Case No: 3304815/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M F Sarwar	v	Dataforce Interact Limited

Heard at: Bury St Edmunds **On:** 17 – 21 June 2019

Before: Employment Judge Cassel

Members: Ms L Daniels and Mr B Smith

Appearances:
For the Claimant: In person
For the Respondent: Mr A MacNellan, Counsel

JUDGMENT having been sent to the parties on 17 July 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claimant, Mr Mohammad Farhan Sarwar, submitted a claim form that was received by the Tribunal on 18 March 2018. Following its submission, the matter was listed for a Case Management discussion which took place on 3 October 2018 at Bury St Edmunds in front of Employment Judge Laidler.

2. During that discussion there was some clarification of the claims that are brought. They were described in some detail in the Case Management Summary and six sub-headings were recorded which are as follows:

   (1) protected disclosures;
   (2) sex discrimination;
   (3) religious discrimination;
   (4) working time;
   (5) the Claimant being accused of coming in late when he was not, by Afreen Babar; and
   (6) accusation of mistreatment of company property by the breaking of a monitor.

3. The hearing of the substantive claims at Bury St Edmunds took place over

four days for evidence to be taken and submissions and the announcement of a decision on the fifth day. During the hearing the Claimant represented himself and Mr MacNellan appeared for the Respondent.

4. The Tribunal was conscious that the Claimant's first language is not English and we reminded ourselves of the overriding objective provided for in the Rules of Procedure and among other things made sure that we put the parties on an equal footing and took time to explain the procedure that we would undertake.

5. During the hearing we heard evidence from the Claimant and we read witness statements provided by him from Sandra Elesterio, Callum Marlow, Owais Hussain and Syed Naqvi.

6. We heard evidence from the Respondent's witnesses in the following order: Mr Chris Venn, Mr David Raw, Ms Kim Morton, Ms Anne Vidler and Ms Helen Whitworth. They gave evidence and the Claimant had the opportunity of cross examining them.

7. We were provided with two substantial bundles of documents and made it clear to the parties that only those documents to which reference was made in evidence would be considered, apart from those of course involving what are commonly called as pleadings; the claim form, the response form and the case management summary. In addition, and it was extremely helpful, the Respondent provided a chronology and cast list with which broadly speaking the Claimant agreed. We explained that that was not in itself evidence but was an indicator to us to assist in our deliberations.

8. At the commencement of the proceedings on the first day, we explained to both parties that the evidence we would consider during this part of the hearing was for liability only. If the issue of remedy arose, it would be considered separately.

9. At the end of the evidence, Mr MacNellan produced written submissions, for which we are grateful, and the Claimant made oral submissions, which we recorded in our notes of evidence. At the end of those submissions we indicated that we would first deal with jurisdiction making those relevant findings of fact that we considered appropriate and if we had jurisdiction on any of the matters, would make further findings.

Jurisdiction

10. The first matter we considered was whether the Tribunal had jurisdiction to hear the claims that were submitted and we deal with jurisdiction in the same order as that which was disclosed in the Case Management Discussion document.

11. <u>Protected Disclosure</u>

    11.1 During the proceedings, it became apparent that the claim of protected disclosure was very much bound up with the complaints

of bullying and harassment which were allegedly made by other members of the workforce through entries in Facebook and WhatsApp.

11.2 The Claimant advised the Respondent of that behaviour on or around 30 March 2017. Enquiries were made by the Respondent and it was concluded that the events that took place did so whilst the Claimant was an Agency worker and that the Agency had dealt with it. An issue as to whether all of those engaged in that behaviour were Agency workers or permanent staff arose, but we make no specific findings of fact as to who did what, whether they were Agency workers or whether they were in their place of work. That in our view is not the issue. The fact of the matter was that the Claimant having raised the complaint, that behaviour ceased very shortly thereafter.

11.3 There was vague evidence which amounted to a simple allegation that in some way through *"bad mouthing"* and other acts in the office, that behaviour continued. At its highest there was no credible evidence that that could be linked to treatment raised insofar as protected disclosure, race, sex or religious discrimination.

11.4 The Tribunal does have power to extend jurisdiction. Broadly speaking there are two circumstances. First, if the Tribunal finds that the acts are continuing acts, that is acts that were performed over a period of time, the last date on which those acts occur is the date on which jurisdiction is calculated. There is also provision within the Employment Rights Act 1996 under s.111 (2) (b) to extend time. Under sub-section (2) we are told,

> That an Employment Tribunal **shall** not consider a complaint under this section unless it is presented to the Tribunal:
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> (a) before the end of the period of three months beginning with the effective date of termination; or
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> (b) within such further period as the Tribunal considers reasonable in the case which it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

11.5 We find that the acts about which complaint was made fall into two distinct categories. Those which ended in March or April 2017; and these we find were discrete acts. So far as we can understand the other acts, these were also discrete acts and there was nothing to link them in any sensible view to the earlier acts. They were of an entirely different nature so far as we can understand them. We do not therefore find that the acts could be considered, or should be considered as continuing.

11.6 We then look to evidence as to whether it was reasonably practicable, or not, to bring the complaint within the period

described in the statutory provision in the Employment Rights Act 1996. There was in fact no evidence whatsoever that it was not reasonably practicable, and thus no basis in law for us to extend time.

11.7 For the sake of completeness, we deal with what has been described as the second series of acts; the bullying and harassment through "bad mouthing" in the work place. So far as we can ascertain, reminding ourselves that we must apply the balance of probabilities throughout these proceedings, we find that such acts did not take place and in so far as the Tribunal does have jurisdiction, we dismiss those claims.

12. Sex Discrimination

12.1 So far as we understand it, these fall into two parts. First, there was a single act said to have taken place on 7 November 2017 which was described loosely, and we adopt the description, as an unpleasant conversation. Second, there were further acts on 14 November 2017 when there was an indication given by Mr. Venn that he would put on the Claimant's file a note which Mr. Venn described as the most minor of disciplinary sanctions. Pausing there, we have seen the Respondent's disciplinary procedure and nowhere within that procedure does it state that such a note forms part of a disciplinary procedural sanction.

12.2 The first act was one which was a discrete act. In our judgment, the second acts can sensibly be described as continuing acts. In evidence, Mr Venn told us that he started the investigation which he ceased at the time when there was some reference to putting a note on the Claimant's disciplinary personnel file. Thereafter, the investigation was undertaken by Mr. Craig Allen, from whom we did not hear, who then concluded the investigation. Any alleged faults in Mr Venn's investigation were addressed by Mr Allen and men working for the Respondent were interviewed and those were men identified by the Claimant. Mr Allen's investigation concluded on or around 20 November 2017.

12.3 There was no credible evidence that the approach taken by Mr Allen to the investigation was in any way discriminatory and in any event, we find that any alleged discrimination must have ended on 20 November 2017. There was no credible evidence of any continuing act or acts of discrimination.

12.4 The Equality Act 2010 also allows a Tribunal to extend times in certain circumstances. Under s.123 Time Limits are specifically referred to the proceedings on a complaint under the Equality Act 2010. At s.123(1)(a),

> "The period of three months starting with the date of the act to which the claim relates, is the date for which the complaints must be raised in a claim to the Tribunal".

Under s.123(1)(b), the Tribunal has power to extend that period by reference to,

> "such other period as the Employment Tribunal thinks just and equitable".

12.5 Before deciding to extend time, the Tribunal reminds itself that it is the exception rather than the rule that allows time to be extended. The second matter to which we paid careful attention was the evidence given by the Claimant. There was no evidence at all as to why the Tribunal should consider it just and equitable to extend time. For those reasons the Tribunal has no jurisdiction to hear the complaint.

13. Religious Discrimination

13.1 The events appear to surround 10 November 2017 and in essence the complaint made by the Claimant is that he was unable to attend Friday prayers, and he is a devout Muslim, by reason of the Respondent's behaviour and more particularly the behaviour of Mr Venn. The complaint is of a single act. The time for which a complaint of Religious Discrimination must be presented to the Tribunal is determined by the statutory provision that we have referred to above. It must be within three months, making allowance of course for that time which is necessary to complete the requirements of Early Conciliation. The complaint was not presented within that specified period of time and we have no jurisdiction to hear the complaint. We add that even if we did have jurisdiction, we would have dismissed that claim. There was no evidence that Mr Venn acted in a discriminatory manner.

14. Working Time

14.1 The parties are agreed that the period in relation to this complaint runs from 6 October 2017 until 2 December 2017. On behalf of the Respondent, Mr MacNellan accepts that part, if not all of that period of complaint falls within the jurisdiction of the Tribunal bearing in mind the date on which the claim form was submitted. However, for reasons that we describe later, we do not address the question whether there were continuing acts and whether all of those acts fall within the jurisdiction of the Tribunal.

15. The Accusation of Coming in Late

15.1 We understand that the allegation of Race Discrimination and in the alternative, victimisation, arises from allegations that the Claimant arrived late for work on a number of occasions. We do not make findings of fact as to whether in fact the Claimant did arrive late for work, for reasons that we explain below. The comparator on whom the Claimant relies is Mr Drage. It appears the basis of the allegation that the Claimant makes is of an unlawful difference in treatment. The Claimant was alleged to have attended work late on a number of occasions and faced disciplinary action whereas Mr

Drage did exactly the same but did not face such action. There was no clarity as to the dates of the lateness, but it is accepted by the parties that this must have been either during October or November 2017. So far as we understand the complaint, the first time any decision making was considered, or action was taken, was 12 September 2018 which is a date **following** the submission of the claim form. There was no separate claim form which raised this complaint and no evidence that this matter had been addressed in Early Conciliation and for these reasons we do not have jurisdiction to hear the complaint.

16. Mistreatment of Property

16.1 We can deal with this matter briefly as although it is unclear as to precisely what it is that is being claimed, the events post dated the submission of the claim form and for the same reason as we have dismissed the last claim, we dismiss this claim for lack of jurisdiction.

17. Matters on which we do have jurisdiction

17.1 These can be sumarised as:

i. bullying and harassment; and
ii. breach of the Working Time Regulations.

17.2 As far as bullying and harassment is concerned, we remind ourselves of the provisions of s.136 of the Equality Act 2010 which is in the following terms:

1. This section applies to any proceedings relating to a contravention of this act;
2. If there are facts from which the Court could decide, in the absence of any other explanation that at person (A) contravened the provision concerned, the Court must hold that the contravention occurred;
3. But sub-section 2 does not apply if A shows that A did not contravene the provision.

Simply put, the Tribunal could find no facts from which we could infer that a breach had occurred so we do not look to the Respondent to provide any explanation.

17.3 Breach of the Working Time Regulations – as Mr MacNellan pointed out, the relevant provision is Regulation 30(1)(a) which is in the following terms:

1. A worker may present a complaint to an Employment Tribunal but his employer,

a. has refused to permit him to exercise any right that he has under sub-section 1 Regulation 12

and other Regulations.

17.4 Regulation 12 relates to rest periods and it is of this which the Claimant complains. Simply put, the submission made by the Respondent, which we accept, was that there was no evidence that a request was made in anything approaching appropriate terms, let alone evidence of a refusal, of that right. Looking at the matter reasonably and sensibly, the Claimant was working long hours as a volunteer and was being paid for that time. We do however, express our concern at the terms of the Section 1 statement signed by the Claimant.

17.5 We had produced to us at pages 144 – 156 a copy of the Section 1 statement. There are two signature pages. One at page 155 in which the Claimant is asked to acknowledge the receipt of the Statement of Terms of Employment and at page 156 where he is asked to confirm his consent to the opt out under Regulation 4 and Regulation 5 of the Working Time Regulations 1998. The Claimant gave convincing evidence, which we accept, that page 155 was signed by him and that his signature on page 156 was clearly obliterated by him because he did not consent to the opt out and in so doing wished to make that clear in the manner in which he signed it. We were told that when the Section 1 statement reached the Respondent's Human Resource Department, it was looked at by an administrator and was considered very briefly. However, any reasonable inspection of that document would have raised concerns in the mind of a reasonable employer.

17.6 We find that the Claimant, by reasonable means, did try to indicate to the Respondent that he was opting out of the Working Time Regulations and that opt out had not been fully appreciated or understood by the Respondent. That, however, does not affect our conclusion that in order to succeed under Regulation 30 that which is necessary is missing. Simply put, what is missing is a request and a refusal.

18. For all these reasons we dismiss the claims.

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Employment Judge Cassel

Date: 22.8.2019

Judgment sent to the parties on

.....28.08.19.....

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For the Tribunal office