EMPLOYMENT TRIBUNALS

Claimant: Mr S Khan

Respondent: JD Sports Fashion Plc

Heard at: Manchester **On:** 18 May 2018
29 June 2018
(in chambers)

Before: Employment Judge Horne

REPRESENTATION:

Claimant: Mrs Soler, claimant's wife
Respondent: Ms Gould, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The tribunal has jurisdiction to consider the claimant's complaint that the respondent directly discriminated against him by treating him as having failed an induction on 28 June 2017 because of his race. Although the claim was presented after the expiry of the statutory time limit, it is just and equitable for the time limit to be extended

2. The claimant requires an amendment to his claim form to pursue any other allegations of direct race discrimination.

3. Permission to amend the claim form is refused.

4. This judgement does not prevent the claimant from alleging facts relating to the conduct of the respondent's employee on 28 June 2017 as being facts from which the tribunal could conclude that the decision to treat the claimant as having failed the induction was because of his race.

REASONS

The issues for determination

1. On 2 February 2018 the claimant notified ACAS that he was proposing to bring a claim against JD Sports Fashion Plc ("JD Sports"). Early conciliation did not result in any agreement and the claimant obtained his certificate from ACAS the same day. Later that day, the claimant presented a claim form to the tribunal. It was given claim number 2403990/2018. The respondents to the claim were JC Sports and Assist Resourcing UK Limited ("Assist"). The claim against Assist has since been withdrawn. As against JD Sports, the claim was concisely stated as follows:

> "I claim against the refusal from the JD trainer made the 28 June 2017 to become employer. As I was not able from him to complete a written task during the induction. This decision is outrageous and hide racism against my race as I am not white person."

2. There is room for disagreement in this case (see paragraph 39 below) as to when the deadline for presenting this claim expired. What is beyond doubt, and undisputed, is that the deadline had long since passed by the time this claim was actually presented. The issue for me to determine was whether it was just and equitable to extend the time limit until 2 February 2018.

3. During the course of Mrs Soler's oral arguments on this issue, it appeared as if she might be seeking to expand the claim to include additional allegations of discrimination. These allegations are listed at paragraph 27 below. In relation to these allegations I considered further issues:

   3.1. Did the allegations require an amendment to the claim?

   3.2. If so, should such an amendment be granted?

Evidence and Submissions

4. I heard oral evidence from the claimant's wife, Mrs E Soler. Her first language is French, but she told me that she did not need and interpreter in order to conduct today's hearing and give evidence. She did not make a witness statement. Rather, she answered questions from me and from counsel for the respondent, Miss Gould. After having concluded her evidence, Mrs Soler indicated that the claimant himself wished to give evidence. When I asked Mrs Soler what the claimant wished to say, both Mrs Soler and the claimant explained that he wished to describe in detail what happened on 28 June 2017 in order to show that JD Sports had discriminated against him. I indicated that I would not make any finding at this stage as to whether such discrimination had taken place or not. At this point the claimant then agreed that it was no longer necessary to give evidence.

5. The respondent did not call any oral evidence.

6. Once Ms Gould and Mrs Soler had presented their closing arguments, I gave both parties the opportunity to make further submissions in writing. I took this step for two reasons. First, Ms Gould told me that the trainer responsible for the alleged discrimination had left the respondent's employment, but was unable to provide further details. The second reason was that Mrs Soler struggled at times

to make herself fully understood. Both sides then emailed their written closing arguments to the tribunal. The claimant's submissions were dated 29 May 2018 and were accompanied by documents which I read. The respondent's submissions in reply were dated 1 June 2018. I am grateful to both parties for their written and oral arguments.

Facts

7. JD Sports is a large, well-known sportswear retailer, operating out of numerous premises, including a warehouse in Rochdale. Many of its staff are supplied by an employment agency, Assist. The degree of integration of Assist and its agency workers into JD Sports' business is evident from the fact that Assist has its own on-site office in the Rochdale warehouse.

8. The claimant is a Pakistani national. His first language is not English. He is married to Mrs Soler, whose first language is French. Until 3 July 2017, Mrs Soler was employed by Assist to work at the Rochdale warehouse. She has had her own difficulties with JD Sports and Assist and has since ceased to work for them.

9. In June 2017 the claimant applied to Assist so that he could do agency work at the Rochdale warehouse. On 28 June 2017 he attended the warehouse for an induction training day. He was one of a group of people being trained by Mr Jason Howarth. The claimant remembers him because of a tattoo on his neck. Leaving aside, for the moment, whether it would have been apparent to the claimant at the time of the induction who Mr Howarth's employer was, it is now clear that he was actually employed by JD Sports.

10. Part of the induction involved reading, understanding and writing on forms containing written health and safety information. The claimant was told that he had not successfully completed this part of the induction. Consequently, he was not offered any agency work at the warehouse.

11. It is not entirely clear exactly what happened during the next few days. From emails shown to me on the claimant's behalf, it appears (although I make no concrete finding) that on 30 June 2017 Mrs Soler sent a written complaint to JD Sports arising out of the events of the induction day. It also appears that the complaint was acknowledged by Mr Colin McBride on JD Sports' behalf. An email conversation ensued between Mr McBride and Mrs Soler. On 11 July 2017 Mrs Soler sent a further email to Mr McBride. Its wording was not very easy to follow. It did, however, make clear that Mrs Soler was complaining that her husband, the claimant, was a "victim of discrimination and harassment about his race". The email continued,

> "despite two times success for classic test, this trainer takes decision alone for getting the sack my husband for "no ability for fill a form" during a induction … Assist himself writes the decision was taken by this trainer. I need his name, this complaint is outside the company … that give right for my husband to attacks this men in court.."

12. It was reasonably apparent from this email that the claimant was proposing to bring a tribunal claim arising out of the behaviour of the trainer at the induction day.

13. Mr McBride forwarded the claimant's complaint to Steve Rose, contract manager for Assist. In turn, Mr Rose sent the entire email chain back to the claimant with a covering email stating,

> "as you were an employee of Assist Resourcing, any further complaints you may have you should raise them through the correct channels as previously advised."

14. Not unreasonably, Mrs Soler and the claimant understood both JD Sports and Assist to be telling them that if the claimant had any complaints about the conduct of the trainer at the induction day, such complaints were the responsibility of Assist and not JD Sports.

15. On or about 8 September 2017, the claimant received the outcome of the investigation by Assist into his allegations.

16. During the summer of 2017 the claimant and Mrs Soler sought the assistance of the Citizens' Advice Bureau (CAB). At some point over the summer they spent 30 mins in the CAB office talking to a "lawyer". Mrs Soler also did her own research on the internet. She found out that, in order to bring an employment tribunal claim the claimant would have to make contact with ACAS. This was done on 22 September 2017. The claimant gave the details of Assist as the prospective respondent. She did not name JD Sports. She was informed that the time limit for bringing a tribunal claim was 3 months. Early conciliation with Assist broke down and ACAS issued a certificate on 22 October 2017.

17. On 21 November 2017 the claimant presented claim 2423898/2017 to the tribunal, naming Assist as the respondent. He and Mrs Soler completed the form together. The claim form included the following allegation:

> "28 June 2017: I have been refused about my "writing task". JD Trainer says that I am not able for understand health and safety. I understand everything point of the induction, but Assist said that is not their responsibility because it was the JD trainer responsibility. I would like to add that "written task" consists to sign after each sentence to confirm that you understand it. According to them I am not able to sign to my name a paper."

18. It is clear from this passage of the claim form that, by 21 November 2017, the claimant had been informed that Assist was denying responsibility for the actions of the trainer on the induction day. Nevertheless, I accept Mrs Soler's evidence that, at the time of presenting this claim she was finding the tribunal process hard to understand. Neither she not the claimant spoke English as a first language. She could not understand how the claimant's employer could deny responsibility for the actions of a trainer at the place where the claimant was employed to work.

19. Mrs Soler tried again to seek legal advice. She raised a query with Pearsons Solicitors, asking if she was entitled to free legal advice. her enquiry prompted an email from Pearsons dated December 2017. The email stated that there was no free advice available and that the claimant would have to pay for it. I accept that Mrs Soler had no further dealings with Pearsons over the matter.

20. On 22 December 2017, Assist submitted its ET3 response. In relation to the allegation about 28 June 2017, paragraph 10 of the response stated,

> "It is accepted that the claimant failed his induction and this was due to him being unable to complete the written tasks set by the respondent. Such tasks

were required for good business requirements and health and safety requirements."

21. There was nothing in the response to suggest that Assist would deny liability for the actions of the trainer. Indeed paragraph 10 appeared to accept that it was Assist who had set the written tasks which the claimant had failed.

22. During November and December 2017, as well as trying to make progress with the claimant's claim, Mrs Soler was busy trying to find employment. She attended the offices of Get Oldham Working nearly every day to apply for jobs.

23. A preliminary hearing of claim 2423898/2017 took place before Employment Judge Tom Ryan on 26 January 2018. At this hearing, Employment Judge Ryan pointed out that it might not be possible for the tribunal to find Assist liable for discrimination by JD Sports. Mrs Soler said that JD Sports would therefore need to be joined to the proceedings. It was explained to her that she would have to make a proper application and give JD Sports the opportunity to make representations about it.

24. As I have already indicated, the claimant then presented his claim on 2 February 2018 against JD Sports.

25. On 20 March 2018 Mr Howarth's employment with JD Sports ended. He may or may not still be contactable. I do not know one way or the other.

26. Owing to a mistake by the tribunal, when the claimant withdrew his claims against Assist, a judgement was issued in error also dismissing the claimant's claim against the JD Sports. But when the claimant pointed out the error, the case was listed for a reconsideration hearing. It was at this hearing that I had to consider the question of time limits.

27. During the course of the preliminary hearing, Mrs Soler was invited by the respondent to explain the claimant's basis for contending that JD Sports' decision to fail the claimant at induction was because of race. In response, Mrs Soler said that the claimant had been the only Pakistani worker in the classroom. He was the only person who failed the induction. She went on to describe other ways in which the claimant had allegedly been treated less favourably than others because of his Pakistani origin. These other instances of less favourable treatment were:

    27.1. JD Sports has a policy of prohibiting staff from wearing branded clothing. The claimant was wearing a plain cap. Mr Howarth checked the claimant's cap to see if it had a hidden brand label. Others in the warehouse were allowed to wear caps with visible sportswear logos.

    27.2. In front of others, Mr Howarth told the claimant, "you are the wrong guy".

    27.3. Mr Howarth spoke to the claimant about alcohol and drugs differently to the way in which he spoke to others.

28. Mrs Soler gave further information about the claimant's basis for thinking that the respondent was hiding its true reason for failing the claimant at induction. She said that the claimant had been told that he had failed the induction because he had not understood health and safety information that he had been given to read. It is the claimant's case that this reason must have been false. Trainees were given a large amount of written information to read in a short time, then asked to

sign the form without writing anything to demonstrate their understanding. These facts pointed, Mrs Soler said, to JD Sports' not really caring how much health and safety information a trainee could actually understand.

Relevant Law

Overriding objective

29. Rule 2 of the Employment Tribunal Rules of Procedure 2013 sets out the overriding objective as follows:

> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

Adjudicating on claims

30. A tribunal must not adjudicate on a claim that is not before it: *Chapman v. Simon* [1993] EWCA Civ 37.

31. In *Chandhok v. Tirkey* UKEAT0190/14, Langstaff P observed:

> 17. ….Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. ...

> 18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.

32. In *Ali v. Office for National Statistics* [2005] IRLR 201 the Court of Appeal emphasised that, in deciding whether a particular complaint has been raised in a claim form, the tribunal should examine the document as a whole. Merely ticking a box alleging discrimination by reference to a protected characteristic may not be sufficient to raise a complaint of such discrimination if the underlying facts cannot be ascertained from the narrative.

33. In *Amin v Wincanton Group Ltd* UKEAT/0508/10/DA, HHJ Serota QC distinguished between a claim that is "pleaded but poorly particularised" and a *Chapman v. Simon* case, where the complaint is not pleaded at all. In the former case, the claimant is not required to amend the claim. The lack of proper particulars does not affect the tribunal's jurisdiction. The remedy in an appropriate case would be to strike out the relevant part of the claim. It is, HHJ Serota observed, "clearly undesirable that important issues in Employment Tribunal proceedings should be determined by pleading points".

34. In relation to unrepresented claimants, tribunals must not be overly technical in their application of the *Chandok* approach. Where the claim form is capable of being read as including allegations (for example of constructive dismissal, or of dismissal on a different day), and the parties have attended the hearing prepared to deal with those allegations, the tribunal should ordinarily permit those allegations to be argued (*Aynge v. Trickett t/a Sully Club Restaurant* UKEAT/0264/17 at paras 10 and 13). If the claim form cannot bear that interpretation, consideration should be given to an amendment (para 14)

<u>Whether amendment should be granted</u>

35. Guidance as to whether or not to allow applications to amend is given in the case of *Selkent Bus Company v. Moore* [1996] IRLR 661. The following points emerge:

    35.1. A careful balancing exercise is required.

    35.2. The tribunal should consider whether the amendment is merely a relabelling of facts already relied on in the claim form or whether it seeks to introduce a wholly new claim. (Technical distinctions are not important here: what is relevant is the degree of additional factual enquiry needed by the claim in its amended form: *Abercrombie & Ors v Aga Rangemaster Ltd* [2013] EWCA Civ 1148).

35.3. Where the amendment raises substantial additional factual enquiry, the tribunal should give greater prominence to the issue of time limits and whether or not the relevant time limit should be extended.

35.4. The tribunal should have regard to the manner and timing of the amendment.

35.5. The paramount consideration remains that of comparative disadvantage. The tribunal must balance the disadvantage to the claimant caused by refusing the amendment against the disadvantage to the respondent caused by allowing it.

Time limits

36. Section 123 of EqA provides, so far as is relevant:

> (1)… proceedings on a complaint [of discrimination] 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.
>
> …

37. The "just and equitable" extension of time involves the exercise of discretion by the tribunal. It is for the claimant to persuade the tribunal to exercise its discretion in his favour: *Robertson v. Bexley Community Centre* [2003] EWCA Civ 576. There is, however, no rule of law as to how generously or sparingly that discretion should be exercised: *Chief Constable of Lincolnshire Police v. Caston* [2009] EWCA Civ 1298.

38. Tribunals considering an extension of the time limit may find it helpful to refer to the factors set out in section 33 of the Limitation Act 1980 (extension of the limitation period in personal injury cases): *British Coal Corpn v. Keeble* [1997] IRLR 336. These factors include:

38.1. the length of and reasons for the delay;

38.2. the effect of the delay on the cogency of the evidence;

38.3. the steps which the claimant took to obtain legal advice;

38.4. how promptly the claimant acted once he knew of the facts giving rise to the claim; and

38.5. the extent to which the respondent has complied with requests for further information.

Conclusions – time limit

Length of delay

39. There is room for a rather technical debate about the last day on which the claimant could validly have presented his claim against JD Sports. The uncertainty relates to the effect of Section 140B of the Equality Act 2010. Did the claimant's compliance with the early conciliation requirements as against Assist had the effect of stopping the clock in relation to his claim against JD Sports? Depending on the answer to that question, the last day for presenting the claim

could have been 27 September 2017 or 22 November 2017. For the purposes of this hearing, I assume in the respondent's favour that the deadline expired on 27 September 2017 and that the claimant was therefore presented 4 months too late.

40. One curious feature of this case is that the claimant chose to present a new claim rather than amending claim 2423898/2017 to join an additional respondent. It was this latter course that Employment Judge Ryan clearly had in mind at the time of the preliminary hearing. Had the claimant chosen to amend his claim in this way, time limits would not have been an absolute bar. The main focus would have been on the period of delay between actual presentation (21 November 2017) and the application to amend. That delay was just over 2 months. The tribunal would have had to look at the comparative disadvantage that would be caused by granting or refusing the amendment as the case might be.

Reason for the delay

41. In my view the claimant had good reasons for leaving it until 2 February 2018 to present a claim against JD Sports. Here are my reasons:

    41.1. The need to join JD Sports as a respondent arises out of the rather complex scheme of legal liability under the Equality Act 2010 for acts of employees and agents. An employer may be liable for acts of its own employees. It will not, however, be liable for the behaviour of employees of somebody else, such as the employer's client, unless the misbehaving employee can be said to have acted as the agent of the employer. This is so, even if the client and the employer operate on the same premises. These principles of liability are not always easy even for lawyers to understand. Still less are they obvious to employees who try to represent themselves and whose first language is not English.

    41.2. In my view, the claimant was positively misled by Assist and JD Sports into thinking that the claimant's complaint about the conduct of the trainer on 28 June 2017 was the responsibility of Assist. Whilst it appears that Assist may during an internal grievance process have disabused the claimant of that notion, Assist then added to the confusion by appearing to have accepted in its ET3 response that it was responsible for the written test upon which the claimant failed his induction. Assist did not try to deny liability on the basis that JD Sports was the trainer's employer.

    41.3. The fact that the claimant obtained half an hour's worth of legal advice from the CAB and enquired about the possibility of free advice in December 2017 does not stop the above reasons from being good reasons. Half an hour's legal advice is unlikely to have enabled the claimant to know that the claim should have been brought against JD Sports rather than Assist.

Effect of the delay

42. In her well-focussed submissions, Miss Gould for the respondent reminded me that the evidence in relation to this claim is likely to include the testimony of witnesses whose memories may have faded. This is an important point. Some of the new allegations of discrimination are based on conversations about drugs and alcohol and about a decision to check a particular item of headwear. The comment, "you are the wrong guy" could have discriminatory or entirely innocent meaning depending on its context. The delay in bringing the claim against JD

Sports will undoubtedly have made it harder to find the facts in relation to these specific allegations. On the other hand, the evidence concerning the decision to treat the claimant as having failed the induction is less likely to lose its cogency as a result of a few months' delay. The induction information which the claimant allegedly failed to understand was in writing. The ways in which the claimant attacks the respondent's reason for failing him is based upon the content of the test papers themselves. I would be surprised if large organisations such as JD Sports and Assist do not keep records of agency workers who attended health and safety inductions. It ought to be possible when examining those records to gain an idea of the ethnic profile of the trainees in the classroom on 28 June 2017. Such evidence ought to make it easier to test the claimant's assertion that he was the only Pakistani worker in the room.

43. JD Sports argues that the delay has put them to a specific disadvantage because Mr Howarth has since left his employment with JD Sports. I disagree. Any difficulty caused by Mr Howarth's departure was not caused by the delay in naming JD Sports as a respondent. Had the claim against JD Sports been presented by 27 September 2017 it is highly unlikely that Mr Howarth would have still been employed by time of the final hearing. The respondent would have had to try and trace him to give evidence in any event.

44. This brings me to a more nuanced argument about the effect of the delay on the evidence of Mr Howarth. JD Sports argues that it has lost its opportunity to interview him at a time when the events were fresh in his mind. In my view, this objection has some force in relation to any of the specific allegations about his behaviour if they are pursued as separate complaints of race discrimination. The respondent's argument has less force, however, in relation to the only allegation of discrimination that is actually contained in the claim form. Mr Howarth should have been interviewed within a short time of Mrs Soler's email of 10 July 2017. He should have been asked about his decision to treat the claimant as having failed the induction. Any reasonable investigation would also have included such questions as whether anybody else had failed their induction and what their ethnicity was. Any disadvantage caused to JD Sports by the lack of a contemporaneous interview has little to do with the delay in presenting the claim against JD Sports, at any rate so far as that claim concerns the decision to treat him as having failed the induction.

Promptness with which the claimant acted

45. In my view the claimant acted promptly in trying to seek legal advice. Once it was made clear to him that he had brought a claim against the wrong respondent he acted promptly in presenting a new claim to the tribunal.

Overall balance

46. Having considered the various factors, my view is that the balance tips in favour of allowing an extension of time. If the only allegation of discrimination is that which appears in the claim form, a fair hearing will still be possible. The effect of the delay on the quality of the evidence is not as serious as JD Sports make it out to be. It would be unfair to deprive the claimant of the opportunity to bring this claim when it is not his fault that he was misled into pursuing it against the wrong respondent.

Conclusions - amendment

47. I return to the specific allegations of less favourable treatment that I have listed at paragraph 27 above. Whilst it will be for the tribunal conducting the final hearing to evaluate the evidence, it appears to me at least arguable that, if these allegations were proved as facts, a tribunal would be able to conclude from those facts that the reason for failing the claimant at induction was because of his race. The tribunal ought therefore to consider them as part of the background.

48. It was not clear whether the claimant was actually seeking to amend his claim to include these allegations as separate acts of direct discrimination. In case that is the claimant's intention, I have considered whether the allegations would require an amendment to the claim. In my view an amendment would be required. It is quite clear to me that only one act of less favourable treatment was complained of. That was the decision to fail the claimant at induction.

49. I have therefore gone on to consider whether an amendment ought to be granted. My view is that it should not. These allegations were made to the tribunal for the first time nearly one year after the date on which the discrimination is alleged to have occurred. There is nothing to suggest that they were included as separate allegations of discrimination at the time that the claimant raised his internal complaints to JD Sports and Assist. They do not feature in claim 2423898/2017. As I have already indicated, memories about these specific incidents are likely to have faded. It is one thing to have to rely on fading memories to address peripheral points that might point to whether different less favourable treatment was discriminatory. It is quite another thing to have to rely on the same evidence in order to defend a claim that those incidents themselves were acts of discrimination for which JD Sports might be held liable. The balance of disadvantage points clearly in favour of refusing the amendment. The only allegation which should proceed to a final hearing is that which is contained in the claim form, namely the failure of his induction.

Employment Judge Horne

Date: 6 July 2018

JUDGMENT SENT TO THE PARTIES ON

12 July 2018

FOR THE TRIBUNAL OFFICE