because of a protected characteristic applying the burden of proof found at Section 136 of the Equality Act; and

    21.3. Whether any acts found to be discriminatory were presented within the time limit imposed by Section 123 of the Equality Act 2010.

Section 26 - Harassment

22. The Claimant relies upon the two incidents above at paragraphs 20.1 and 20.4 as being incidents of harassment on the grounds of race. The issues for the Tribunal will be:

    22.1. Whether the treatment happened as alleged; and

22.2. Whether the treatment created the proscribed environment set out at sub section 26(1)(b); and

22.3. Whether it related to race; and

22.4. Whether any acts found to be discriminatory were presented within the time limit imposed by Section 123 of the Equality Act 2010.

Other claims

23. The Claimant also brought claims for unpaid leave under the Working Time Regulations. The Respondent says that it paid "rolled up holiday pay". The issues set out in paragraph 11 of the order of Employment Judge Sage dated 24 April 2017 should be read as including a challenge to the practice of paying rolled up holiday pay.

24. The claim for breach of contract turns upon whether the Claimant was an employee. If he was what period of notice was he entitled to and was his contract terminated by the Respondent in breach of any such right to notice.

25. The claim for sick pay apparently relates to the fact that bank workers are not paid sickpay. The Claimant challenges the legality of that position. No dates when the Claimant was off sick have been identified and accordingly there may be an issue as to whether the claims are in time depending on the jurisdiction invoked.

26. The Claimant had intimated claims under the European Convention on Human Rights and the Human Rights Act. The Tribunal has no jurisdiction to deal with such freestanding claims although the infringement of human rights may be relevant to the substantive claims above.

Judicial mediation

27. I raised the possibility of this case being considered for an offer of judicial mediation. The Respondent expressed no interest in this as it is constrained in its approach to settlement. The parties were encouraged to consider any appropriate form of dispute resolution.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

Schedule of Loss

1. The Claimant shall, if he has not already done so in compliance with the oral direction given at the hearing, by 2 July 2017 serve on the Respondent a fully particularised schedule of loss in which he should set out the remedy he seeks in respect of each of his claims. If he says that he is entitled to an award for injury to feelings and/or a claim for personal injury he should set out what level of award he contends is appropriate and the reasons why that is the case.

Disclosure of documents

2. The parties are ordered to give mutual disclosure of documents relevant to the issues identified above by list and copy documents so as to arrive on or before

18 July 2017. This includes, from the Claimant, documents relevant to all aspects of any remedy sought.

3. Documents relevant to remedy include evidence of all attempts to find alternative employment: for example a job centre record, all adverts applied to, all correspondence in writing or by e-mail with agencies or prospective employers, evidence of all attempts to set up in self-employment, all pay slips from work secured since the dismissal, the terms and conditions of any new employment.

4. This order is made on the standard civil procedure rules basis which requires the parties to disclose all documents relevant to the issues which are in their possession, custody, or control, whether they assist the party who produces them, the other party or appear neutral.

5. The parties shall comply with the date for disclosure given above, but if despite their best attempts, further documents come to light (or are created) after that date, then those documents shall be disclosed as soon as practicable in accordance with the duty of continuing disclosure.

6. The expression "documents" in this order includes all written documents whether they are in paper or electronic form and so includes e-mails texts messages sent on social media, web pages forums and the like. It also includes photographs, plans and drawings or any description. In addition, it includes any audio recordings. If there are any audio recordings, then they must be transcribed by any party who wishes to refer to their contents. All hand written documents should, unless the cost is disproportionate, be transcribed.

Bundles

7. It is ordered that the Respondent has primary responsibility for the creation of the single joint bundle of documents required for the hearing.

8. To this end, the Respondent shall prepare a draft index for the proposed bundle and supply it to the Claimant by 1 August 2017.

9. The Claimant is ordered to notify the Respondent on or before 15 August 2017 of any additional documents to be included in the bundle at his request. These must be documents to which he intends to refer, either by evidence in chief or by cross-examining the Respondent's witnesses, during the course of the hearing.

10. If any party objects to the inclusion of any document within the bundle then it shall be included at the back of the bundle separately indexed and any such dispute shall be resolved by the Tribunal at the final hearing.

11. The Respondent is ordered to provide to the Claimant a full, indexed, page numbered bundle enclosed in one or more ring binders to arrive on or before 29 August 2017.

12. The Respondent is ordered to bring sufficient copies (at least five) to the Tribunal for use at the hearing, by 9.30 am on the morning of the hearing.

Witness statements

13. It is ordered that oral evidence in chief will be given by reference to typed witness statements from parties and witnesses.

14. The witness statements must be full, but not repetitive. They must set out all the facts about which a witness intends to tell the Tribunal, relevant to the issues as identified above. They must not include generalisations, argument, hypothesis, or irrelevant material.

15. The facts must be set out in numbered paragraphs on numbered pages, in chronological order.

16. If a witness intends to refer to a document, the page number in the bundle must be set out by the reference.

17. It is ordered that the Claimant shall serve all of the witness statements upon which he intends to rely on the Respondent by no later than 26 September 2017.

18. It is ordered that the Respondent shall serve all of the witness statements upon which it intends to rely on the Claimant by no later than 7 November 2017.

19. Each party shall bring sufficient copies (at least 5) of their witness statements to the final hearing.

20. Any party who fails to serve their witness statement in accordance with these orders shall not be entitled to rely upon any witness statement not so served without the permission of the Tribunal.

Other matters

21. The Respondent is ordered to prepare a cast list, for use at the hearing. It must list, in alphabetical order of surname, the full name and job title of all the people from whom or about whom the Tribunal is likely to hear.

22. The Claimant is ordered to prepare a short, neutral chronology for use at the hearing.

23. These documents should be agreed if possible 4 weeks before the date set for the final hearing.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

2. The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge John Crosfill
Date: 21 June 2017