HC

EMPLOYMENT TRIBUNALS

Claimant: **Mr Mohemmed Nadeem Ullah Khan**

Respondent: **Primark Stores Limited**

Heard at: **London Central Employment Tribunal** **On:** **22 May 2019**

Before: **Employment Judge H Clark (sitting alone)**

Representation

Claimant: Ms C Hadfield - Counsel

Respondent: Ms T Barsam - Counsel

JUDGMENT FOLLOWING OPEN PRELIMINARY HEARING

It is the judgment of the Tribunal that:

1. The Respondent's application to strike out part of the Claimant's claims on the basis that they are out of time, is refused.

Further it is ordered:

2. The Claimant's application to amend his Claim Form to add one additional allegation of having made a protected disclosure (allegation "e" on the agreed list of issues) is allowed. The balance of his application is refused.

REASONS

1. By a Claim Form presented on 3 October 2015 the Claimant made a number of claims arising of his employment by the Respondent and the termination of it of religion and belief discrimination, race discrimination, victimisation, whistle-blowing detriment, unfair dismissal, wrongful dismissal and unlawful deduction from wages. This Preliminary Hearing was listed to consider the Respondent's application dated 26 February 2019 to strike out some of the Claimant's claims on the basis that they were out of time.

The Proceedings

2. For the purpose of this hearing the Tribunal took account of the contents of a bundle of documents running to 172 pages prepared by the Respondent. The Tribunal was also provided with witness statements from the Claimant (drafted at the hearing) and of Ms H Buller on behalf of the Respondent. The Claimant's witness statement addressed issues relating to extending time to present his claim. Ms Buller outlined the potential evidential prejudice to the Respondent if time were extended. It was not necessary for either witness to give evidence. I am grateful to both Counsel for their oral submissions and to Ms Barsam for her written skeleton argument.

3. The thirteen allegations of less favourable treatment/detriment/harassment are set out in the agreed list of issues at numbered paragraph1(c) at sub-paragraphs (a) to (m). In summary they are as follows:

(a) From 5 February 2011 various allegations of aggressive/bullying behaviour by NC (and NvC) such as removing the Claimant from the shop floor and cancelling training courses.
(b) On 2 December 2011 NvC threatening the Claimant in a meeting and telling him to "get lost out of his office."
(c) After moving to the Oxford Street West Store, being bullied by FO, including being shouted at and not being permitted to attend training.
(d) A store manager's (SB) failure to carry out an appraisal for the Claimant from 2012 onwards.
(e) Prior to February 2012, Area Manager, CA's reducing the Claimant's Sunday overtime.
(f) On 24 April 2012, the Regional Controller South's (SG) deciding to move the Claimant to Oxford Street West Store.
(g) Subjecting the Claimant to an improper disciplinary investigation for allegedly being rude to a manager on 3 May 2013.
(h) Delaying the outcomes and appeal outcomes of the Claimant's 8 grievances.
(i) Adopting unfair and biased processes in respect to all the grievances and producing biased outcomes.
(j) Suspending the Claimant on 18 August 2014
(k) The HR Director's (FC) refusal without reasonable cause to accept or investigate the Claimant's grievance of 13 February 2015
(l) Subjecting the Claimant to an unfair and biased disciplinary process which led to his dismissal.
(m) On 17 June 2014, being told by NB to "get out of my office" in a hostile tone.

The Issues

4. This hearing was listed to consider an application by the Respondent dated 26 February 2019 to strike out parts of the Claimant's claim on the basis that he had no reasonable prospects of persuading the Tribunal in the full merits hearing that they were in time or that it would be just and equitable to extend time. The Claimant applied to amend his Claim Form to add additional protected disclosures. This application was opposed by the Respondent.

The Law

5. The Tribunal's power to strike out a claim or part of it is derived from rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 where a claim has "*no reasonable prospects of success*". It is a draconian power, since it deprives a party of the opportunity to have certain issues fully aired in the Tribunal. It is well established that a Tribunal should be slow to strike out a discrimination claim (*Anyanwu v South Bank Student Union [2001] ICR 391*). Discrimination claims are fact sensitive and often turn on what inferences it is appropriate to draw from primary evidence. This can be too nuanced an exercise to perform at a preliminary hearing on limited evidence. However, that is not to say that a discrimination claim or assertion which is prima facie implausible should never be struck out.

6. The substantive law concerning discrimination time limits is contained in section 123 of the Equality Act 2010. The relevant parts of the section provides that:

"

(1) *"Subject to sections 140(A) and 140B, 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.
(2) *….*
(3) *For the purposes of this section –*
(a) conduct extending over a period is to be treated as done at the end of the period;"

7. In *Commissioner of Police of the Metropolis v Hendricks* [2003] ICR 530, the Court of Appeal cautioned against determining issues related to acts extending over a period at a preliminary hearing, with limited evidence. However, there may still be cases in which it is appropriate to do so and that the Claimant must show a "prima facie case" that a complaint is part of an act extending over a period. Mummery LJ at paragraph 48 explained that a Claimant was entitled to pursue her claim beyond a preliminary stage if she proves, "*either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period."* This was in distinction to a "*succession of unconnected or isolated specific acts"*, for which time would run from the date when each act occurred (paragraph 52). This definition was preferred to expressions such as institutionalised discrimination or a climate or culture of discrimination. If the final act of discrimination in a series is itself out of time, it might be appropriate to strike out.

8. The Tribunal was also referred to *Aziz v FDA [2010] EWCA 304* in which Jackson LJ reviewed the authorities on the corresponding provision concerning continuing acts in the Race Relations Act 1976. At paragraph 36 he stated, "*Another way of formulating the test to be applied at prehearing review is this: the claimant must have a reasonably arguable basis for the contention that the various complaints also linked as to be continuing acts or to constitute an ongoing state of affairs*:" The authority for that proposition was *Ma v Merck Sharpe and Dohme Ltd*

[2008] EWCA Civ 1426. In considering whether separate incidents form part of an act extending over a period one "*relevant but not conclusive factor is whether the same* individuals *or different individuals were involved in those incidents: see British Medical Association v Chaudhary UKEAT/1351/01/DA."*(paragraph 33). He continued at paragraph 34, "*one issue of considerable practical importance is the extent to which it is appropriate to resolve issues of time bar before a hearing. Obviously there will be a saving of costs in matters outside the jurisdiction of the ET disposed of at an early stage. On the other hand, the claimant must not be barred from presenting his or her claim on any issue where there is an arguable case."*

9. The time limit for a whistle-blowing claim is set out in section 48 of the Employment Rights Act 1996, namely, it must be presented:

> "*(a) before the end of the period beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or*
>
> *(b) Within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable the complaint to be presented before the end of that period of three months."*

10. The Tribunal was referred to the case of *Arthur v London Eastern Railway Limited [2007] IRLR 58*, which held that for acts to be part of a "series of similar acts" for the purposes of section 48, they need to be both similar in nature but also temporally linked.

Factual Background

11. The Claimant's employment with the Respondent started on 17 August 2002, when he worked in a shop in Tooting as a retail operative 4 hours per week. His early years of employment appear to have been uneventful and the Claimant secured a number of promotions up to February 2010 when he was appointed Assistant Store Manager at the Respondent's store in Croydon.

12. The Claimant's first grievance was raised in June 2011 in which he alleged that he was being undermined by the Store's Deputy Manager (NC) and the HR manager, who he suggested were involved in an affair (which they denied). The Claimant also alleged that both these members of staff were fraudulently claiming wages to which they were not entitled. This grievance (A) was not upheld.

13. The Claimant raised a second grievance (B) whilst at the Croydon store against the store manager (NvC) who he said had acted aggressively towards him and that his conduct towards the Claimant had deteriorated after his grievance against NC. This grievance was not upheld. The Claimant appealed both grievance outcomes which were heard together at a meeting on 24 January 2012. These appeals were dismissed and, the Claimant was transferred to the Respondent's Oxford Street West store. The reason for this transfer relied upon by the Respondent was that the Claimant's grievances and conduct towards some of his colleagues in Croydon had damaged his working relationships. It was considered that a "fresh start" with a new management team was needed to avoid a breakdown of the relationship between the Claimant and Respondent (paragraph 9 of the Response Form). The

Claimant regards his enforced transfer as an act of discrimination/detriment.

14. The Claimant started work at the Oxford Street West store in July 2012 and over the following 18 months raised four additional formal grievances, the outcomes of which the Claimant appealed. In the course of 2014, the Claimant's conduct is alleged to have deteriorated and he was accused on more than one occasion of being obstructive and aggressive in his dealings with colleagues. When he refused to attend an investigation meeting on 18 August 2014, he was suspended. In the course of his suspension, he raised five further grievances, which were not upheld. After some difficulties in arranging a date for a disciplinary hearing, it was held on 19 March 2015 and 21 April 2015. The outcome of that hearing was that the Claimant was summarily dismissed. This was communicated to the Claimant in a letter dated 5 June 2015. An appeal against that decision was dismissed on 16 October 2015.

15. The Claimant started to experience symptoms of anxiety and stress in 2012 and was referred for two series of CBT paid for by the Respondent's private health insurance in 2012 and 2013. The Claimant has been taking anti-anxiety medication since 2012 and was referred to an Occupational Physician by the Respondent in January 2014. He has had three more sessions of CBT following his suspension. Following his dismissal, the Claimant has been diagnosed with PTSD.

16. When the Claimant's Claim Form was received by the Employment Tribunal, REJ Potter determined that it was in a form for which could not sensibly the responded to. She, therefore, instructed the Respondent in a letter dated 29 October 2015, to confine its response to the claims for unfair dismissal and outstanding wages. The Claimant had completed the Claim Form himself and had included a number of grievances that he had raised with the Respondent between 2011 and 2015.

17. The Claimant's discrimination and whistleblowing claims were rejected on 10 February 2016. With the assistance of Solicitors, by letter dated 24 February 2016, the Claimant successfully applied for a reconsideration of the rejection of his discrimination claims, but not the whistleblowing claims. A subsequent case management hearing on 8 April 2016 noted that the Claimant would need to seek leave to amend his claim in relation to any protected acts which were not set out in his Claim Form. On 2 February 2018 the EAT set aside the Tribunals' judgment dated 4 February 2016 and 8 April 2016 and remitted the case back to the Employment Tribunal for a further case management hearing to identify the claims and issues. At a further case management hearing on 30 November 2018 there was still a lack of clarity in relation to the list of issues. A list of issues was finally agreed on 14 February 2019.

18. Ms Buller explained in her witness statement that six of the employees who it would be necessary for the Respondent to call to give evidence to defend itself against some of the claims brought by the Claimant, are no longer employed by the Respondent. One of these witnesses conducted grievance H, another conducted grievances C, D and E, a third conducted the appeal against grievance G. The other three witnesses are specifically named by the Claimant in his allegations. Three of these members of staff ceased working for the respondent in 2018 but the other three ceased their employment in 2014, 2015 and 2016. Quite apart from

concerns about memory fade, the Respondent is concerned that it will be unable to contact former employees and/or it may not be able to secure their attendance at the Tribunal hearing.

Submissions

19. Ms Barsam submits that the only in time allegations are the suspension and dismissal of the Claimant (set out at allegations J and L in the list of issues). In particular, incidents which are alleged to have taken place when the Claimant was employed at the Croydon store in 2011 are highly unlikely to be capable forming part of series with events which took place in a different store with almost entirely different personnel. For them to be so, the Claimant would need to show a prima facie case that there was a connection between the individual perpetrators. An allegation that the Claimant was threatened and abused on 2 December 2011 by NvC is the paradigm isolated incident, as was NB's allegedly telling the Claimant to get out of his office. The Claimant does not put forward a prima facie case of, for instance, a link between his manager at Croydon's allegedly reducing his overtime and the Claimant's dismissal in 2015. In relation to the one manager who overlapped with the Claimant at both stores (FO) the Claimant himself outlined that he had a good relationship with this manager in Croydon, a relationship which soured in the Oxford Street West Store. Apart from a pleaded connection between the Managers hearing grievances C and F (both of which relate to the Claimant's time at Oxford Street West), the Claimant's allegations of discrimination or detriment read as a series of isolated events involving entirely different members of staff.

20. Ms Hadfield reminded the Tribunal that striking out discrimination or whistleblowing claim is a draconian step, which should only take place in the case of very obviously unmeritorious cases. The Tribunal should take the Claimant's case at its highest, because it is not in a position to examine the facts in any depth. Account should also be taken of the fact that the Claimant drafted his claim himself, that he is a litigant in person, who had been suffering from stress and anxiety for some time at the point at which he filed his claim and whose first language is not English. Ms Hadfield highlighted a number of passages in the Claim Form where the Claimant is making allegations of being targeted or where the Tribunal is invited to draw an inference that the Claimant has been subject to a campaign of harassment by a number of the Respondent's senior managers. There are regular references to the upholding of decisions of "English store managers" and of the "*whole process being biased due my race religion and believe(sic).*" The Claimant asserts that a third-party external manager should have been appointed to hear his grievances as the internal independent manager "*was influenced by management within the circle. (Store)*". There are multiple references in the Claim Form from the Claimant to "my employer" not being willing to take his complaints seriously, but just wanting "*to support seniors due to my race, religion and believe(sic).*" The Claimant refers to a "*massive conspiracy taking place behind closed doors where all senior management is driven by their commitment to target me and cause unnecessary psychological trauma.*" He acknowledges that there have been several investigations involving different people in his case, but that he was denied notes of those investigations and he states, "*I can safely conclude that there is a clear case of cover-up taking place…*" In all but name, the Claimant is asserting that there is a culture of discrimination at the Respondent, which pervades both stores at which he

worked and senior management more generally.

Conclusions

21. There is force in Ms Barsam's submission that the Claimant has not explained in his Claim Form precisely how a series of events which started in February 2011 and ended with his dismissal in June 2015, involving different personnel and disparate allegations, are linked in a way which might satisfy either of the legal tests in section 123 of the 2010 Act or section 48 of the 1996 Act. The burden lies on the Claimant to demonstrate a prima facie case that they are. However, read broadly and fairly, against the background of his being a litigant in person suffering from mental health issues, throughout his original Claim Form the Claimant articulates his own belief that a number of managers of increasing seniority at the Respondent were acting in concert in an unlawful manner – whether related to his race, religion or belief, the fact that he had complained about discrimination or that he had made protected disclosures. He has not, for instance, explained precisely how one manager in the Croydon store, might influence the behaviour of another manager in the Oxford Street West store or, what it is about the Respondent's workplaces or wider culture, which would allow unlawful discrimination to proliferate.

22. The Tribunal recognises that proving discrimination is a nuanced exercise, which often relies on the drawing of inferences from primary facts. The same might be said of the exercise of observing patterns of behaviour across an organisation and the reasons for them. It is difficult, without hearing evidence and reading any of the contemporaneous documents, to form a clear view as to whether the Claimant is reading into his managers' conduct motivations (whether conscious or unconscious), which are simply not there. I accept Ms Hadfield's submission that the Claim Form cannot be expected to contain the same detail as a witness statement and that the Claimant has made a number of assertions in his Claim Form which are tantamount to an assertion that a culture of discrimination exists amongst the Respondent's management. Whilst the case law suggests that such terms are not helpful, from the start of his claim and consistently throughout it, the Claimant has maintained that there is a link between the Respondent's management's attitude towards him and the way his grievances are dealt with. Whether he can make good those assertions in evidence, is another matter, but for the purposes of this hearing, I must take his case at its highest, provided it is not inherently implausible.

23. There is a very stark contrast between the first eight years of the Claimant's employment with the Respondent and the last four. From 17 August 2002 when the Claimant joined the Respondent as a weekend retail operative to first grievance in February 2011, the Claimant was promoted on five occasions, raised no grievances and does not appear to have had any disciplinary issues. Between February 2011 to June 2015, relations between the Claimant and a number of his fellow managers and the Respondent quite clearly deteriorated in a way which must have been extremely difficult for all concerned. The Claimant himself asserted there was an express link between NvC's behaviour at Croydon and his grievance against NC (paragraph 2.3 of his Solicitor's letter dated 24 February 2016) and that SG is alleged to have told the Claimant that pursuing these grievances would make things

difficult for him in the Company (paragraph 2.4). He was then moved away from Croydon against his wishes.

24. On the Respondent's own case, the Claimant's transfer was linked to the two grievances and his conduct around them (paragraph 9 of the Response Form), albeit for reasons related to the Claimant rather than any thread of unlawful conduct on behalf of the Respondent. Had the Claimant's transfer been voluntary and unrelated to his grievances, there would have been considerably more force in the Respondent's submissions that any potential chain of causation between allegations of discrimination or other unlawful conduct occurring in Croydon was broken when the Claimant started work at the Oxford Street West store. As it is, it is common ground between the parties that there was a link between the Claimant's grievances and his enforced transfer – the dispute is as to the nature of that link. That is a matter for the full merits hearing.

25. The fact that the allegations of discrimination or detriment involve a number of different perpetrators, two sites and, apart from those allegations concerning the conduct of the Claimant's grievances, there is a limited commonality in the nature of the allegations, leads the Tribunal to conclude that the Claimant has little reasonable prospects of establishing that they form part of a series or an act extending over a period, but it is unable to conclude that he has no reasonable prospects of doing so. There are no significant time gaps between the allegations, which might diminish the likelihood of a connection. All the allegations concern members of the Respondent's management team rather than junior members of staff remote from the chain of command. At the heart of the Tribunal's task in the full merits hearing is the determination of what led to such a dramatic and continuing deterioration in the Claimant and Respondent's relationship and what part, if any, the Claimant's race, religion or protected disclosures played in it. Sometimes, it is possible to perform this task on the pleadings alone, where allegations are inherently implausible. In my judgment, it is not inherently implausible, for instance, that the Claimant had a general reputation as a "complainer" which followed him from Croydon to Oxford Street West and that store managers' behaviour towards him there was influenced by that reputation. The Claimant's raising of six further grievances would have confirmed this reputation. If this were the case, determining whether this was tainted by unlawful discrimination or victimisation is a task for the full merits hearing and cannot fairly be performed on a consideration of the pleadings alone.

26. As the Tribunal is satisfied that the Claimant has established a prima facie case that all his allegations are in time, it is not necessary to determine in the alternative, whether it would be just and equitable to extend time.

Amendment to the Claim Form

27. The Claimant seeks to amend his Claim Form to add to the alleged protected disclosures on which he relies in support of his whistle-blowing claims. These were set out in his Solicitor's letter dated 24 February 2016 and relate to allegations d, e, f and g in the list of issues. As the Claimant points out, no time limit issues arise, because time runs from the alleged detriments, not the disclosures. The Claimant

submits that there is no discernible prejudice in permitting the amendment, the content of which has been available to the Respondent since February 2016.

28. The Respondent opposes this application. Whilst the Respondent accepts in that time runs from the date of detriment not disclosure, the new allegations of protected acts are effectively new claims. The Tribunal must have regard to the interests of justice in determining the Claimant's application, which includes a consideration of whether new evidence will be required as a result of the amendment. In relation to allegation d, which is an oral disclosure, it will be necessary to hear oral evidence from SG concerning precisely what was said at a grievance meeting on 12 December 2013. In relation to allegations f and g, the alleged complaints were made to individuals who are no longer employed by the Respondent. The Claimant has already made a number of whistleblowing claims and the balance of prejudice lies heavily against amendment at this late stage.

29. The Tribunal's power to grant an application to amend a pleading derives from the Tribunal's case management powers in the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. Guidance was given to Tribunals by the EAT in *Selkent Bus Co Ltd v Moore [1996] ICR 836* as to the factors which are likely to be relevant in an exercise of discretion. These are the nature, timing and manner of the proposed amendment, the effect of any time limits and the prejudice or hardship to either party in granting or refusing it. The Tribunal must also be guided by the overriding objective in the Tribunal Rules to deal with cases fairly and justly.

30. The Claimant's proposed amendment seeks to broaden the number of protected disclosures on which he relies to support his claims that he was subjected to detriments as a result of making protected disclosures. It is, thus, akin to adding new claims, albeit the Tribunal time-limit is not affected because he does not seek to expand the number of detriments upon which he relies. The Respondent has had notice of these new allegations since February 2016, when they were set out in a Solicitor's letter. They have been included in the List of Issues prepared in February 2019, albeit, the record of a Preliminary Hearing held on 8 April 2016 explicitly makes the point that "*If the Claimant wishes to rely on any other protected acts (including the acts at 2.4 - 2.8), he will need to seek leave to amend his claim*." This oral application for amendment is substantially delayed, given the need for it was identified by the Tribunal in 2016. No reason has been put forward for this delay.

31. The full merits hearing is listed to start on 9 September with exchange of witness statements due on 9 August 2019. The Respondent, therefore, has time to adduce evidence in relation to these allegations. However, the additional alleged disclosures occurred between 14 May 2012 and 12 December 2013 and one of them related to something SG allegedly said during a grievance hearing in early 2012. The Respondent suggests that, not only is there is a general prejudice to it in allowing the amendment given the passage of time will have affected the cogency of the evidence, there is specific prejudiced because complaints e and f were made to members of staff who are no longer employed by the Respondent. SF left the Respondent's employment in February 2014 and FC in September 2016. The Claimant's delay in applying to amend his claim to add allegation "f" in particular has caused specific prejudice to the Respondent. Had the Claimant applied to

amend his Claim in a timely manner following the Preliminary Hearing on 8 April 2016, FC would have still been employed by the Respondent, who would have been in a position to seek information from her about the allegation.

32. The Claimant relies on six other protected acts to support his various detriment claims, which will proceed regardless of this application. Given the more than 3 year delay in the Claimant's making this application to amend his claim and the specific evidential difficulties that the Respondent is likely to face in relation to the proposed amendments d, f and g, I am satisfied that that the balance of prejudice lies in favour of refusing the Claimant's application in relation to these three disclosures. Allegation "d" relies on the Claimant's and SG's memories of what was said during a grievance appeal in early 2012 and allegations f and g relate to members of staff who have not been employed by the Respondent for some time. A distinction can be drawn in relation to allegation "e", given the disclosure was made in an email to SG, who is still employed by the Respondent. The Claimant's application to amend is allowed to that extent, as the Tribunal is not satisfied that there will be any material, evidential prejudice to the Respondent in allowing it.

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Employment Judge Clark

Dated: 29 May 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

5 June 2019

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS