



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

**AND**

**Respondent**

Mr K. Praisoody

Tesco Stores Limited

**Heard at:** London Central

**On:** 6 December 2017

**Before:** Employment Judge Mr A. Spencer

## **Representation**

**For the Claimant:** Mr A Hashim, Counsel

**For the Respondent:** Mr O Holloway, Counsel

## **REASONS**

### **Introduction**

1 This case came before me today for a preliminary hearing to determine the Respondent's application for strike-out or alternatively a deposit order in respect of the Claimant's complaints of race discrimination.

2 The Respondent's application was made before the Claimant filed further details of his race discrimination claims and before either the Respondent or the Tribunal knew what specific factual allegations the Claimant was relying on in support of his race discrimination claim.

3 I observed at the outset of this hearing that those further details of claim raised new factual allegations that were not made in the original claim form and which raised the need for amendment of the claim form if the Claimant was to rely on those new allegations.

4 I also identified that when considering an amendment application, the Tribunal ought to consider the question of time limits and whether any new claims were out of time and whether it was just and equitable to extend time.

5 I canvassed the approach to be taken at today's hearing with the parties' representatives and adjourned to allow them to take instructions. The parties agreed to proceed as follows:

5.1 Firstly, for me to consider an amendment application by the Claimant as there was such a disconnection between the facts set out in the claim form and the new facts set out in the Claimant's further details complaint. It was agreed that determination of the amendment application would require consideration of whether any new factual allegations and complaints were out of time and if so whether it was just and equitable to extend time; and

5.2 It was agreed that once I had determined those issues I should go on to deal with the strike-out and deposit order applications. However, now the Respondent has seen the Claimant's further details of claim it concedes that if permission to amend is given it will not be appropriate to strike-out the claims and so the Respondent now seeks a deposit order only.

### **Witness Evidence**

6 I heard evidence this morning from the Claimant. He had not provided a witness statement but gave oral evidence-in-chief. I had the opportunity to see his evidence tested under cross-examination and the opportunity to put questions to him myself.

### **Documents**

7 I considered the documents on the Tribunal file and the documents in a short bundle of documents prepared by the Claimant's representative.

### **Case Chronology**

8 The Claimant was dismissed on or about 8 May 2017. He presented his claim from to the Tribunal on 8 September 2017. In his claim form he ticked boxes to indicate that he was bringing four complaints. Those complaints are of unfair dismissal, race discrimination, failure to pay holiday pay and arrears of pay. However, the factual complaints raised by the Claimant in his claim form can be summarised as follows:

8.1 The Claimant says that he was ostracised after giving a statement to Rachel Chard the Respondent's Group Personnel Manager, that statement being made against Mr Cordan, an operations manager, in March 2015 as part of an investigation into Mr Cordan's behaviour.

8.2 The Claimant also complained of being pressured into returning to work quickly after a hernia operation in June 2015.

8.3 He also complained of being given no support after telling Rachel Chard in January 2016 that he was being harassed and bullied.

8.4 He also referred to having an accident at work in January 2016 in which he broke a bone in his hand complaining that this added to his stress and that inadequate cover was provided by the Respondent.

8.5 The Claimant referred to being accused of not paying colleagues correctly in February 2016 after which he became unwell and was signed off sick and subsequently dismissed for alleged gross misconduct.

9 Those are the factual complaints raised in the claim form. There were no details of race discrimination apparent from the details given in the claim form. Further, no details were given to support or explain the claims for holiday pay and the claim for arrears of pay.

10 The Respondent filed a Response in reply to the claim form. They disputed the claims. Their arguments in the Response can be summarised as follows:

10.1 Firstly, it is said that there was no basis for the race discrimination claim and that it should be struck out; and

10.2 Secondly, with regard to the unfair dismissal claim, it is asserted that the Claimant was fairly dismissed for alleged misconduct following a fair disciplinary investigation and fair procedure; and

10.3 In relation to the claims for holiday pay and arrears of pay the Respondent confirmed that it was unable to identify the Claimant's case from the details in the claim form but denied the claims nevertheless.

11 The Respondent applied to strike-out the race discrimination claim or alternatively for a deposit order to be made. That application is set out in an email to the Tribunal dated 3 November 2017.

12 The Respondent sought to strike-out the race discrimination claim on the grounds that it has no reasonable prospect of success on the basis that firstly the Claimant had failed to demonstrate facts from which the Tribunal could conclude in the absence of an explanation from the Respondent that the Respondent's actions were connected to his race and secondly that the Claimant had failed to identify any comparator for the purposes of a direct discrimination

claim. In the alternative the Claimant sought deposit orders on the same grounds.

13 The Claimant was ordered by the Tribunal to provide further details of his claim and did so. Those details were filed on 30 November 2017. Those details state that the claims of race discrimination are complaints of direct race discrimination contrary to section 13 of the Equality Act 2010 and a complaint of harassment contrary to section 26 of the Equality Act 2010. Particulars of the facts giving rise to those claims are set out in the further details filed on 30 November 2017.

### **The Further Details/Proposed Amended Claim**

14 In the Claimant's further details of his claim, he refers to a series of events spanning from June 2015 to Boxing Day 2015 regarding racially discriminatory remarks alleged to have been made to him by two named managers, a Mr Connell and a Mr Carberry. The Claimant has however confirmed in evidence this morning that the comments made by the two managers actually continued until February 2016.

15 The Claimant confirmed that the final act of discrimination relied on occurred in February 2016. He suggested in cross-examination that he also considered his dismissal to be racially discriminatory. However, after taking instructions the Claimant's representative confirmed that this argument was not pursued further, and the Claimant did not seek to assert that his dismissal was an act of race discrimination.

16 The Claimant asserted in his further details of complaint that the treatment of him by Mr Connell and Mr Carberry amounted to direct discrimination in that white store managers were treated more cordially and more professionally than the Claimant and that the behaviour also amounted to harassment.

### **Applicable Law**

17 The Tribunal's power to either strike-out complaints or to make a deposit orders and the tests be applied to each application are set out in Rule 37 (Strike-Out) and Rule 39 (Deposit Orders) of the Employment Tribunals Rules of Procedure 2013. Rule 37 is no longer relevant given that the Respondent is not pursuing a strike-out application. The relevant part of Rule 39 states under the heading: "Deposit Orders":

*"Where a tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success it may make an order requiring a party, the paying party, to pay a deposit not*

*exceeding £1,000 as a condition of continuing to advance that allegation or argument.”*

18 Turning to the applicable law for an amendment application, the approach to deciding an application for amendment is set out in the judgment of Justice Mummery in the case of **Selkent Bus Co Ltd -v- Moore [1996]**. Those principles are helpfully summarised in the Presidential Guidance on General Case Management issued by the President of the Employment Tribunals in England and Wales 2014.

19 In cases concerning substantial amendments such as this regard must be had to all the circumstances and in particular to any injustice or hardship which would result from allowing the amendment or a refusal to allow it. In deciding whether to grant an application to amend, the Tribunal must carry out a careful balancing exercise of all relevant factors having regard to the interests of justice and the relative hardship that will be caused to the parties by either granting or refusing the application. Those relevant factors include:

19.1 The nature of the amendment to be made. The Tribunal must consider whether the amendments applied for are minor matters or a substantial alteration describing a new complaint; and

19.2 Secondly, the Tribunal must consider the question of time limits. If a new complaint or cause of action is intended by way of an amendment the Tribunal must consider whether that complaint is out of time, and if so, whether the relevant time limit should be extended; and

19.3 Thirdly, the Tribunal should consider the timing and the manner of the application. Allowing an application is an exercise of discretion and delay in making that application and the reasons for the delay are relevant factors in the exercise of that discretion.

20 Finally, turning to the law relating to time limits, there is a time limit under the Equality Act 2010 within which the Claimant must present his or her claims to the Tribunal. The claim must be lodged within the period of three months starting with the date of the act to which the complaint relates subject to extension for early conciliation. That time limit is set out in section 123(1) of the Equality Act 2010. Time will run from the date of the act or omission complained of. However, section 123(3)(a) of the Equality Act 2010 extends time where the discriminatory act concerned is part of a series of acts that extend over a period. In such cases the time limit is taken to run from the end of that period. In other words, the time runs from the date of the last act in a series of acts.

21 If the complaint is out of time the Tribunal has discretion under section 123(1)(b) of the Equality Act 2010 to extend time where the Tribunal considers it to be just and equitable to do so. The burden is on the Claimant to satisfy the Tribunal that its discretion should be exercised in his or her favour. The exercise of that discretion in favour of a Claimant should be the exception rather than the rule. The discretion is a wide one and it is often helpful to consider the factors set out in section 33(3) of the Limitation Act 1980 when exercising that discretion. However, those factors not the only factors that the Tribunal may consider relevant and the Tribunal is entitled to take into account anything that it considers to be relevant.

### **Findings of Fact**

22 Having heard evidence this morning and reviewed the documentation my findings are as follows:

23 The Claimant was employed by the Respondent as store manager. His complaints of race discrimination relate to a series of examples of extremely offensive comments related to the Claimant's race that are alleged to have been made by his two managers; Mr Connell and Mr Carberry between June 2015 and February 2016.

24 The Claimant was signed off sick in February 2016. Although he subsequently returned to work he accepts that after this point in time he did not have further contact with Mr Connell or Mr Carberry and that there are no further examples of racial harassment or discrimination by either man after that date.

25 The Claimant returned to work after a period of ill-health in June 2016 and submitted a grievance using the Respondent's grievance procedure. That grievance is in writing and is dated 12 June 2016. A copy is in the Tribunal bundle. Although the grievance is headed "discrimination and harassment" it made no mention of racial comments at the hands of Mr Connell or Mr Carberry. It is notable that that grievance raised none of the issues that the Claimant now seeks to introduce in his further details of complaint.

26 The Claimant attended a grievance hearing on 23 June 2016. He was supported at that hearing by a union representative. Again, the matters that are now raised in the further details of complaint were not raised by the Claimant at the grievance hearing. The Claimant says (and I accept) that he was told by the Respondent that race discrimination was a serious allegation to make and in the circumstances the Claimant decided not to raise the allegations.

27 The Claimant suggested in evidence today that he did raise the complaints of race discrimination at the grievance meeting and that these complaints were deliberately omitted from the minutes of the meeting. However, I do not accept the Claimant's evidence that there were significant omissions from the minutes of the grievance meeting. That suggestion is not consistent with the facts that the minutes deal with the Claimant's grievances as per his written grievance. The Claimant's evidence is also inconsistent with the fact that the minutes of the meeting are signed not only by the Claimant but also by his representative to confirm their accuracy.

28 I also note that the minutes of the grievance meeting confirm that both the Claimant and his union representative were given an opportunity at the end of meeting to confirm whether there were any other matters to be raised and neither took the opportunity to do so.

29 The Respondent provided a written outcome to the Claimant's grievance which is dated 22 July 2016. The grievance was not upheld, there is no evidence of any appeal by the Claimant against the grievance outcome and the Claimant did not pursue an Employment Tribunal claim at that point in time.

30 The Claimant continued to work until he was off sick for about one month in September 2016. He then returned to work and continued to work until his dismissal in May 2017.

31 The Claimant presented his claim form on 8 September 2017. I refer to what I have said previously about the chronology of the case since then.

32 I accept that the Claimant did suffer ill-health during the period from February 2016 to the date he presented his Tribunal claim. This included mental health problems although it is unclear from the Claimant's evidence precisely what those problems were. However, I am satisfied from hearing the evidence that they did not significantly affect the Claimant and certainly did not prevent him from pursuing an Employment Tribunal claim in the period before September 2017.

33 It is notable that the Claimant was able to work for most of the period, from February 2016 to his dismissal and that the treatment he received from his GP included counselling and sleeping tablets being prescribed without any medication for mental health issues.

34 The Claimant presented his claim in September 2017 as a litigant in person. I accept that it was not until the Tribunal ordered him to provide further particulars of his race discrimination claim that he took advice from Citizens Advice who he first consulted within the last month and who assisted him in

preparing the further details of complaint and also represented him at today's hearing.

35 I made enquiries regarding the Claimant's financial position for the purposes of the deposit order application. The Claimant is currently working between 10 and 15 hours per week. His take-home pay is approximately £360 per month. He receives Universal Credit. Once his rent is paid he has a surplus of Universal Credit of £100 per month giving a net income of only £460 per month. The Claimant lives with his wife who does not work. They have no other sources of income. They do not own their home or have any capital assets or savings. The Claimant has no debts.

### **Conclusions**

36 I start with the amendment application. I considered the factors I identified earlier firstly by considering the significance of the amendment. On any analysis the amendment that the Claimant seeks is a significant amendment. This is not a case where the Claimant is merely seeking to correct some clerical error in the claim form or merely to put legal labels on factual allegations that are already in the original claim form. Instead the Claimant seeks to introduce a number of entirely new factual allegations. The amendments he seeks to make are therefore substantial matters and describe entirely new complaints that were not raised in the original claim form.

37 I also considered the timing and the manner of the application. The application was made extremely late in the day. It was not made until some three months after the Claim Form was presented and some 20 or more months after the events complained of took place. On any analysis it is a late application.

38 It is also of note that the new claims the Claimant seeks to introduce are considerably out of time. The events he complains of are plainly a series of connected events. They involve largely the same people and very similar behaviour and so there is certainly a prima facie case that time runs from the last in the series of events. That means the time began to run against the Claimant from the last complaint in February 2016. The claim is therefore considerably out of time given that the claim form was not presented until 8 September 2017 and the application to amend was not made until the hearing today.

39 I have considered whether it is just and equitable to extend time to allow the Claimant to pursue the additional claims of race discrimination. I am not persuaded by the Claimant that it is just and equitable to extend time. The factors that are of particular importance are as follows:



39.1 Firstly, there is the issue of delay. The Claimant could have presented these complaints in February 2016. He did not do so then or later despite raising a grievance in June 2016 and despite getting an outcome to that grievance in July 2016 and even though the Claimant evidently had trade union support and advice at that point in time. There is a very considerable delay on the part of the Claimant in raising these allegations. They have been raised for the first time in the further details of complaints some 20 months or more since the events complained of occurred; and

39.2 Inevitably the quality of evidence and the recollections of witnesses will have faded in that time. The Respondent does not put evidence before me of any specific prejudice such as the unavailability of witnesses and therefore it is not a factor that is particularly persuasive. However, there will inevitably be deterioration in the memories of those involved which will make a fair trial more difficult.

39.3 I have also taken into account that there is no good reason for the Claimant's delay in presenting this application so late. As I have said he could have presented these claims in February 2016. It could be said it was reasonable for him to await the outcome of his grievance, but he still failed to present these claims in July 2016 when the grievance outcome was known. I accept that the Claimant has suffered ill-health for some of the intervening period, but I am not persuaded that his ill-health was sufficiently grave to prevent the Claimant from pursuing the claim. It is of note that he was able to deal with the grievance in the intervening period and had trade union support.

39.4 The assertion that the Claimant may not have had legal advice until recently is not a persuasive factor in my view. He had trade union support from the outset and there is no reason why he could not have sought advice at an earlier stage.

40 Taking all the matters together I must balance the respective prejudice to the Claimant in not allowing the claims and the prejudice to the Respondent in allowing them. On balance I am not persuaded that it is just and equitable to allow the claims to be pursued so late in the day and I will therefore disallow the application for an amendment on that basis.

41 The deposit order application falls by the wayside given that the race discrimination allegations will not proceed. For what it is worth, I will set out my conclusions in relation to the deposit order application. I would not have been persuaded to grant a deposit order in this case. I take into account the fact that

discrimination cases are fact sensitive and should generally be determined on their merits save in the most clear-cut cases. There is some force in Mr Hashim's arguments that the case law that leans against strike-out of discrimination claims also supports the fact that the Tribunal should be slow to make deposit orders in respect of such claims. There is perhaps some force in Mr Holloway's argument that the Claimant's case is weakened considerably by the fact that he did not refer to the serious allegations of race discrimination during his grievance. That certainly calls for explanation and weakens the Claimant's case. However, I am told that the Claimant's evidence of these allegations can be corroborated by the evidence of other witnesses. Assuming that this is correct and notwithstanding Mr Holloway's arguments I would have been persuaded that the Claimant's case had more than little reasonable prospect of success and therefore avoided the threshold for making a deposit order.

**Addendum to further reasons**

42 After delivering judgment the question of what should happen to the race discrimination claim was canvassed with the parties. The claim had been raised in the original Claim Form by ticking the applicable box on the form. However, no particulars of the claim were given in the Claim Form and the Claimant's application to amend his claim to add those particulars had failed. Notwithstanding this, the Claimant declined to withdraw the race discrimination claim.

43 In the circumstances the Respondent's representative applied for the race discrimination claim to be struck out. The application was opposed by the Claimant's representative.

44 However, I decided to strike-out the race discrimination claim on the basis that it stood no real prospect of success in the circumstances. The Claimant had merely ticked a box in his Claim Form to make a claim for race discrimination. The details of complaint in the claim form contained no allegations that were said to amount to race discrimination. The allegations which formed the basis of the race discrimination claim in the Claimant's further particulars could not be relied on as they were not allowed in by way of amendment. In the circumstances, I accept that the race discrimination stands no real prospect of success and should be struck out.

Employment Judge: Mr. A Spencer on 20 December 2017