Case Number: 3201731/2018

RA

EMPLOYMENT TRIBUNALS

Claimant: **Mr HD Saxena**

*** Respondent:** **Power Leisure Bookmaker Limited**

Heard at: **East London Hearing Centre**

On: **1st February 2019**

Before: **Employment Judge A Ross (sitting alone)**

Representation

Claimant: Mr S Saxena (Brother)

Respondent: Ms G Leadbetter (Counsel)

JUDGMENT

The unanimous judgment of the Employment Tribunal is that: -

1. **The Claimant's application to amend, set out in the application dated 16 November 2018, is refused.**

2. **The complaints of direct race discrimination set out at 4.3.1 and 4.3.2 of the list of issues in the Preliminary Hearing Order dated 7 November 2018, are struck out for want of jurisdiction.**

3. **The complaint of direct discrimination set out at 4.3.3 and the complaint of harassment at 4.10 to 4.11 of the said list of issues will proceed to trial.**

REASONS

The Preliminary Hearing

1. This preliminary hearing was listed to consider (1) an application to amend by the Claimant; (2) whether the claim should be struck out for want of jurisdiction, having regard to the relevant statutory time limit; and (3) whether striking out or deposit orders should be made.

2. The Claimant was represented by his brother (whom I will refer to as Mr Saxena in these reasons). The Respondent was represented by Counsel who had attended with a skeleton argument. Mr Saxena had refused to accept the skeleton argument and so had not read it. I explained the use of written submissions was not unusual and could assist both parties and the Employment Tribunal. I put the matter back 30 minutes to enable Mr Saxena to read the skeleton argument (he had thought 20 minutes should be sufficient).

3. On resuming the hearing, I invited Mr Saxena to call the Claimant to give evidence. I explained the purpose behind paragraph 6 of the case management order dated 7th November 2018 was that the Claimant himself could prepare a witness statement. Mr Saxena explained that the Claimant and himself had misunderstood this order and obtained a witness statement for a potential witness about the incident of the 31 July 2018, which was sought to be added by way of amendment.

4. Mr Saxena requested an adjournment to discuss this with the Claimant and whether he wanted to give evidence. I put the matter back. Before I did so, I pointed out that the evidence from the Claimant was likely to be necessary if he was going to be able to establish jurisdictional facts to show whether the claim was brought within such further period as was just and equitable, if the Respondent's case that the complaints were out of time succeeded. I explained to the parties that I could only decide to exercise my discretion to extend time if there was evidence that it was just and equitable to extend the time for bringing the claim. Mr Saxena returned and called the Claimant to give evidence.

5. At various points in his evidence, the Claimant referred to his mental state during 2018, due to alleged stress arising from the incidents in January 2018. The Claimant did not produce any medical evidence. Whereas I accepted the Claimant experienced stress arising from matters at work in 2018, I did not accept that it led to symptoms of an impairment which prevented or reduced his ability to present a claim in time, for the following reasons: his claim form contains detailed particulars (and was presented on 8 August 2018); he was able to construct a second grievance against Ms Goodwin in a detailed email of 19 August 2018; he had been in contact with ACAS from April 2018; and he had sought legal advice from the Citizens' Advice Bureau.

6. There was a bundle of documents prepared for the Preliminary Hearing by the Respondent (p1-88). Page references in these Reasons refer to that bundle.

Findings of fact

7. The Claimant was originally employed in the Respondent's East Ham Station branch. The Claimant was transferred by the Respondent to the Plashet Grove branch from 19 February 2018.

8. On 25 January 2018, the Claimant filed a grievance against Claire Goodwin (district manager) and Mr Darr (branch manager). The grievance (p56-64) alleged that Ms Goodwin was guilty of bullying and aggressive behaviour. The grievance did not allege that Ms Goodwin acted because of the Claimant's race or ethnicity. The grievance ended with the Claimant's expectations of the Human Resources function of the Respondent (p36):

> "*I am reaching out to you because HR are the best people to understand common issues in workplace and understandably we all need support. The place where I work now is East Ham and I want to work in same branch without being forced to work elsewhere. I would have considered legal action against Claire for harassment but I believe I have faith in HR and Paddy Power. It is with this request I suggest that we all sit in one meeting to address issues constructively and without threats but for finding a common ground, building new process and discipling Claire and Max for such conduct*".

9. The Claimant alleged the Respondent deliberately delayed dealing with his grievance, but there was no persuasive evidence of this before me. It is correct there were delays such as Human Resources did not respond to the grievance for about 17 days. The Claimant was also responsible for some delay, such as by objecting to Mr Simpson on the grounds that he was not independent, because he was the same level in management as Ms Goodwin; as a result, an alternative independent officer, Mr Rickus, had to be appointed. In any event, the grievance interview with Mr Rickus took place on 7 March 2018. After this, as the notes make clear, Mr Rickus was to interview the two managers complained of and three other witnesses.

10. By a grievance outcome letter, dated 27 April 2018, the grievance was not upheld in respect of Ms Goodwin and insofar as it was upheld in respect of Mr Darr, it was found that there was a personality clash.

11. By grounds of appeal dated 2 May 2018, the Claimant requested the evidence collected by Mr Rickus during his grievance investigation. The grounds of appeal finish as follows (p71):

> "I am the victim and how you have responded is making me feel like I am wrong to reach out to company against someone who is senior in organisation and I will not stop until she is held accountable. I have not considered hiring legal counsel yet but if need be I will be hiring to defend my rights to work fairly. This is not a threat but it is a clear indication that I trusted HR to deal with my claim honestly. This is clearly not happened. I feel this is adding insult to my injury as many of the evidences are still there and you have chosen to put it down as no evidence."

12. This shows that the Claimant knew he possibly had some form of legal redress and a "claim".

13. This is likely to be because in April 2018, whilst waiting for the grievance decision, the Claimant was advised by Mr Saxena to consult ACAS. The Claimant consulted ACAS by telephone on three of four occasions, in April 2018, although he could not recall exact dates due to the stress he felt at the time. ACAS gave certain information about the Equality Act 2010 including that there were 9 protected characteristics. The Claimant states that this was when he realised that he was the victim of race discrimination.

14. The Claimant's evidence was that when he gave ACAS "specifics", he learnt that there was a time limited for bringing such complaints. I asked when this was. The Claimant stated that this was in an email from Gary in ACAS who explained that the Claimant had three months to claim but he could not recall the date of this. Given the issues to be determined at this preliminary hearing and even allowing for the fact that the Claimant was represented by a non-lawyer, Mr Saxena (who is an accountant), I found it inconsistent for this email not to be produced by the Claimant, unless it pointed to him knowing the time limit at a relatively early stage in the chronology of events.

15. Moreover, I found it likely that the Claimant would have found out at an early stage, when discussing protected characteristics with ACAS, that the venue for bringing claims was the Employment Tribunal. I found it unlikely that ACAS did not mention time limits for raising complaints in the Employment Tribunal at a relatively early stage of the Claimant's enquiries with them, when it was appreciated that the Claimant was considering an Employment Tribunal claim. Further, the Claimant admitted looking at the ACAS website in about April 2018.

16. I find that the Claimant knew of the time limit at the latest, at some point between receiving the grievance outcome letter of the 27 April 2018 and before he lodged grounds of appeal, on 2 May 2018, whether from the telephone calls with ACAS or the email from Gary at ACAS, or from the ACAS website. The reference to "my claim" in the grounds of the appeal demonstrates to me that discussions with ACAS had reached an advanced stage by that point.

17. The Claimant said that he had faith in HR of the Respondent, but it is clear from the grounds of appeal that by the 2 May 2018, he had no faith in HR to deal with his complaints "honestly".

18. The Claimant stated that by 2 May 2018, he was over emotional, stressed and unable to explore his options. I did accept that he was emotional and had some stress at this time, but not that these factors stopped him from exploring his options. After all, he had already spoken to ACAS on three or four occasions and applied for an early conciliation certificate on 26 May 2018.

19. This finding is supported by the fact that the Claimant approached the Citizens Advice Bureau at the end of May or the beginning of June 2018 and found that he was not eligible for assistance.

20. The Claimant could have included the complaint concerning 31 July 2018 incident when he lodged his claim on 8 August 2018. I found the Claimant was able to do so; I rejected his evidence that he was unable to do so due to stress symptoms or a tendency to "hibernate" as he put it. The Claimant went on annual leave at or about this time. The Claimant's evidence was that during his holiday, he realised this incident was part of a continuing act of intimidation and harassment. I did not accept ***that evidence. On his evidence, at that time, he had had no legal advice so it was odd that he should have concluded that a continuing act, a term special to the Employment Tribunal jurisdiction, existed. Moreover, if he did think this, it was inconsistent that there was no mention of a continuing act in his ET1 when it was lodged.

21. The Claimant was assisted by Mr Saxena to formulate his ET1. The process was that the Claimant told him facts and Mr Saxena committed them to writing. The ET1 particulars are 10 pages long. Given that the Claimant was able to give instructions for a such a long and detailed set of particulars, it was unlikely that his mental state was such that he could not have done so for the incident on 31 July 2018. This finding is corroborated by the fact that the Claimant put in detailed grievance about the 31 July 2018 incident on 19 August 2018 (see pp87-88).

The law

22. The power to amend is a general case management power (at Rule 29 of the 2013 Rules of Procedure). I need to consider whether to grant or refuse the application to amend is in accordance with the Overriding Objective.

23. The power to amend is a judicial discretion to be exercised "in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions": see *Selkent Bus Co v Moore* [1996] IRLR 661, to which I was referred. I have reminded myself of the guidance provided by Mummery J (as he then was) in *Selkent*. In short, whenever the discretion to grant an amendment was invoked, a tribunal should take into account all the circumstances, including the nature of the amendment, the applicability of time limits and the timing and manner of the application, before balancing the hardship and injustice of allowing the amendment against the injustice and hardship of refusing it.

24. I remind myself that the circumstances to be taken into account will vary depending on the case.

25. In order to determine whether the amendment amounts to a wholly new claim, as opposed to adding or substituting a new cause of action linked to or arising out of the same facts as the original complaint, it will be necessary to examine the case as set out in the Claim to see if it provides a causative link with the proposed amendment. I need to consider whether the new complaints are a wholly new claim or whether they are a rectification or expansion of the original claim.

26. In *Abercrombie & Others v Aga Rangemaster Ltd* [2014] ICR 209. In particular, per Underhill LJ:

> "48. Consistently with that way of putting it, the approach of both the

> Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are C already pleaded permission will normally be granted"
>
> Underhill LJ continued:
>
> "50. Where the new claim is wholly different from the claim originally pleaded the claimant should not, absent perhaps some very special circumstances, be permitted to circumvent the D statutory time limits by introducing it by way of amendment. But where it is closely connected with the claim originally pleaded - and a fortiori in a re-labelling case - justice does not require the same approach".

Applicability of time limits

27. Time limits are required to be considered where there are entirely new claims unconnected with the original claim as pleaded.

28. Where a new cause of action is added, it is dated back only to the date of the application to amend, *not* to the date of the original ET1, which may cause such problems with the time limit for that cause of action (i.e. there is no doctrine of 'relation back' in an Employment Tribunal): *Galilee v Commissioner of Police for the Metropolis* [2018] ICR 634.

29. If there is a time limit issue in relation to the application to amend, there is no absolute rule that it must be definitively decided before the amendment can be granted; it may be sufficient for the claimant to show a prima facie case that he or she will be able to satisfy the time limit point later: *Galilee v Commissioner of Police for the Metropolis* applied in *Reuters Ltd v Cole* UKEAT/0258/17.

Jurisdiction: Time Limits

30. Section 123 Equality Act 2010 states that:

> "*Proceedings on a complaint within section 120 may not be brought after the end of*
>
> *(a) The period of three 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.*".

31. Section 123(3) EA provides: -

"*Conduct extending over a period is to be treated as done at the end of the period.*"

32. A distinction is to be drawn between a single act (which may have continuing consequences) and a continuing act arising from a policy, rule, scheme or practice operated over time: *Barclays Bank v Kapur* [1991] ICR 208.

33. I reminded myself that Tribunals should not take too literal an approach to the question of what amounts to continuing acts by focusing on whether the concepts of policy, rule, scheme or practice fit the facts of the particular case. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period." Instead, the focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs in which female officers were treated less favourably: *Hendricks v Commissioner of Police for Metropolis* (2003) ICR 530 at para 54.

34. Although I have considered *British Coal Corporation v. Keeble* [1997] IRLR 336, the principles to be applied in the application of section 123 EA 2010 have recently been summarised in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 1840. The principles to be applied when considering the exercise of the discretion within section 123(1) EA are as follows:

34.1 The exercise of a tribunal's discretion is the exception rather than the rule. The Tribunal cannot extend time unless the Claimant convinces the Tribunal that it is just and equitable to do so: see *Robertson v. Bexley Community Centre* [2003] IRLR 434 at para 25.

34.2 The Tribunal's discretion to extend time under the "just and equitable" test is the widest possible discretion: *Morgan* at paragraph 17.

34.3 There is no justification for reading into the statutory language any requirement that the Tribunal must be satisfied that there was a good reason for the delay, nor that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal must have regard: *Morgan*.

34.4 If a claimant gives no direct evidence about why he did not bring his claims sooner a Tribunal is not obliged to infer that there was no acceptable reason for the delay, or even that if there was no acceptable reason that would inevitably mean that time should not be extended: *Morgan* at paragraph 25.

34.5 Factors which are almost always relevant to consider when exercising any discretion whether to extend time are:

(a) the length of, and reasons for, the delay and

(b) whether the delay has prejudiced the respondent (for example, by

preventing or inhibiting it from investigating the claim while matters were fresh).

See *Morgan* at paragraph 19.

Striking out and deposit orders

35. Rule 37(1)(a) contains a power to strike out where all or part of a claim or response has no reasonable prospect of success.

36. A case should not generally be struck out when the central facts are in dispute: *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126.

37. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances. In *Anyanwu v South Bank Students' Union [2001] IRLR 305, HL*, a race discrimination case in which preliminary questions of law—res judicata and statutory construction (RRA 1976 s 33(1))—had occupied the tribunals and courts on four occasions, Lord Steyn put forward the proposition against striking out in terms almost amounting to public policy, when he stated (at para 24):

> *"For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest*."

38. Further, Lord Hope of Craighead stated (at para 37):

> " … *discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence*."

39. In *Anyanwu*, Lord Hope also observed that the time and resources of the tribunal should not be taken up by hearing evidence in cases that are bound to fail. This point was also recently re-emphasised by the Court of Appeal in *Ahir v British Airways Plc* [2017] EWCA Civ 1392, paragraph 16. In Ahir, it was held that discrimination claims could be struck out, even where there was a dispute of fact, where there was no reasonable prospect of the facts necessary to establish liability being established.

40. Rule 39(1) confers a power to order a party to pay a deposit where all or part of a claim or response has little reasonable prospect of success.

Conclusions

41. Applying my findings of fact and the above law, I have reached the following conclusions on the preliminary issues before me.

(1) The application to amend

42. By an oral application made at the preliminary hearing on 7 November 2018, the Claimant applied to amend his claim which had been presented on 8 August 2018, to include a complaint of harassment which he alleged had occurred on 2 August 2018. Case management orders were made for the application to amend to be put in writing by 16 November 2018.

43. In the formal amendment document dated 16 November 2018, the Claimant indicated that he had got the date of the incident wrong at the preliminary hearing and having checked, the incident he sought to rely on occurred on 31 July 2018. No point was taken on this.

44. Objection was taken, however, to the fact that the Claimant was trying to amend to add a victimisation complaint as well as a harassment complaint from the same facts. I investigated what protected act was alleged. Mr Saxena pointed to the grievance of 18 January 2018, and said that the incident of 31 July 2018 was retaliation after the appeal decision. From the appeal outcome letter, the Claimant did not raise the allegation of race discrimination against Ms Goodwin in the grievance appeal (see p84).

The nature of the amendment

45. The Respondent contended that the Claimant was seeking to raise an entirely new claim, covering new factual matters. It is true that the new complaint is a complaint relying on new factual matters, However, the balance of hardship requires me to review all the circumstances.

46. Mr Saxena used this incident of 31 July 2018 to argue that I should treat all the incidents leading to this complaint as part of a continuing act and this act was part of a continuing act over time. I did not accept the argument that there was a continuing act in this case, in the form of a state of affairs existing up to and including 31 July 2018. I explain why below. This was a new factual allegation not referred to in any way when the claim form was presented just eight days after the alleged incident. A substantive amendment was proposed.

47. The fact that this allegation was not contained in the claim as originally drafted is inconsistent with the detail set out in a fairly long set of particulars attached to the ET1. There was no plausible reason why it should have been omitted from those particulars.

48. I concluded by inference that, on realising the issue was taken by the Respondent in respect of time limits and jurisdiction, the Claimant sought to add this additional complaint in an attempt to make an argument that there was a continuing act. Mr Saxena appeared to believe that if added by an amendment, this complaint would be in time and make all the other complaints in time. This is a misunderstanding

of the law.

The applicability of time limits

49. The new allegation was on its face out of time. The last day of the three-month period was 30 October 2018. Mr Saxena appeared to submit that this complaint would be in time if the amendment was allowed. Applying *Galilee*, it would be out of time in respect of both the harassment and victimisation complaints. This is a factor weighing against allowing the amendment.

50. I did not find that it would be just and equitable to extend time for this complaint. This was because, well before 31 July 2018, the Claimant knew of the three month primary limitation period. Moreover, the Claimant presented a claim on 8 August 2018 and there was no good reason why this further compliant could not have been included.

51. Further, the Claimant could have applied to add this complaint well before 5 November 2018 preliminary hearing, such as on or after the grievance email of 19 August 2018.

The timing and manner of the application

52. I considered the overriding objective and noted that it included as factors that claims would be dealt with expeditiously and in such a way as to save expense. The Claimant did make this application at the first preliminary hearing, before which date the final merits hearing had not been listed and the issues were not defined.

53. I balance this against the finding that there was no reason why this allegation could not have been included in the original claim. It was after all included in an email to Mr Smeaton, HR manager, in August 2018.

54. Even if I had accepted that the Claimant had “hibernated” to such an extent that he could not submit his complaint as part of the claim of 8 August 2018, I would have found that he could have included this complaint in the claim on or about 19 August 2018, when he emailed Mr Smeaton with the allegation.

55. In addition, the allegation set out at the 16 November 2018 had expanded and now incorporated an allegation of victimisation. According to the note of the Regional Employment Judge at the preliminary hearing, this had not been raised before the draft amendment was filed on 16 November 2018.

The balance of hardship and justice

56. I accept that there would be some hardship to the Claimant if the amendment were not allowed. I also take account of the fact that the Claimant is a litigant in person and represented by a non-lawyer. However, this degree of hardship or injustice is very limited given that the Claimant knew of the complaint and the time limit at all relevant times. Moreover, the Claimant has other complaints which may proceed subject to my decision on those other issues.

57. In contrast, the key factors of the nature of the amendment, the statutory jurisdictional time limit and the timing and manner of the application also shift the balance in the Respondent's favour. In addition, although the Respondent would be able to address the additional complaint with witnesses already giving evidence, I accept that this would add to the cost of preparation and potentially add at least something to the time estimate of the hearing.

(2) Jurisdiction: the time limit in Section 123 Equality Act 2010

58. The Claimant's complaints are set out in the list of issues in the preliminary hearing order dated 7 November 2018. The complaints identified at the preliminary hearing were on their face brought outside the statutory three-month time limit within Section 123 (1) Equality Act 2010.

59. Before me and in the amendment application, the Claimant had contended that the incident on 31 July 2018 was part of a continuing act and an intimidatory or harassing state of affairs. I found that the complaints at 4.3.1 and 4.3.2 and 4.10 to 4.11 of the case management summary were not presented within the primary limitation period of three months for the following reasons;

59.1 The Claimant transferred to another branch from 19 February 2018. The last date on which the race specific comment by Mr Darr at 4.11 could have been made was 18 February 2018.

59.2 Therefore, in respect of the alleged incidents in January and February 2018 the last day on which the Claimant could have contacted ACAS and extended the primary limitation period was 18 May 2018.

59.3 The Claimant did not contact ACAS until 26 May 2018 therefore there was no prospect of the Claimant getting any extension of time to present a claim under the early conciliation provisions.

59.4 The claimant received the early conciliation certificate on 10 July 2018. The Claim was presented on 8 August 2018 which was almost 6 months out of time, in respect of these complaints.

59.5 I have considered whether there was a continuing act in this case, in the sense explained in *Hendricks.* I concluded that there was not for the following reason:

59.5.1 The allegations from January and February 2018 and that at 4.3.3 of the list of issues involve different alleged perpetrators. In the claim there is no allegation that they are acting together but rather an allegation that Ms Goodwin is showing favouritism to Mr Darr because they used to work together.

59.5.2 Moreover, the complaint concerning non-disclosure in the grievance process, which must occur at some point between the January - February 2018 incidents and 31 July 2018 incidents, involve the HR team, who are not part of the line

management of the Claimant at all.

59.5.3 The Claimant moved to a different branch from 19 February 2018 and could not have been subject to any detriment by Mr Darr after that.

59.5.4 There appears to be nothing connecting the incidents of January and February 2018 and the incident of 31 July 2018, save that Ms Goodwin was alleged to treat the Claimant in a derogatory manner on these two occasions.

59.5.5 The balance of evidence points to there being a series of individual acts albeit with continuing consequences rather than a continuing act.

Whether it would be just and equitable to grant an extension

60. I have considered the guidance in *Robertson v Bexley LBC*, *Morgan*, and *British Coal Corporation v Keeble*. In respect of the allegation at 4.3.1 and 4.3.2 of the list of issues (direct race discrimination in respect of Ms Goodwin), I have concluded that it would not be just and equitable to extend time for the following reasons:

60.1 There was no good reason for the delay in bringing the claim. I have explained above when the Claimant knew or could have taken steps to find out the primary limitation period. I treat this as a mere factor weighing against the Claimant and note that it is not conclusive.

60.2 Even after learning of the primary limitation period the Claimant delayed in making the claim. There was a distinct lack of promptness even allowing for the fact that he is a litigant in person.

60.3 These allegations will require detailed factual analysis to assess primary facts to see why Ms Goodwin did what she did. There must be at least some prejudice to the Respondent, given the passage of time and recollections albeit would be modest in this case.

60.4 As noted in the striking out section of this set of Reasons, these complaints appear to be misconceived, because the stated reason for the alleged treatment is not race but favouritism.

60.5 I accept the Claimant will lose half his complaints if there is no extension of time, but I balance this against the fact that half of his complaints will remain.

61. In respect of the allegation of harassment at 4.10 and 4.11 of the list of issues, I take a different view and find that it would be just and equitable to extend time. This is for the following reasons:

61.1 The same factors about lack of good reasons and lack of promptness in bringing the claim apply and weigh against the Claimant.

61.2 In this allegation, however, the Respondent's own investigation concluded that Mr Darr was likely to have made an insulting, race-specific comment: see paragraph 43 of the Grounds of Response. Therefore, there is likely to be a far more limited factual enquiry, because the Respondent appears to accept the Claimant's evidence to some extent.

61.3 The Respondent carried out an investigation at the time and had an interview with the alleged perpetrator, in which Mr Darr admitted making an apparently insulting comment (specific to race or ethnicity, and described as a "joke"). There is clearly documentary evidence. Given this, there is little or no prospect that the cogency of the evidence will be affected by any delay.

61.4 Given also that the Respondent found the insulting remark was made by their employee, the merits of the complaint must be better than in the case of 4.3.1 and 4.3.2 where the Claimant has the burden of showing less favourable treatment and that there is something more in order to shift the burden to the Respondent of showing the reason why the act took place.

61.5 In respect of the complaint of harassment at 4.10 and 4.11 there is no need to show less favourable treatment and the race or ethnicity specific nature of the comment demonstrates that it was related to race or ethnicity.

Issue 4.3.3

62. In respect of the allegation at 4.3.3 of the list of issues, the list fails to identify when the refusal by, or failure of, the Respondent to give the Claimant copies of all the evidence relating to the grievance in respect of Mr Darr took place. The Respondent's skeleton is silent as to whether this complaint is out of time.

63. Having studied the particulars of the claim attached to the ET1 (p17), it is alleged that Mark Smeaton refused to hand over evidence in respect of the grievance against Mr Darr. At page 18, the particulars state Mr Smeaton had a document that stated the Claimant needed the evidence. Before me, in evidence, the Claimant stated Mr Smeaton had refused to provide this evidence. According to the particulars of the claim Mr Smeaton was part of the final appeal hearing of the grievance. In the response, it is confirmed that in the grievance appeal outcome letter dated 17 July 2018, Mr Smeaton had refused to provide details of his investigations into other staff members. From the grounds of appeal of 2 May 2018 (p70), this is the first time at which the Claimant appears to request the evidence for the grievance decision. By email of 25 June 2018, Mr Smeaton informs the Claimant as follows (p76);

> "*I note that one of your desired outcomes is disciplinary action to be taken against Claire Goodwin and Max Darr, I would again advise at this point that where allegations are raised by an individual against another employee, they are investigated but for data protection and confidentiality reasons the outcome of these investigations will not be shared with the individual who raised the*

allegations, I just want to manage your expectations".

64. The actual decision by Mr Smeaton to refuse the disclosure of the investigation is made on 17 July 2018 in the grievance outcome letter (p83 at number 4).

65. This complaint therefore is in time.

(3) Strike out or deposit application

66. The Respondent indicated that it only sought to strike out the complaints concerning Ms Goodwin or sought a deposit order in respect of these.

67. In respect of the complaints and issues at 4.3.1 and 4.3.2, direct race discrimination allegations concerning Ms Goodwin, I find that these two complaints have no reasonable prospect of success even if the Tribunal had jurisdiction to determine them. My reasons are follows.

68. The claim (as opposed to the list of issues which cannot be used to amend the claim) pleads the following; (p154):

> "*Claire Goodwin has racially discriminated by favouring my East Ham station branch supervisor Max Darr as we both are from British Asian ethnic background. Claire Goodwin in prior employment has likely worked with Max Darr and she has on numerous occasions ignored Max's incompetence,…, breach of polices several times, changing shifts of all team members by hiding behind an excuse of his health issues for which he has never given any medical certificates or recent status. He continued to push evening shifts on me and other teams who were equally frustrated by his actions despite being branch supervisor who should be closing the branch. Claire continued to favour to him by pushing me out of the East Ham branch to Plashet Grove branch because I was able to see what wrongdoings he was doing including theft and secondly Max Darr racially abused client and me*."

69. In addition, the claim states: (p18)

> "*This was all done because Claire Goodwin shielded Max Darr and his given discriminated against me. Max Darr is a British Asian male and so I am I. Therefore, we share common ethnic race-Asian*."

70. Given those pleaded allegations, it can be seen that the Claimant cannot have been treated in a less favourable way than Mr Darr because of his race or ethnicity for the following reasons:

70.1 The Claimant is relying on the fact that Mr Darr and himself are both British Asian. There is no distinction in the claim between British Asian of Pakistani ethnicity and the Claimant being British Asian of Indian ethnicity.

70.2 Moreover, the claim alleges that the less favourable treatment complained of is caused by favouritism of Ms Goodwin from her time working with Mr Darr.

71. It appears that at the time of the grievance, the Claimant did not think that Ms Goodwin had treated him less favourably because of race, because the grievance of 25 January 2018 and the appeal does not allege race discrimination against her.

72. In my judgement, this is therefore a plain and obvious case for striking out of these two allegations.

Conclusion

73. My conclusions to the preliminary issues dealt with today are as follows:

73.1 The application to amend is refused.

73.2 The complaints of direct race discrimination set out at 4.3.1 and 4.3.2 of the list of issues are struck out for want of jurisdiction.

73.3 The complaint of direct discrimination set out at 4.3.3, and the complaint of harassment at 4.10 to 4.11, of the list of issues will proceed to trial.

Employment Judge Ross

13 May 2019