EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Nathaniel Egbayelo	**v**	**Ocado Central Services Ltd**

Heard at: Watford **On**: 21 May 2019

Before: Employment Judge Alliott

Appearances

For the Claimant: In person
For the Respondent: Mr C Rajgopaul, Counsel

JUDGMENT

1. All the claimant's complaints are out of time and it is not just and equitable to extend time.

2. The claimant's claim is struck out.

REASONS

1. This open preliminary hearing was ordered pursuant to an order made by Employment Judge Wyeth on 8 October 2018. The issues for determination at the preliminary hearing are as follows:

> "2.1 Whether any or all of the complaints are out of time such that the tribunal does not have jurisdiction to hear the complaint;
>
> 2.2 Whether any or all of the complaints should be struck out under Rule 37 of the Employment Tribunals Rules of Procedure 2013; and/or
>
> 2.3 Whether a deposit or deposits should be ordered to be paid by the claimant in accordance with Rule 39 of the 2013 Rules on the basis that all or any of the complaints have little reasonable prospect of success;"

2. By a claim form presented on 16 May 2018 the claimant presented claims for s.26 Equality Act 2010 harassment related to the protected characteristic of race. The unwanted conduct relied upon was set out in the list of issues in the order of 8 October 2018. The specific instances of unwanted conduct identified relate to alleged incidents which took place between 21 February 2017 and 12 July 2017 when the claimant was given a final written warning.

The evidence

3. In the order of 8 October 2018, for the purposes of this open preliminary hearing, witness statements were dealt as follows:-

> "3.1 It is ordered that oral evidence in chief will be given by reference to typed witness statements from parties and witnesses;
>
> 3.2 Any witness statements must be strictly limited to containing facts relevant to the preliminary hearing issues only and should be sent to the other party by 23 April 2019."

4. The claimant has provided a witness statement from his wife but did not prepare a witness statement for himself. The claimant explained to me that this was because he misunderstood the order and did not consider himself to be a witness but the claimant. As it was, the claimant gave oral evidence in line with his document dated 17 December 2018 in the trial bundle at pages 48-53. That document was submitted to the tribunal to address the time issues raised. The claimant gave evidence for approximately 1 hour and 20 minutes. In addition, the claimant presented his closing arguments for the 45 minutes allowed in the timetable for this open preliminary hearing.

The law

5. S.123 of the Equality Act 2010 provides as follows:-

> "(1) Proceedings on a complaint within s.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.
> …
>
> (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:"

6. As regards continuing acts, in his document dated 17 December 2018 the claimant cited the case of Owusu v London Fire & Civil Defence Authority [1995] UK EAT 334 and cited an extract from the judgment of Mr Justice Mummery, as he then was, in the EAT as follows:-

> "The position is that an act does not extend over a period simply because the doing of the act has continuing consequences. A specific decision not to upgrade may be a specific act with continuing consequences. The continuing consequences do not make it a continuing act. On the other hand, an act does extend over a period of time if it takes the form of some policy, rule or practice, in accordance with which decisions are taken from time to time."

7. The issue of continuing acts of discrimination is dealt with at paragraph 35.24 of the IDS Employment Law Handbook Discrimination at Work The House of Lords has drawn a clear distinction between a continuing act and an act that has continuing consequences.

8. A decision not to regrade an employee was a one-off decision whereas a refusal to award promotion (as in the case of Owusu as cited by the claimant) was continuing due to the fact that it was said to have taken the form of 'some policy rule or practice in accordance with which decisions are taken from time to time'.

9. In Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530, CA, the Court of Appeal made it clear that it is not appropriate for employment tribunals to take too literal an approach to the question of what amounts to "continuing acts" by focusing on whether the concepts of "policy, rule, scheme, regime or practice" fit the facts of the particular case. In the case of Lyfar v Brighton & Sussex University Hospitals Trust 2006 EWCA Civ 1548, CA it was stressed that:

> "Tribunals should look at the substance of the complaints in question - as opposed to the existence of a policy or regime – and determine whether they can be said to be part of one continuing act by the employer."

10. Lastly, in the case of Aziz v FDA [2010] EWCA Civ 304, CA the judgment dealt with a procedural issue of considerable practical importance namely, on what basis should employment tribunals approach the question of whether a claim is time barred at a pre-hearing review:

> "The Court of Appeal approved the approach laid down in Lyfar, that the test to be applied at the pre-hearing review/preliminary hearing was to consider whether the claimant had established a prima facie case, or, to put it another way, "the claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs."

11. As far as any just and equitable extension of time is concerned, this is a matter of discretion for myself. Quoting from paragraph 5.103 of the IDS Employment Law Handbook Employment Tribunal Practice and Procedure I direct myself as follows:-

> "While Employment Tribunals have a wide discretion to allow an extension of time under the "just and equitable" test in s.123, it does not necessarily follow that exercise of the discretion is a foregone conclusion in a discrimination case. Indeed the Court of Appeal made it clear in Robertson v Bexley Community Centre T/A Leisure Link [2003] IRLR 434 Court of Appeal that when the Employment Tribunals consider exercising the discretion under what is now s.123(1)(d) Equality Act "There is no

> presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule."

12. The respondent has submitted that I should take into account British Coal Corporation v Keble [1997] IRLR 336 wherein it is suggested that good practice would be to address the various factors set out in the Limitation Act 1980 at s.33, namely the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the respondent has co-operated with the claimant's request for information, the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking legal action. In addition, I have considered access to advice, awareness of rights and any relevant internal procedures.

Time

13. The ACAS notification was on 16 April 2018 and the ACAS Certificate was also on 16 April 2018. The certificate was transmitted by email and accordingly deemed served on that day. Consequently, Day A is 16 April 2018 and Day B is 16 April 2018. As there is no period between Day A and Day B, so there is no period not to be counted. By my calculation if the three month limitation period expired on Day A then the claimant would have one month after Day B which would expire on 15 May 2018. Accordingly, any act after 17 February 2018 would be in time. Further, any act after 17 January 2018 would be one day out of time.

14. The last specific act complained of was 12 July 2017 which is at least seven months out of time.

Facts

15. The claimant told me that he was a senior manager in Africa, a qualified accountant. He told me that he is currently training in the UK to qualify as an accountant. It is quite apparent to me that the claimant expresses himself clearly orally and in writing. From looking at the various documents he has submitted to the tribunal he has been able to research the law with ability. In 2017 he presented three employment tribunal claims which were consolidated. These claims were made against the respondent and related to holiday pay.

16. Were there any continuing acts of harassment after 12 July 2017?

17. The claimant relies on two arguments to contend that there were continuing acts of harassment until at least February 2018.

18. Firstly, he argues that the written warning that was administered to him on 12 July 2017 only came about as a result of the disciplinary process. As the

disciplinary policy continued to operate until February 2018, so he argues that there was a continuing course of conduct.

19. Secondly, the claimant argues that as the final written warning was placed on his personnel file and was operative for a period of twelve months, so the administration of the final written warning on 12 July 2017 was a continuing act for that 12 months.

20. I reject the claimant's arguments on both grounds. In my judgment, the existence of a disciplinary policy is incapable of rendering a final written warning administered under it as a continuing act, in effect for the entirety of the claimant's employment.

21. Secondly, I do not consider that the fact that the final written warning was "live" for 12 months constituted a continuing act. Looking at the substance of the complaint it is quite clear that it was the fact of a written warning being administered on 12 July 2017 that the claimant is relying upon. In my judgment a final written warning operative for 12 months is not a continuing act even though it had continuing consequences.

22. Accordingly, I find that the claimant's allegations of unwanted conduct are out of time as regards the primary three month time limit.

23. I now turn to consider whether it would be just and equitable to extend time to February 2018.

24. The claimant was quite clear to me as to the reasons why he had not presented a claim sooner. He told me that he felt he did not have enough evidence and he asserted that the respondent was not willing to give him information. He told me: "If I bring it earlier no way could I prove my case as all the documents are falsified".

    and "I haven't got enough evidence to bring it in". He asserted that he only got the evidence from an individual called Alex Staines in February 2018. Alex Staines was a close colleague of the claimant who he worked with all the time.

25. As regards the assertion that the respondent did not provide the claimant with information requested, it is a fact that when the claimant was invited to a disciplinary hearing in a letter dated 7 June 2017 he was provided with all the investigation notes that had been gathered by the respondent. Some 15 different documents were sent to the claimant. In my judgment it cannot be said that the respondent failed to provide the claimant with information relating to his disciplinary procedure. In essence, the claimant told me that what he was expecting to be provided by the respondent was an acknowledgement that the documents had been falsified or forged. In my judgment that was never going to happen. The claimant placed considerable reliance upon information that he says he obtained from Alex Staines in a telephone call in February 2018. In short, he suggested that he had at last found some evidence to support his contentions that HR were orchestrating a campaign of harassment against him on the grounds of his

race in order to secure his dismissal. The claimant has provided an alleged transcript of that telephone call. The respondent has submitted that it has not been able to verify this transcript as the claimant will not allow it to hear the transcript and that as such it is inadmissible. Nevertheless, I invited the claimant to take me to the parts of that transcript which sustained his allegation that Alex Staines told him that HR were in some way colluding in setting up false allegations against him. The claimant was unable to take me to any part of that transcript to substantiate his allegation.

26. I have examined carefully whether it could be said that the claimant justifiably brought his claim late because he only discovered crucial evidence of wrongdoing on the part of the respondent at some later date. Were that to be the case it could well provide grounds for me considering it to be just and equitable to extend time. However, in my judgment there was no such discovery of important information late in the day. In my judgment the claimant was fully aware of all the facts and matter of which he complains about now in July 2017. I find that the claimant was familiar with the Employment Tribunal process as he had claims progressing against the respondent in 2017. The claimant told me expressly that he was well aware of the three month deadline and he was aware of this in 2017. In his form ET1 the claimant has set out that:-

> "ACAS advised me to resign and bring this racial harassment and conspiracy to kick me out of work to the employment tribunal in June 2017 but I couldn't follow the advice then because I have no access to public fund and my family will suffer a serious hardship as a result, so, I couldn't resign."

27. Accordingly I address the various factors that I need to consider in the exercise of my discretion.

28. <u>The length of and reasons for the delay</u>.

    28.1 The length of the delay at seven months is considerable. I do not find the reasons for the delay convincing. I do not find that the claimant did not have the information that he required to bring a claim sooner. This is not a case where the claimant can claim that he was ignorant of his rights or did not have access to advice. He clearly had advice from ACAS at the relevant time.

    28.2 Further, there was no relevant internal procedure that he was waiting to be concluded. In fact on 7 August 2017, following the administration of his final written warning, the claimant wrote to the chief executive officer of the respondent expressly saying that he was <u>not</u> launching an appeal. I note that in that letter he demanded £100,000 compensation for, inter alia, bullying, harassment at work and victimisation. That again suggests to me that the claimant was fully aware of his rights. I find that the claimant has not demonstrated a good reason for the delay.

29. <u>The extent to which the cogency of the evidence is likely to be affected by the delay</u>.

30.1 I take account of the fact that any delay tends to be the enemy of justice in the sense that memories inevitably will fade. That is especially so against the context of the current listing at Watford Employment Tribunal which would mean that this case would not come on until early 2020. I am told that five of the potential witnesses for the respondent are no longer employed by the respondent. Whilst clearly they could be traced, the respondent will have more difficulty in doing so. Two of the individuals were the notetakers at various investigatory and disciplinary meetings against the background where the claimant is alleging they have falsified the notes. One of the individuals is the one who conducted the disciplinary hearing. I find that the delay of seven months will have materially contributed to the likely adverse effect on the evidence which would be given some three years after the events being dealt with.

30. The extent to which the respondent has co-operated with the claimant's request for information.

31.1 I find there has been no lack of co-operation from the respondent dealing with the claimant's request for information. As I have already found the claimant was provided with all the information relevant to his disciplinary hearing at an early stage. The only information he claims he has not had is confirmation of his conspiracy theory that HR were colluding with various managers to engineer the dismissal of the claimant. I regard such an allegation as fanciful.

31. The promptness with which the claimant acted once he knew of the facts giving rise to a cause of action.

32.1 The claimant knew all of the facts that he currently relies upon by 12 July 2017 and he cannot be said to have acted promptly. In any event, even if he discovered some crucial information in February 2018 he nevertheless delayed before launching his claim. I find that there was a lack of promptness even after February 2018.

32. The steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking legal action.

32.1 I find that the claimant was well aware of his legal position having spoken to ACAS in June/July 2017.

33. Consequently, in my judgment it is not just and equitable to extend time for the claimant to present these claims.

34. Accordingly I strike out the claimant's claim.

35. I do not go on to consider striking out the claimant's claim as having no reasonable prospect of success and/or whether or not to make a Deposit

Order. I record here, should it be necessary, that had I extended time I would not have struck out the claims on the grounds that there was no prospect of success as the Employment Appeal Tribunal have repeatedly said that issues under the Equality Act are fact sensitive and need to be determined by a full tribunal.

36. However, I record here that had I extended time I would have made Deposit Orders as I consider that the claimant's claims have little reasonable prospect of success. I do not give my reasons now as they are unnecessary at this stage.

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Employment Judge Alliott

Date: …05.06.19……..

Sent to the parties on: ...10.06.19...

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For the Tribunal Office