EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr A Manuwa	**v**	Tesco Stores Limited

PRELIMINARY HEARING

Heard at: Reading **On:** 9 February 2018

Before: Employment Judge S George

Appearances
For the Claimant: Mr J Sykes (Advocate)
For the Respondent: Mr T Adkin of Counsel

JUDGMENT

1. The claim of constructive unfair dismissal is dismissed on withdrawal.

2. The respondent's application for the claim to be struck out under regulation 37(1)(d) of the Employment Tribunals Rules of Procedure 2013 on the ground that it is not being actively pursued is dismissed.

3. The employment tribunal has no jurisdiction to hear complaints under section 13 of the Equality Act 2010 (hereafter EqA) based on the factual allegations that are set out in issue 7.1.1 and 7.1.2 of the list of issues incorporated in the order of Employment Judge Gumbiti-Zimuto of 5 May 2017 because the claim was not presented within three months of the acts complained of and it is not just and equitable to extend time.

4. Save as provided for in paragraph 3 of this judgment, the application to strike out the claim of direct race discrimination under regulations 37(1)(a) of the Employment Tribunals Rules of Procedure 2013 on the ground that it has no reasonable prospects of success is dismissed. Further orders will be made on issue 7.1.4.

5. The application to strike out the victimisation claims on the grounds that they have no reasonable prospects of success is dismissed. Further orders will be made in relation to issues 8.2.3 and 8.2.4.

REASONS

1. This claim arises out of the claimant's employment as a service and advice assistant in one of the respondent's Tesco Express stores in Aylesbury. The

employment started on 25 April 2012. He was dismissed following a redundancy process that started on 9 September 2016 and at the final consultation meeting of 27 October 2016, he confirmed that he wished to take redundancy.

2. Taking into account the effect of the early conciliation procedures on time limits in this case, any alleged acts which pre-date 22 October 2016 are potentially out of time. The claimant conciliated, starting on 27 October 2016, the same day as that on which he confirmed that was going to take redundancy. His effective date of termination was 5 November and the early conciliation certificate was issued on 7 November. He presented his ET1 on 2 February 2017, originally claiming unfair dismissal, race discrimination, redundancy payment and unpaid annual leave accrued but not paid on termination of employment. The respondent defended the claims by a response that was entered on 25 April 2017.

3. The claims came before Employment Judge Gumbiti-Zimuto on 5 May when he clarified the issues and made various case management orders that appear at page 29 of the bundle. Issue numbers in these reasons refer to the numbering adopted by Judge Gumbiti-Zimuto. The intention then was that the issues relating to jurisdiction and the applications for orders striking out the claim would be considered at a preliminary hearing scheduled for 19 October 2017 and that, provided the claim continued beyond that hearing, the full merits would be conducted between 24 and 26 January 2018.

4. On the occasion of the 5 May preliminary hearing, the complaints for a redundancy payment and holiday pay were dismissed on withdrawal and by email dated 17 October 2017, the claimant withdrew his constructive unfair dismissal claim. I dismiss that on withdrawal today.

5. Pursuant to the case management orders made by the learned Employment Judge, the parties have provided me with witness statements and a slim bundle of documents. Page numbers in these reasons refer to the pages in that bundle. I have a witness statement from the claimant which he has signed. He adopted that in oral evidence and was cross-examined upon it today. I also have a witness statement from Victoria Shelley, who was formerly known as Victoria Eastwood, who is a people partner for the respondent and at the time covered a group of stores which included the claimant's home store. I have also had a written skeleton argument from Mr Sykes on behalf of the claimant.

6. At the start of the hearing, Mr Sykes provided a few additional documents concerning his client's grievance and some internal meetings. He also provided a copy of the claimant's appeal against the dismissal of his grievance and his resignation letter. Mr Adkin did not object to those being put before me today and Mr Sykes drew my attention to some matters in them. As a comment, the manuscript minutes of meetings were difficult to read in places which reduced their evidential value.

7. It was clarified by the respondent that they continued to pursue an application that had been made by email dated 19 September (see joint bundle page 40)

for the claim to be struck out on the grounds that it had not been actively pursued.

Amendment application

8. At the outset of the hearing, it was also drawn to my attention that the claimant's witness statement (paragraph 4) set out a number of matters, some of which expanded upon the claim beyond that which was referred to in the claim form. Two matters in particular, those referred to in paragraph 4C and 4I of the witness statement, it was accepted by the claimant, required an application for amendment which was duly made and I heard that today. I have taken into account submissions by both representatives and my conclusions on the amendment application are set out in paragraphs 8 to14.

9. Properly understood, paragraph 4C of the claimant's witness statement sets out particulars of the consequences to him of the negative review that he said he received. That negative review is something which is included within issue 7.1.3. In that issue, the allegation is that, sometime in 2015, Adam Green and Ollie Eggleton stated that he was not working effectively in a review. As explained in his witness statement, what the claimant says is that Ollie Eggleton refused to sign his review and Adam Green negatively reviewed him despite the outgoing manager's (Dave Long) positive review of his performance.

10. As a consequence, the claimant did not have a "category green" review and that meant that he was not put forward for promotion, unlike a white colleague whose name was Morton. He dates this from approximately 2015. He did have some difficulty in evidence in giving particulars of the date, but it seemed clear, taking his evidence as a whole, that he thought it had happened in 2015 rather than 2016. These particulars do give an explanation of the incident that may at first sight appear slightly different to that which is at 7.1.3 but, in my view, if an amendment is needed there is more in the nature of particularising an existing allegation than making a wholly new allegation.

11. I do take into account that the application is only made at the hearing before me in response to a witness statement that was served in October 2017, despite the fact the claimant was represented by solicitor and counsel at the earlier preliminary hearing. These details did not emerge until the claimant's witness statement was prepared following his conference with Mr Sykes. The claimant explained that in preparation for that he had listened to an audio recording of the particular meeting and that he refreshed his memory.

12. However, in my view the balance of convenience is in favour of allowing this amendment by way of clarification. I think that it is not a particularly significant change but is more particularisation of an existing claim. I allow it to the extent it is necessary in order to clarify the issue. Issue 7.1.3 should be amended to say not merely that the claimant was reviewed as not working effectively but that Ollie Eggleton had refused to sign a positive review and instead given him a negative review with the consequence that he was not eligible for promotion.

13. The other amendment application stems from paragraph 4I of the claimant's witness statement. This is a new allegation that on about 8 April 2016, Ollie

Eggleton declined to act upon his report that a white colleague had hidden two laptops to teach him to guard his delivery better.

14. Again, properly understood, this seems to me to be a situation where the claimant is contrasting his white colleague's treatment with the likely treatment of a hypothetical black employee reported to have taken two laptops. It does not seem that he, the claimant, was treated less favourably in relation to this incident but setting out evidence from which the claimant might seek to infer more favourable treatment of white employees. I therefore think, in particularly taking into account the lateness of the application and the likely inconvenience to which the respondent would be put in having to respond to this new allegation, that the balance of convenience is against allowing the amendment.

Application for Strike Out and Deposit Orders

15. In relation to the application to strike the claim or claims out and, in the alternative, for deposit orders, the claimant's representative argues that in respect of all of the remaining allegations there are factual disputes about the incidents which should be resolved.

16. The respondent's representative draws a distinction between two allegations dating from 2015 which he argues are out of time and cannot be regarded as part of a continuing act and other allegations, some of which he argues to be sufficiently weak that it could be said that they had little reasonable prospects of success.

17. The power to strike out a claim on the ground that it has no reasonable prospect of success comes from rule 31(1)(a) of the Employment Tribunal Rules of Procedure 2013. It is a power to be exercised sparingly, particularly where there are allegations of discrimination. In the case of Anyanwu v South Bank University [2001] IRLR 305 HL, the House of Lords emphasised that in discrimination claims the power should only be used in the plainest and most obvious of cases. It is generally not appropriate to strike out a claim where the central facts are in dispute because discrimination cases are so fact sensitive. Furthermore, there is a public interest in ensuring that allegations of discrimination are heard and determined after appropriate investigation of the circumstances because of the great scourge that discrimination, whether on grounds of race or other protected characteristic, represents to society. It is relevant to bear in mind that s.136 of the EqA provides for a shifting burden of proof and so at this stage the question is whether the claimant has no reasonable prospect of establishing facts from which a tribunal at a final hearing might, in the absence of an explanation, infer that the reason he was not offered employment services was discriminatory.

18. That said, where it is plain that a discrimination claim has no reasonable prospects of success (interpreting that high hurdle in a way that is generous to the claimant), then the tribunal does have and, in a plain and obvious case, may use the power to strike out the claim so that the respondent and the tribunal system are not required to spend any more resources on a claim which is bound to fail.

19. The tribunal may not consider a complaint under ss.39 or 40 of the EqA which was presented more than 3 months after the act complained of or within such other period as the tribunal considers to be just and equitable: s.123 EqA. The discretion to extend the time limit is a broad discretion, although one which must be exercised judicially, and the factors which are relevant for me to take into account depend on the facts of the particular case.

20. In British Coal Corporation v Keeble [1997] IRLR 336 the EAT advised that tribunals should consider in particular the following factors: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had cooperated with any requests for information; (d) the promptness with which the claimant had acted once he or she had known of the facts giving rise to the cause of action; and (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she had known of the possibility of taking action. However the factors to be taken into account depend upon the facts of a particular case. Furthermore, one of the most significant factors to be taken into account when deciding whether to set aside the time limit is whether a fair trial of the issue is still possible (Director of Public Prosecutions v Marshall [1998] ICR 518). It is also important to consider whether there is prejudice to the respondent caused by having to face the late claim.

21. For the purposes of s.123 EqA conduct extending over a period is to be taken as done at the end of the period. This concept, of conduct extending over a period, includes where a number of separate acts are so linked that it can be said that they evidence a continuing state of affairs. At the stage of a preliminary hearing, what the claimant has to show is that, on the face of it, there is sufficient connection between the events that it can be said that there is a reasonably arguable basis for the assertion that the various individual acts are so linked as to amount to a continuing act or an ongoing state of affairs: Ma v Merck, Sharp and Dohme Ltd [2008] EWCA Civ 1426 at paragraph 17.

22. First, I consider the respondent's application for a strike out on grounds of failing actively to proceed with the case. The grounds for this are set out in their 19 September 2017 letter which I have taken into account. I understand why, at that stage, the delay was causing concern to the solicitors representing the respondent. The claimant's solicitors have now provided an explanation. It does not amount to delay which endangers the fairness of the trial and the claim has since got back on track. It therefore does not seem to me to be appropriate to accede to that application and it is dismissed.

23. Turning to the allegations of victimisation, the protected acts upon which the claimant seeks to rely are allegations of racism made orally at a meeting on 5 February 2016 and a written grievance which is dated 23 August 2016 but was handed to the respondent on 17 September 2016. The first two detriments alleged are at paragraphs 8.2.1 and 8.2.2 of the list of issues. These are allegations that, following the complaints that led to the meeting of 5 February, the claimant was given more work to do and was not permitted to take rest breaks. The dates on which this is said to have happened and the identity of the person who is said to have given him the work or refused him permission to take rest breaks are not particularised.

24. The claimant only attests to these allegations briefly in paragraph 7 of his witness statement. Again, we are not told who assigned him more tasks to be performed and to perform on his own when they would usually be completed by a team or who denied him rest breaks.

25. I have taken into account the documents that have been provided by the claimant and so far as is possible to read them, the manuscript notes of a support meeting on 18 June 2016 and an undated meeting that has got five pages which is headed "Next Steps". I am not sure whether these are two sets of manuscript notes from the same meeting or minutes from a subsequent meeting. There are references there that suggest that Mr Green, who was present at the meeting was responding to being faced with these allegations. Mr Sykes argues that these minutes show that there were accusations of racism. To be frank, it is very difficult, particularly at this preliminary stage, to see whether these minutes show anything relevant. The claimant does not in fact say that it is Mr Green who was responsible.

26. Given the vagueness of the allegations I have considered very carefully whether deposit orders should be made in respect of these particular allegations. However, I have concluded that it is inappropriate to use a deposit order when what is actually needed are particulars and therefore I do not make a deposit order in respect of these allegations but the claimant will be asked to particularise the individuals against whom he says these allegations are made and to give more detail about the particular occasions that he relies on.

27. The other detriments which are the subject of the victimisation claim are those set out at 8.2.3 and 8.2.4. They will be the subject of another order and further details of my reasoning appears in that order.

28. Next, I turn to the race discrimination claims. The allegation that is issue 7.1.1 is said, in the ET1, to have taken place "over two years ago". The ET1 was presented in February 2017 and therefore it seems that this allegation dates from at the very latest early 2015 but more likely before. The claimant, in oral evidence, could not be clearer about the date than that. His allegation is that he returned from annual leave to find himself linked to allegations of theft by a maintenance technician. He considers that the only link between him and the maintenance technician is their shared ethnicity and that it was for that reason that he was subject to this distressing speculation. He does not say which of the respondent's employees discussed it and he did not complain about it at the time.

29. The second allegation, issue 7.1.2 concerns something said to have happened in about February 2015, again dating back using the ET1's date as a reference point. This is an allegation that is particularised in 4B of the claimant's witness statement. According to him, he had taken delivery of a box of perfume which he had stowed appropriately but which was then mislaid. Some weeks later, when questions were raised about the whereabouts of the perfume, he was asked by a manager, Ms Sawa, "where is it?". As he describes it, she had an angry tone. He explains that he took this angry question on her part to be a suspicion against him and that he took himself therefore to be suspected of

theft and for that to be on grounds of his race. He did say later he told Ms Shelley about it but she did nothing.

30. The next allegation (at issue 7.1.3) is also dated 2015 in the list provided by the learned Judge at the preliminary hearing. The statement date is a little bit vaguer: it says it is one year and four months before. Working back, that suggests a date sometime before June 2016. However, in his oral evidence today the claimant said that he did not think that this incident had been in early 2016 but that he had in mind that it was in 2015. This is the allegation which he expanded on in paragraph 4C of his witness statement and he says that it led to him not being put forward for promotion. It has been expanded by the successful amendment application before me.

31. The respondent's representative argues that there is a gap between the 2015 allegations and the 2016 allegations (such as issue 7.1.4 – which covers a period of time – and issue 7.1.5 - which is dated from 5 February 2016 onwards). Even if the third allegation (7.1.3) dates from sometime in 2015, the earlier two are late 2014 or early 2015 and early 2015 and there is therefore there does seem to be a gap in time. However, the dates of incidents are not the only way in which allegations may be linked and the claimant's representative argues that I should consider these to be linked by reason of the type of incident and perpetrator.

32. The question for me is whether the claimant has shown a prima facie case that the incidents are linked such that they can be said to be the result of an overarching or existing state of affairs. I am mindful that 7.1.1 and 7.1.2 are the oldest allegations; there is a temporal gap between the second of them and the next allegation which, probably, dates from towards the end of 2015. They are not connected by an alleged perpetrator to the rest of the allegations. I have concluded that on those two grounds there is no such evidence of a link or connection between them such that they are part of an act continuing over a period. The claim has not been presented within three months of these acts and therefore that the employment tribunal has no jurisdiction to hear those complaints or complaints based on those acts unless I consider the it was brought within such period as I consider to be just and equitable.

33. The claimant gave oral evidence about the reasons why he did not present within 3 months, his witness statement being silent as to that. I have considered his explanation and whether the claim has been present within such period as was just and equitable.

34. He was represented by his trade union, USDAW, from 5 February 2016 onwards and although he does not give any evidence about specific advice that they gave him, he certainly had access to advice. He made no complaint about the earliest alleged incident at the time. The respondent's ability to investigate that incident now is therefore prejudiced by the age of the allegation and lack of particularisation. Had he complained at the time then they would have had a contemporaneous opportunity to take statements and make enquiries. I therefore consider that they are prejudiced in relation to this allegation. I have considered the concession which the claimant, very fairly, made that he made a choice at the time not to act in a confrontational way.

This is understandable, but it is relevant that I take that into account when considering the balance of convenience.

35. I have concluded that it is not just and equitable to extend time for those particular allegations, which are not arguably part of a continuing course of conduct, to proceed. The claim was presented on 2 February 2017, approximately 2 years after the date of the alleged incidents. I have concluded that the respondent would suffer prejudice in relation to defending them. The claimant had access to advice which could have advised him about appropriate time limits in the body of his union.

36. However, Issue 7.1.3 is arguably linked to others by the alleged involvement of Mr Green. I have therefore that the claimant has an arguable case that there is an act extending over a period in relation to that and the tribunal does have jurisdiction to consider the allegation that that alleged act, together with the others set out in the Employment Judge Gumbiti-Zimuto's record of preliminary hearing amount to an act continuing over a period or a discriminatory state of affairs.

37. There is then allegation 7.1.5 which is of an alleged failure to act on the complaint that the claimant made about Adam Docherty. This is particularised in paragraphs 4.4D, E, F and G of the Claimant's witness statement. Looking at those paragraphs in the round, I have concluded there is sufficient here to say that the issue does not fail the test of there being little reasonable prospects of success. I also consider that, once the claimant started to make allegations as he did in early February 2016, issues such as those particularised in 7.1.6, 7.1.7 and 7.1.9 may end up supporting each other. For this reason also I do not think that these allegations have little or no reasonable prospects of of success. I therefore I think that those should be permitted to proceed without any deposit order.

38. I have considered 7.1.8, the graffiti, separately. The claimant complains of lack of action. Ms Shelley says that she painted it out herself and the claimant says that he never visited the toilet again. It seems to me that since the claimant is not in a position to refute what Ms Shelley says about it, it is a weaker allegation than those mentioned in paragraph 37 above. However, since it is an allegation of a failure to investigate, it seems possible that the other allegations may end up supporting each other and therefore I do not find that it has little reasonable prospects of success.

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Employment Judge George

Date: … 9 March 2018……..

Sent to the parties on: .....15 March 2018.....