

EMPLOYMENT TRIBUNALS



Claimant
Mr. H. Akannilaisu

V

Respondent
Tyfoon Restaurants Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL OPEN PRELIMINARY HEARING

HELD AT: London Central

ON: 25 October 2019

BEFORE: Employment Judge Mason

Representation

For the Claimant: In person (supported by PSU)

For the Respondent: Ms. R. Owusu-Agyei, counsel

The judgment of the Tribunal is that:

The Claimant's claims may proceed; it will be for the Tribunal at the full hearing to determine whether all his claims were in time depending on whether or not it concludes that there was a series of similar acts or failures on the part of the Respondent.

REASONS

Background

1. The Claimant commenced employment with the Respondent as a Chef on 23 January 2016. He remains employed by the Respondent.
2. On 22 January 2019, the Claimant first contacted ACAS and on 25 January 2019 ACAS issued an Early Conciliation Certificate.
3. The Claimant presented this Tribunal claim (ET1) on 21 February 2019. The Claimant complains that the Respondent subjected him to detriments on the ground that he made protected disclosures in May 2016 and in August 2018.

4. The Respondent has lodged a response (ET3) denying the claims and says that the claims are out of time and it is not just and equitable to extend time.
5. On 26 June 2019, EJ Sharma conducted a closed Preliminary Hearing (case management):
 - 5.1 The full merits hearing was listed for 23, 24 and 25 October 2019.
 - 5.2 EJ Sharma noted that the Claimant believes he has various additional claims of discrimination (religion, age, race and “arising from” disability”) and arrears of pay and that he may seek an amendment to his claim form.
 - 5.3 The issues were identified (in summary) as follows:
 - (i) Was the claim presented in time?
 - (ii) Did the Claimant make one or more protected disclosures, specifically:
 - a. May 2016: The Claimant reported some co-workers to the manager because the Claimant alleged that they were falsely recording hours/stealing food (“Stealing Food PD”);
 - b. May 2016: The Claimant reported that the wheel beneath the frying machine was broken to that to clean it the Claimant had to drag out the bottom daily, which began to injure his wrist. Instead of fixing it when he told the head chef about this he was laughed at and told that worse things happen in Africa (“Frying Machine PD”).
 - c. 19 August 2018: The Claimant was told by a porter that he knew where the Claimant lived and that he would send the boys to kill him. The porter waited for the Claimant outside work and the porter was removed by security. The Claimant reported this to the police, who told him to raise it with HR, which the Claimant duly did, (“Porter PD”).
 - (iii) Did the Respondent subject the Claimant to any detriments, specifically:
 - a. Bullying.
 - b. An accusation against him of sexual harassment by the manager’s girlfriend.
 - c. Being suspended since 17 September 2018 with payment stopping in February 2019. (The Respondent says that the Claimant is still employed by the Respondent and that the suspension was lifted on 14 December 2018. A letter in writing was sent to the Claimant on 1 January 2019 to that effect. He has not wanted to return to work, even though the Respondent states that it has tried to place the Claimant elsewhere).
 - (iv) If so, was the Claimant subjected to any of these detriments on the ground that he made one or more protected disclosures?
 - 5.4 EJ Sharma made case management orders including:
 - (i) By 5 July 2019: the Claimant to make an application to amend his claims.
 - (ii) By 5 July 2019: the Claimant to provide further details of his alleged protected disclosures.
 - (iii) By 5 July 2019: the Respondent to provide documentary evidence of meetings with the Claimant since 21 August 2018.
 - (iv) By 12 July 2019: the parties to “*inform each other and the Tribunal in writing ... providing full details, if what is set out in the Case Management Summary section above and about the case and the issues that arise is inaccurate and/or incomplete in any important way*”.

6. On **5 July 2019**, the Claimant wrote to the Respondent and the Tribunal enclosing a draft amended ET1. In his covering letter, he says the amendments "*are limited to a claim for unpaid benefits*" on the basis the Respondent stopped paying him on 25 January 2019. On **15 July 2019**, the Respondent wrote to the Tribunal pointing out that in various documents issued after the Preliminary Hearing on 26 June 2019, the Claimant sought to raise various new issues not pleaded in the ET1. This correspondence was placed before EJ Sharma who directed that an open Preliminary Hearing take place on 23 August 2019.
7. On **2 August 2019**, the Claimant wrote to the Respondent and the Tribunal stating:
"... I would like to inform the Employment Tribunal that I am relying on my original claim and the Record of the Preliminary Hearing held on 26th June 2019".
8. On **23 August 2019**, Acting Regional EJ Wade conducted a closed Preliminary Hearing by telephone. The Claimant was supported by Mr. Cabon, Greenwich Inclusion Project.
 - 8.1 The full merits hearing was postponed and relisted for 16, 17, 20 and 21 January 2020.
 - 8.2 The Claimant withdrew his application to amend his claim. EJ Wade records:
"After discussion the Claimant withdrew his application to amend. His options were clearly explained by me and he was supported by Mr. Cabon".
 - 8.3 REJ Wade listed this case for an open Preliminary Hearing to take place today (25 October 2019) to determine the following:
"Whether the claim should be struck out because it was filed out of time, and if it is not struck out, to make a final decision on the issues and to give directions."
 - 8.4 Directions were given for the open Preliminary Hearing:
 - (i) By 6 October 2019: the Claimant to provide full answers to orders 2(a)-d) (para. 5.4 (ii) above) of EJ Sharma's case management orders 26 June 2019 in a clear and comprehensive list.
 - (ii) By 11 October 2019: the parties to exchange any documents and witness statements relevant to the time issue.
 - (iii) By 18 October 2019: the Respondent to provide a summary of its legal arguments (the Claimant free to do likewise but under no obligation).
9. Since the closed Preliminary Hearing on 23 August 2019, the parties have taken the following steps:
 - 9.1 On **6 September 2019**, the Claimant provided answers to orders 2(a)-(d) para. 5.4 (ii) above) of case management orders 26 June 2019 (further particulars of the alleged protected disclosures).
 - 9.2 On **11 October 2019**, the Claimant sent to the Respondent his witness statement relevant to the time issue.
 - 9.3 On **18 October 2019**, the Respondent provided the Claimant with a summary of its legal arguments relating to the time issues.

Issues considered

10. The issues to be determined at the Open Preliminary Hearing before me on 25 October 2019 were as follows:
 - 10.1 Were any of the complaints presented out of time?

- 10.2 If any of the complaints were presented out of time, is it just and equitable to extend time?
- 10.3 Should any of the complaints be struck out on the basis the Claimant has no reasonable prospect of proving any connection between the alleged protected disclosures and the alleged detriments?
- 10.4 Should a deposit order be made against the Claimant on the basis his claim has little reasonable prospect of success?
- 10.5 If the claim is not struck out, the issues are to be determined and directions given for the full merits hearing.

Evidence and procedure at the Hearing

11. The Respondent provided a black ring binder of documents [85 pages]; I will refer to this as “the bundle”. The Claimant also provided a large amount of documents, some of which the Respondent had seen but not all.
12. Ms. Owusu-Agyei (counsel for the Respondent) provided a written Skeleton Argument (the same document provided to the Claimant on 18 October 2019).
13. The Claimant provided a witness statement (the same witness statement he provided to the Respondent on 6 September 2019 (para. 5.4 (ii) above, further particulars of the alleged protected disclosures).
14. The Claimant was unrepresented. Ms. Maughan and Ms. Miner of the PSU (Personal Support Unit) were in attendance to support him. I asked him at the outset to make me aware if there was anything he did not understand.
15. We broke down the issues and I retired to make decisions on each sub-issue during the course of the day.
16. I then made some case management orders and a deposit order which are set out separately.

Relevant law

17. Employment Rights Act (ERA)

17.1 s47B(1) ERA: Detriment

“(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure”.

17.2 s43A ERA: Meaning of “protected disclosure”

“In this Act a “protected disclosure” means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

17.3 s43B ERA: Disclosures qualifying for protection

“(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

- (a) that a criminal offence has been committed, is being committed or is likely to be committed,*
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*
- (d) that the health or safety of any individual has been, is being or is likely to be endangered,*
- (e) that the environment has been, is being or is likely to be damaged, or*

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.”

17.4 s43C-43H ERA: manner of disclosure

A qualifying disclosure must be made in accordance with 43C-43H ERA. In this case, the Claimant relies on 43C: disclosure (internally) to employer or other responsible person.

17.5 s48 ERA: time limit for bringing claims

“(3) An employment tribunal shall not consider a complaint under this section unless it is presented –

(a) before the end of the period of three months 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 for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3) –

(a) where an act extends over a period, the “date of the act” means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on; and in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done”.

17.6 s48 ERA: Burden of proof

- (i) The Claimant must prove (on the balance of probabilities) that he made a protected disclosure, that there has been detrimental treatment and the Respondent subjected the Claimant to that detriment.
- (ii) The burden then shifts to the Respondent to prove that the Claimant was not subjected to the detriment on the ground that he made the protected disclosure and to prove the reason for the treatment.

Findings of Fact

18. I have considered the pleadings and the (limited) evidence before me and reminded myself that the standard of proof is the balance of probabilities. It is not appropriate at this preliminary stage to make detailed findings of fact. A large number of alleged facts are in dispute and can only be properly determined at a full hearing. Therefore my findings below reflect a summary of the key dates which are not in dispute. I have only referred to dates which the Claimant has provided in his ET1 and as reflected in EJ Sharma’s summary as although the Claimant now seeks to rely on alleged events in 2017, he has not amended his claim.
19. The Claimant commenced employment with the Respondent as a chef on 23 January 2016. His terms and conditions are set out in a written contract signed by the Claimant on 23 January 2016 [not in the bundle but shown to me by the Respondent]; the Claimant confirmed to me that this is his contract. This shows that he is employed on a “zero hours” basis, in other words he is only paid for hours worked and there is no minimum guaranteed hours. He is paid on the 25th of each month. If off sick, he is entitled to Statutory Sick Pay (SSP) only (subject to notification and eligibility requirements being met).

20. The Respondent accepts (ET3) that the Claimant raised grievances in May/June 2016 about (i) co-workers stealing food and (ii) the frying machine being broken.
21. The Respondent also accepts that the Claimant raised a further grievance on 21 August 2018 because of alleged threats of assault by a co-worker. This was not upheld and his appeal (November 2018) was unsuccessful.
22. The Claimant says he also raised concerns in 2017 but I make no findings on this as this is not mentioned in the ET1 and he has withdrawn his application to amend.
23. On 17 September 2018 the Respondent suspended the Claimant following a complaint of sexual harassment against him by a female employee who the Claimant says was at the time the manager's girlfriend.
24. On 10 December 2018, the complainant withdrew the allegation of sex harassment and on 14 December 2018, the Claimant was informed of this and his suspension was lifted. This was subsequently confirmed in a letter to the Claimant in early January 2019. The Claimant has not since returned to work.
25. The Claimant was paid in full whilst suspended and he told me he received all monies due to him in December 2018 and January 2019. However, on 25 February he was paid £190.60 whereas his usual monthly wage is around £1,450.00. The Respondent says as the Claimant is on a "zero hours" contract and he has not worked, this is all he is entitled to. The Claimant says he has been off sick and that despite submitting "fit notes" from his GP, he has not received SSP. The Respondent disputes this (ET3).

Submissions

Respondent

26. Ms. Owusu-Agyei on behalf of the Respondent referred me to her Skeleton Argument and also made verbal submissions. In summary, she says as follows:
 - 26.1 The claim is out of time:
 - (i) When considering the date of a detriment, the relevant date is the date of the act or omission, not the date the employee becomes aware of the act or omission (**McKinney v Newham London Borough Council** [2015] I.C.R. 495).
 - (ii) In some cases, an act of suspension will not constitute an act extending over a period and the date of that detriment will be the date of the decision to suspend (**Kilraine v Wandsworth LBC** [2016] IRLR 422 para. 26).
 - (iii) The Claimant entered his claim on 21 February 2019 and contacted ACAS on 22 January 2019. His claim is out of time if the date of the final detriment is on or before 22 October 2018.
 - (iv) He cannot rely on the alleged failure to pay him on 25 February 2019 as a detriment as this was 4 days after he presented his ET1.

- (v) The last act that may constitute a detriment was 17 September 2018 when the decision was taken to suspend the Claimant. Therefore his claim is over one month out of time.
 - (vi) This is a rare case where the Claimant's suspension does not constitute an act extending over a period. The Respondent did not actively reconsider whether the suspension should continue between 7 September 2018 and when the complaint was retracted on 10 December 2018.
 - (vii) The Claimant has failed to provide any evidence that it was not reasonably practicable for him to have presented his claim in time. Therefore the Tribunal cannot extend the time limit.
- 26.2 The Claimant's claim otherwise has no reasonable prospect of success and should be struck out:
- (i) The Claimant does not seek to connect his alleged disclosures to the detriments in any respect. Such a connection would "*involve an elaborate conspiracy against the Claimant involving different members of staff which resulted in an entirely fabricated allegation of sexual harassment made by a third party*"
 - (ii) The reason that the Respondent suspended the Claimant was in order to investigate the allegation of sexual harassment and once that allegation was retracted his suspension was lifted.
 - (iii) The detriment of bullying is historic and has no relationship with the detriment which is significantly out of time even if it were to be proved.
 - (iv) This is the sort of "plain and obvious" case which has no reasonable prospect of success and strike out is appropriate.
- 26.3 Alternatively, the Respondent seeks a deposit order in light of the little reasonable prospects of success of this claim.

Claimant

27. The Claimant made brief verbal submissions which can be summarised as follows:
- 27.1 He raised a grievance with HR in August 2018 following threats by a co-worker. He was then suspended as a result of a fabricated complaint against him by the manager's girlfriend. These events are connected and part of ongoing victimisation.
- 27.2 All the events are connected. He believes the Head Chef saw him as a threat and this is why he was subjected to constant bullying, threats and victimisation.

Conclusions

28. The detriments relied on by the Claimant were aired at the Preliminary Hearing before EJ Sharma on 26 June 2019. At paragraph 9.2(vii) she lists the alleged detriments (see 5.3(iii) above); this has not been amended and it is this list which I must refer to.
29. Regardless of whether the Claimant was paid all that was due to him on 25 February 2019, the Claimant cannot rely on this as a detriment as this was after he presented his ET1 on 21 February 2019.
30. It is accepted that the Claimant was suspended on 17 September 2019 and that on 14 December 2018, the Claimant was advised that his suspension was

lifted. I am entirely satisfied that this was a continuing act and potentially an ongoing detriment for the following reasons:

30.1 Suspension is not a neutral act and inevitably detrimentally affects the suspended employee throughout the entire period even if he or she is paid in full.

30.2 I do not agree with Ms. Owusu-Agyei that suspension was not a continuing act as the Respondent did not actively reconsider whether the suspension should continue. The Respondent has provided no evidence of this and in any event, the case law is against her, in particular **Kilraine** in which the EAT held that:

"The Tribunal had taken the wrong approach with respect to its conclusion that the suspension was not a continuing act. It was settled law that a disciplinary suspension was clearly an act extending over a period, within the meaning of the Act. Furthermore, a suspension linked with disciplinary proceedings should be viewed as a whole and was to be regarded as an act extending over a period."

30.3 I also do not accept Ms. Owusu-Agyei's submission that this is a rare case where suspension is not an act extending over a period. She relies on para. 26 in **Kilraine**:

"Whereas I do not reject the possibility that there may be some acts of suspension that in truth may not necessarily be acts extending over a period, it seems to me that those situations are likely to be rare. In my view, therefore, the tribunal took the wrong approach".

However, the EAT did not go on to identify any examples of such rare cases and it is therefore of little assistance to the Respondent's case.

31. As the suspension was an ongoing (potential) detriment, the last act the Claimant can rely on is the last date of his suspension, 14 December 2018. The "normal" 3 month time limit for presenting a claim expired on 13 March 2019 and as this claim was presented on 21 February 2019, it was in time regardless of any ACAS extension.

32. With regard to the merits of the claim, I cannot conclude on the limited evidence before me that the Claimant claim has no reasonable prospect of success and should be struck out:

32.1 Ms. Owusu-Agyei submits the Claimant does not seek to connect his alleged disclosures to the detriments and such a connection would "*involve an elaborate conspiracy ... which resulted in an entirely fabricated allegation of sexual harassment made by a third party*". The Claimant does in fact say exactly this; he told me he was subject to "*constant victimisation*" and that the allegation against him of sexual harassment was fabricated by the complainant who (perhaps significantly) was the manager's girlfriend. Ms. Owusu-Agyei may be correct that the Claimant's suspension was a discrete and isolated matter entirely unconnected to the Claimant's alleged protected disclosures. But it will be for the tribunal at the full merits hearing, having had the benefit of all the evidence, to determine whether there was a causative link having considered the mental processes of the person who took the decision to suspend the Claimant and whether that person was materially influenced by the Claimant's prior (alleged) protected disclosure(s). If the tribunal at the full hearing agree with Ms. Owusu-Agyei that the suspension was not a detriment, then time limits will again be an issue.

32.2 With regard to matters prior to August 2018, these were arguably not part of a succession of connected acts. However, I cannot identify any benefit in striking

out these matters as the Tribunal at the full merits hearing would still be required to hear the same evidence by way of background and would inevitably have to make findings in respect of the whole picture.

33. I do however have concerns that the alleged protected disclosures and detriments prior to August 2018 are out of time as there is little evidence that these are connected to much later events in 2018 and are therefore “similar” acts or failures. For this reason, I believe these allegations have little reasonable prospect of success and I am therefore making a deposit order as a condition of the Claimant continuing to pursue any allegations arising out of matters prior to August 2018. Having explored with the Claimant his income and outgoings, I have made a deposit order of £100 and this is set out in a separate order.
34. In conclusion, whether or not there was a series of similar acts or failures on the part of the Respondent falls to be determined by the full Tribunal at the full merits hearing. In the meantime, the Claimant is given the benefit of the doubt and all his claims and allegations may continue subject to compliance with the Deposit Order in respect of allegations prior to August 2018.
35. Case management orders and the Deposit Order will be sent to the parties separately.

Employment Judge Mason
28 October 2019

Judgment sent to Parties on
30/10/2019