

Reserved judgment



EMPLOYMENT TRIBUNALS

Between

Claimant: Mr J Savage

Respondent: Greenwich Leisure Limited

Heard at London South Employment Tribunal on 8 September 2017

Before Employment Judge Baron

Representation:

Claimant: The Claimant was present in person

Respondent: Victoria Webb - Counsel

JUDGMENT AT A PRELIMINARY HEARING

It is the judgment of the Tribunal as follows:

- 1 That claims of victimisation in respect of any matters occurring before 29 April 2016 be struck out as having no reasonable prospect of success;
- 2 That otherwise the Respondent's application for an order under rule 27 of the Employment Tribunals Rules of Procedure 2013 fails.

REASONS

- 1 On 16 January 2017 the Claimant presented a claim to the Tribunal. At a preliminary hearing on 23 March 2017 I noted the following:

The Claimant was employed as a Facility Manager by the Respondent from 5 May 2015 until he resigned with effect from 10 October 2016. He is bringing claims of constructive unfair dismissal under Part X of the Employment Rights Act 1996 and of direct discrimination, harassment and victimisation under the provisions of the Equality Act 2010. The protected characteristics for the purposes of the discrimination and harassment claims are race and sex. The Claimant is a black male.

- 2 At that hearing I made orders for the purpose of clarifying the factual allegations and how they fitted into the relevant statutory framework. The result was a Scott Schedule to which the Respondent added its comments. On 25 May 2017 the Respondent applied to the Tribunal for orders that claims numbered 1 to 12 inclusive in that document be struck out in accordance with rule 37 of the Employment Tribunals Rules of

Procedure 2013, or in the alternative that an order be made under rule 39 for the payment of a deposit by the Claimant as a condition of being allowed to proceed with the claims or part of them. This document relates only to the application under rule 37 as it is a 'judgment' within rule 1(3)(b)(ii) of the 2013 Rules. Other matters are dealt with elsewhere.

3 There are issues of a lack of jurisdiction because of the statutory time limit. The latest date which could fall within the time limit is 7 September 2016, because the Claimant contacted ACAS on 6 December 2016 under the early conciliation procedure. The certificate was issued on 6 January 2017, and the claim form ET1 was presented on 16 January 2017.

4 Section 123 of the Equality Act 2010 provides as follows insofar as material:

123 Time limits

(1) Proceedings on a complaint within section 120 may 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.

(2)

(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.

5 In the application of 25 May 2017 the Respondent's solicitors referred to allegations numbered 1 to 12 as mentioned above, and said that they contended 'that it would not be just and equitable to extend time for submission of any claims occurring more than three months prior to the Claimant's resignation' which took effect on 10 October 2016. I consider that that is a misunderstanding of the limitation provisions and the correct position is set out in paragraph 3 above. Allegations 15 and 16 appear to me to be also out of time.

6 Miss Webb submitted that none of the events which it is alleged occurred on or before 7 September 2016 when considered with an event after that date fall within the concept of 'conduct extending over a period'. Miss Webb addressed me on items 13 to 19 inclusive in connection with this point. The other relevant factual element is that the Claimant was absent due to sickness during May to August 2016 inclusive.

7 Item 13 in the Schedule was dated 7 August 2016 and was stated to be as follows:

I was brought up on disciplinary after highlighting the suffering and abuse I was going through by senior personnel at the children centre.

Miss Webb accepted that that matter fell within the time limit because a first written warning was issued on 7 September 2016.

- 8 In addition to limitation issues Miss Webb submitted that claims of victimisation within section 27 of the 2010 Act could not succeed because no protected acts had been identified.
- 9 After Miss Webb had completed her submissions I invited the Claimant to explain his position. I also explained the concept of, and requirement for, a protected act to the Claimant. The Respondent had helpfully provided a ‘Cast List’ giving the job description and race of those involved.¹ The relevant details are as follows:

| | | |
|--------------------|---|----------|
| Janet Akinkuole | Senior HE Advisor | Black UK |
| Beverley Bernstein | Children’s Centre Business Manager – oversees Facilities Department | White UK |
| Lee Franklin | Reginal Facilities Manager | White UK |
| Alex Gunn | Maintenance Engineer | White UK |
| Roger Guy | Maintenance Engineer | White UK |
| Margaret Hurle | Children’s Centre Administration Manager | White UK |
| Lynn Manning | Childcare Manager | White UK |
| Tracey Megson | Children’s Centre Operations Manager | White UK |
| Clair Noone | Childcare Manager | White UK |
| Debbie Norris | Children’s Centre Business Manager | White UK |
| Lee Packham | Maintenance Engineer | White UK |
| Lisa Walsh | Strategic Lead, East Children’s Centres | White UK |

- 10 I will deal with each of the allegations in the Schedule in turn.

¹ The race was provided on the basis of how each individual described him/herself. Details of Gary Sobers and Mandy Perkins were not provided.

- 10.1 Allegation 1. This is an allegation of direct race discrimination, harassment and victimisation. It was agreed that this matter related to a meeting held on 10 November 2015. The Claimant alleged he was abused by Beverley Bernstein and Lisa Walsh but only gave details in the Schedule of his allegation against Ms Bernstein. He added orally details of his complaint against both Ms Bernstein and Ms Walsh. The Claimant named Ms Norris, Ms Noone and Ms Hurle as comparators. Miss Webb submitted that they were all in different positions and it was difficult to see how they were comparators for the purposes of section 23 of the 2010 Act.
- 10.2 Allegation 2. The Claimant refers to 'multiple dates and occasions' for this allegation. The Claimant says that he complained to Lee Franklin about the above incident and he is alleged to have commented: 'Well they said you won't make it, because they are strong woman'. This is an allegation of sex discrimination. The Claimant referred to Roger Guy, Lee Packham and Alex Gunn as comparators. Miss Webb said that those comparators were all male, and in a totally different job from that of the Claimant.
- 10.3 Allegation 3. The Claimant says that on 18 February 2016 he was not invited to a SLT meeting and was told by Tracey Megson that 'it was an all girl thing and you are not invited.' Miss Webb submitted that this was just a one-off comment, and pointed out that one of the named comparators was male. The Claimant then sought to expand this claim to refer to other later meetings (to which Miss Webb objected) saying that Alex Gunn was allowed to attend, but it was still a sex discrimination claim. It is also a claim of victimisation.
- 10.4 Allegation 4. This allegation apparently is that on three specified occasions towards the end of June 2015 Ms Bernstein, Ms Walsh and Ms Norris sent out insulting emails and Ms Bearman sent an email to the effect that girls would teach the Claimant a thing or two. This is alleged to be sex discrimination and harassment, and the Claimant named Ms Hurle, Ms Norris and Ms Noone as comparators. It is also an allegation of victimisation. Miss Webb said this allegation was extraordinarily vague concerning the first three named individuals, and that no relevant emails had been found on the dates specified by the Claimant. The Claimant then withdrew the allegation concerning Ms Bearman. He asked to substitute an allegation arising from an email of 6 July 2015 to him from Ms Bearman containing the following:

I'm sure one of the girls would of corrected you on the below anyway but just to reiterate

There was then set out details of the Respondent's purchase order and invoicing procedure. In the circumstances I allow the amendment. There is no material prejudice to the Respondent.

- 10.5 Allegation 5. This allegation relates to training and was initially said to be one of sex discrimination. The allegation as set out in the Schedule was confused as the Claimant appeared to be comparing himself with males in one column and with females in another. Leave was granted to change the allegation to one of race discrimination, and the reference to female comparators falls away. It was also said to be an allegation of victimisation, and I am assuming that that remains. The Claimant alleges that Lee Peckham and Roger Guy were provided with training in late 2014 and early 2015 but the Claimant was refused such training in July 2015. It is agreed that they were junior to the Claimant. The alleged discriminators were Ms Walsh, Ms Bernstein and Ms Megson.
- 10.6 Allegation 6. The Claimant is alleging that his probationary interview due to take place after two months was delayed, that his probationary period was extended, and that he had to cut the grass so that SLT members could see him doing it. This is said to be sex harassment and victimisation by Ms Walsh and Ms Bernstein.
- 10.7 Allegation 7. This is another complaint of victimisation and harassment by Ms Walsh and Ms Megson. The protected characteristic is that of race. It is difficult to understand what exactly is being alleged. The Claimant says that when he was inspecting a building the Respondent uses Ms Megson said: 'Well people in high rise have to take what they get.' Miss Webb said that the allegation was wholly unclear. The Claimant said he had interpreted the comment as being one made on the assumption that high rise buildings are predominantly occupied by black people. It was not about him personally.
- 10.8 Allegation 8. No date was provided by the Claimant. The Respondent believes it to be around June 2015 as it appears to be duplicated in allegation 10 below. The Claimant alleges that he was told by Ms Walsh that he was the most hated person in the Children Centre. This is an allegation of race discrimination, harassment and victimisation. The Claimant has confused the matter by stating that Ms Walsh was responsible, but then adding the names of Ms Megson, Gary Sobers and Mandy Perkins as perpetrators. Ms Norris, Mr Guy, Mr Packham and Lynn Manning were named as comparators. Miss Webb submitted that they were not suitable comparators.
- 10.9 Allegation 9. The Claimant simply says that on three unspecified occasions he was told he was not able to handle strong females. He names the perpetrators as Ms Walsh and Ms Bernstein. It is

an allegation of direct sex discrimination, and the named comparators are Messrs Gunn, Packham and Guy.

- 10.10 Allegation 10. This is an allegation as to an event (or events) on 24 June 2015. What occurred arose from the completion (or non-completion) of a building to be used by the Respondent. The Claimant alleges that the building was not ready to be handed over by the contractor, and that Ms Megson overruled his decision. The Claimant then would not allow the building to be used. The Claimant then repeats allegation 8 as to being told that he was the most hated person. The claims are of harassment based upon the protected characteristic of race, and the alleged perpetrators are Ms Megson, Ms Walsh and Ms Perkins. The Respondent says that it is believed that the issue related solely to a telephone line not having been installed.
- 10.11 Allegation 11. This allegation is one of race discrimination, harassment and victimisation. The Claimant clarified the allegation as covering two issues. The first is that Ms Bernstein was seeking to have him replaced in his role by Mr Gunn. The second is that Mr Guy made it clear he did not want to be lead by a black manager. The dates supplied by the Claimant were 25 November and 16 December 2015. The named comparators were Ms Norris, Ms Manning, Mr Guy, Mr Packham and Mr Gunn. The Claimant also referred in the Schedule to confidential information being handed over, but the allegation is not clear, and the point was not discussed further at this hearing.
- 10.12 Allegation 12. The Claimant says that on 12 April 2016 he was verbally abused and discriminated against at a meeting by Ms Walsh and Ms Bernstein. He says he was referred to as 'the most hated person', 'a bastard', being 'incompetent' and a 'thief'. They also are alleged to have said that the Claimant had been saying that he was being targeted because he was black. Further the minutes of the meeting were said to have been held back by Ms Akinkuole. The Claimant refers to Ms Norris, Ms Manning, Mr Guy and Mr Packham as comparators.
- 11 It is also necessary to summarise the subsequent allegations being made by the Claimant. Mention has been made above of allegation 13 concerning the disciplinary procedure. I now turn to the remaining matters.
- 11.1 Allegation 14. This is an allegation of both harassment on the grounds of sex and race, and also of victimisation. It is against Ms Akinkuole and Ms Norris, and is that the Claimant did not receive and pay during June to August 2016 when he was on sick leave. The Respondent's position is that the allegation is factually correct, and the non-payment was in accordance with its disciplinary policy.

- 11.2 Allegation 15. The Claimant says that on 2 September 2016 he was the subject of racial abuse by his new line manager, Ms Norris, and also by Mr Gunn. The alleged abuse appears to be around statements that black staff cut grass.
- 11.3 Allegation 16. This is a very vague allegation spanning the period from September 2015 to September 2016, but he did refer specifically to 6 September 2016. The allegation is that Ms Bernstein and other senior members of staff went quiet when the Claimant entered the room and staff were not allowed to speak to the Claimant 'when certain managers are in the room.' The alleged perpetrators are Ms Bernstein and Ms Walsh.
- 11.4 Allegation 17. The dates are 7 and 9 September 2016 when the Claimant says that a grievance was not addressed and he was fired. Ms Akinkuole, Ms Norris, Ms Walsh, Ms Bernstein, Mr Franklin and Jeff Lynch are the named alleged perpetrators.
- 11.5 Allegation 18. The Claimant says that on 7 September 2016 he was told by Ms Akinkuole that nothing he could do would succeed because it had to go through her. Further Ms Norris is said to have assured Ms Akinkuole that nothing the Claimant complained about would go further. This is a claim of race harassment and also victimisation.
- 11.6 Allegation 19. This is the final allegation, and it is of an accusation made by Sarah Aldridge and Mr Gunn on 14 September 2016 that the Claimant had sabotaged an inspection of Mulberry Park Children's Centre. Again this is alleged to have been racial harassment and victimisation.
- 12 There is one matter with which I can easily deal. At this hearing the Claimant alleged that he had committed a protected act on 29 April 2016. There was no suggestion of any earlier such act. Whether or not there was a protected act on that date is not an issue which was addressed at this hearing in detail and is not for me to decide. However what I do conclude is that the allegations of victimisation preceding that date cannot succeed and are struck out.
- 13 In the Schedule the Respondent denied the factual allegations. That is a matter which would of course be tested by a Tribunal at any hearing. Other adverse comments were made as to the merits of the claims. Miss Webb submitted that there was not conduct extending over a period so as to bring within the statutory time limit factual allegations which are *prima facie* outside of that limit.
- 14 It is apparent that there are allegations pre-dating 7 September 2016, and the first matter to be considered is whether it is arguable that there was conduct extending over a period. Lisa Walsh is named as an alleged discriminator in respect of each of the allegations numbered 1 to 12, and Ms Bernstein is also named in the majority of them. They are also named in allegations 13 and 17. I am not therefore able to conclude

that the allegations both inside and outside the time limit do not have any individuals in common. That is one material consideration in deciding whether there was a conduct extending over a period.

- 15 The other factor to consider is the nature of the allegations. Unfortunately what the Claimant alleges is not always entirely clear, but I consider the details are sufficient to enable me properly to consider the point. There is some minor duplication, but taking a broad view the Claimant is alleging that he was badly treated (to use a general phrase) in his role as Facility Manager. The legislation before the Equality Act 2010 referred to 'any act extending over a period', and that phrase has been replaced in the 2010 Act by 'conduct extending over a period'. That in my view has made the meaning of the concept clearer, although not making any change of substance.
- 16 I emphasise that this was a preliminary hearing at which the allegations made by the Claimant have to be taken at their face value, unless patently unsustainable. I have decided that I am not able to come to a conclusion on two points. The first is that I cannot now conclude that any allegations relating to matters occurring on or after 7 September 2016 do not have any reasonable prospect of success. The second matter is that I am not able now to conclude that the allegations by the Claimant do not form part of conduct extending over a period, part of which occurred on or after 7 September 2016. In order to strike out the claims I would have to be satisfied on both points. In my judgement the Claimant has an arguable case on both matters, and that is all that is required for current purposes.
- 17 The application therefore fails save in respect of the allegations of victimisation relating to matters before 29 April 2016.

Employment Judge Baron

25 October 2017