Case no : 2200815.2019

EMPLOYMENT TRIBUNALS

Claimant: **Mr Haziz Rahim**

Respondent: The Commissioner of Police of the Metropolis

RESERVED JUDGMENT ON PRELIMINARY HEARING

Heard at: **London Central** **On:** **Wednesday 23 October 2019**

Before: Employment Judge Hildebrand

Appearances
For the Claimant: Ms Angela Delbourgo, Counsel
For the Respondent: Ms S Keogh, Counsel

JUDGMENT

1. The Claimant's claims of race and religion and belief discrimination are struck out on the grounds that they were presented outside the prescribed time and the tribunal has no jurisdiction to hear them.
2. The Claim is not one where it would be appropriate for the Claimant to give evidence by video link from Afghanistan.

REASONS

Introduction

1. This preliminary hearing follows a hearing before me on 19 September 2019 when I ordered an open preliminary hearing on the jurisdictional issues raised by the Respondent in paragraphs 13 to 17 of the Grounds of Resistance ("GOR") utilising one of the days which had been listed on issue for the full merits hearing in this case.

2. I made directions at that time for the Claimant to provide a witness statement by 9 October 2019 and for the Respondent to produce the bundle by 16 October 2019. The Respondent expresses what appear to be justifiable concerns about the

manner in which this litigation is conducted by the Claimant and his advisers. The witness statement and bundle were provided by the Claimant on 17 October 2019. The bundle is not focussed on the issue to be determined and the witness statement does not deal with the material normally found in relation to the determination of an extension of time on just and equitable grounds. Despite the letter from the Claimant's employer dated 15 September 2019, unusually seeking leave on behalf of the Claimant to give evidence by video link, I had anticipated that since this date was fixed for the final hearing the Claimant would be in a position to attend for this hearing. His clarification would have been of assistance. I do not see how given the law in relation to burden of proof and the complexity of the history covered by the case it could be practicable for this case to be heard without the oral evidence, capable of challenge in cross examination, of the Claimant.

3. It is important to record concerns expressed at the outset to the Claimant's Counsel. I explained that since there had been no application to amend the Particulars of Claim, ("POC") that document would be the focus of my consideration. The Claimant has supplied other material, not least a bundle of 500 plus primary documents. He has supplied an extensive witness statement. I explained at the outset that I was constrained in this preliminary hearing by consideration of the pleaded case. Counsel explained to me that she did not have instructions to apply to amend unless the case was allowed to proceed. Counsel informed me that she would seek to persuade me that the critical date was was when the Claimant left the Respondent and that under the authority of **Gilham** she would also seek to amend to allege prejudice to the Claimant as a result of his status as an office holder. He should consequently be able to claim unfair dismissal. I asked if there was an application to amend to deal with that issue, not directly related to the preliminary issue, and was informed that the Respondent's application to strike out could be considered by reference to the Claimant's skeleton argument as amended. The documents could be considered by reference to the Claimant's table of events pleaded.

4. It is also useful to record that the Claimant's skeleton initially recorded that the claimant had engaged the services of solicitors as soon as practicable after his resignation. It also recorded that he had issued his claim with the assistance of his

legal representatives. Both of those references were deleted before the hearing. Counsel for the Claimant could not clarify the reason for this and was given time to take instructions. The outcome was that the skeleton had been drafted by Counsel for the Claimant who appeared on 19 September 2019 and the passages had been removed on the instructions of the Claimant. The legal advisors referred to as assisting in the presentation of the claim were not the Claimant's present solicitors.

The application

5. I received in connection with the application an extensive bundle of documents. This contains, the pleadings, the skeleton argument produced by the Claimant and subsequently amended as described above, the witness statement from the claimant running to some 24 pages, a timeline from the claimant running for some 22 pages and a large selection of other material being documents created over the time of the Claimant's appointment with the Respondent. The documents are in a confused state. The Claimant has failed to give any comprehensible chronological analysis of events. The dates of events described drift forwards and backwards over the history. In the end I was left with some doubts whether the correct year was described in relation to some events.

6. The Respondent's application was made orally. The key dates are that the conciliation began on 10 January 2019 and finished on 10 February 2019. The Claim was presented on 9 March 2019.

7. The Respondent placed as the start date the record of an incident in June 2017 regarding Ramadan, and difficulties concerning his use of the prayer room at the end of 2017, and concluded on 22 May 2018 then reverting to 23 January 2017. There is no connection it is submitted between these various events. Although the Claimant says that Ramadan occurs every year the claim was made before Ramadan in 2019 and nothing had arisen since Ramadan the previous year. When one looks at the skeleton argument, incidents are recorded from the pleading as continuing acts. There is no connection between those acts and no application to amend had been made. Even if the dates when the claimant alleges he should have been paid overtime were to be included, the last such date in the Claim was

just prior to his resignation on 20 September 2018 and therefore a month out of time.

8. The Claimant gave no reason for his resignation in the email found at B 409 in the bundle. There is nothing to say that the manuscript note which he made on that document was contemporaneous. The Claimant had been called to a meeting pursuant to regulation 12 and regulation 13. Regulation 12 deals with extensions to probation and regulation 13 deals with termination of probation. On 20 July 2018 the Claimant's probation was extended for a further six months. This is mentioned in the Response but not in the Claimant's pleading.

9. The Claim form was presented on 9 March 2019. That is 6 months and 16 days out of time. The Claimant entered ACAS early conciliation on 10 January 2019 by which time the Claim was already significantly out of time. The statutory early conciliation scheme provided no extension because the Claimant was already outside the initial 3 month period at that point. By reference backwards from 10 January the last event about which complaint could be made was 11 October 2018. The Claimant had given 30 days notice of resignation to expire on 20 October 2018. He had resigned a month earlier and has not complained of any adverse events in the notice period. In the circumstances the claim is plainly out of time. Counsel referred to the skeleton argument and table produced. The last pleaded act of discrimination is 22 May 2018. Although the Claimant pleaded subsequent events in relation to failure to pay overtime this was pleaded as discrimination. The last operative date pleaded was 20 September 2018.

10. It was therefore submitted that there was nothing pleaded which was within time in the context of discrimination. There was nothing in the Claimant's witness statement to say why the claim has not been issued in time.

11. The Respondent referred to the text at the end of the Claimant's skeleton argument. The Claimant argued that time ran from 20 October 2018. It was contended that there had been a continuing act in the form of an ongoing situation or a continuing state of affairs in which the acts of discrimination occurred as opposed to a series of unconnected or isolated incidents. The Respondent noted the reference to the case of **British Coal.** It is for the claimant to show that it is just

an equitable for time to be extended. There is no presumption in favour of an extension. The Claimant must deal with the length of, and reason for, the delay. The claimant was abroad but he should have contacted ACAS when he still a constable. We do not know when the Claimant went abroad. Pleaded acts of discrimination cannot be inferred from the fact that the Claimant decided to resign. He cannot pray these in aid as they are not in the Claim. In terms of prejudice if time is extended the cogency of the evidence is likely to be affected. The events are long in the past. Even though the Respondent's witnesses are police officers their memories are no better than a other witnesses. Cooperation by the party to be sued was not a relevant consideration in this case.

12. In terms of the Claimant's contact with lawyers the Respondent submitted we no longer have confirmation regarding when he attempted to obtain legal advice. That has been removed from the skeleton. Even if the Claimant did not obtain legal advice at the time of his resignation he could have done so. His complaints were long-standing. He was in contact with the Association of Muslim Police and the Police Federation as we know from his witness statement. He received advice from the Federation. In July 2018 he dispensed with the services of his Federation officer representative. He could have obtained another. He therefore had the full support of the Federation or the Association at the relevant time. There is also no suggestion he was unable to contact appropriate sources of advice via the Internet. If this is a relevant factor it is usually set out in the evidence. If time is extended that would be significant prejudice to the Respondent. The Respondent submitted the case ought to be dismissed.

The Claimant's Resistance

13. The Claimant's Counsel in opposition relied on the skeleton argument drafted by her predecessor and on the Supreme Court authority of **Gilham** both in relation to the assessment of the just and equitable issue and in relation to extension of time. She stated that if she failed on jurisdiction she intended to apply to amend. I explained that if she failed on jurisdiction there would be no claim to amend at that point.

14. The Claimant's representative said that termination of employment was the effective start date. I understand this to mean termination of the statutory appointment. The case was referred to ACAS on 10 January and the Claim was presented within a month of the certificate given on 20 February. The unfair dismissal claim would therefore have been brought within the requisite period. The unlawful discrimination claim was therefore, she submitted, in time. If it was out of time it was out by only a few weeks and not a year as stated by the Respondent. The correct date for the start of limitation was 20 October 2018. A continuing pattern of discrimination as referred to in **Hendricks** was identified. Various acts have been identified but the main problem hinged on the issue of Ramadan when ability to follow his religious practices cut across the Claimant's duties. Little account was taken of the Ramadan fast in this section of the police. Ramadan fell in the summer months in 2017 and 2018. The Claimant complained about the Queen's Birthday duty in 2017 which coincided with the Ramadan fast. The Claimant was tempted into breaking his fast which he regarded as a discriminatory act. Even if the person doing this did not regard it as an attempt, the Claimant did.

15. Regarding the extent of the pleading of acts of discrimination, the pleadings just identify the main issues but were not required to set out evidence or all the arguments. This was especially the case if the Claimant was not legally represented at the time the Claim was brought. More minor items such as time off for Friday prayers were at a low level but would "bubble along" and be manageable. However in relation to Ramadan the Claimant found this intolerable. It was hot weather. No adjustments to duties or to what the Claimant was allowed to wear were made. More minor acts of discrimination occurred at Christmas when the Claimant was invited to a party at which alcohol was consumed. Religious observation is a factor in the claimants capability reports. The Claimant was downgraded as a result of his adherence to his religion. There was a policy not to make allowance for Ramadan in the scheduling of duties. The case of **Owalabi** was cited in this context. That was a similar case where there was a series of incidents interspersed with time. The fact of a gap between them did not stop them being continuing acts. The incidents at Ramadan were very onerous. It was a severe incident of discrimination. The Respondent is a large employer and could schedule work duties in a sympathetic manner as others do, for example in relation to exams, to accommodate Ramadan. This was only a problem during the daylight

hours. The Claimant asked to be moved to another team as his relationship with broken down and he had been made fun of. The whole situation needed to be taken in the round.

16. The Claimant had resigned on 21 September 2018 and when he cooled down he had tried to withdraw his resignation. Others have been treated more favourably in relation to withdrawal. I pointed out that this was not pleaded nor indeed claimed at any stage by the Claimant. The Respondent objected to the the Claimant's representative giving evidence in relation to continuing acts. The Claimant's representative was unable to identify any pleading where it was alleged the refusal to allow the Claimant to withdraw his resignation was an act of discrimination.

Reply by respondent

17. The Respondent submitted that the main source of complaint related to Ramadan. It was not suggested that there were incidents all year round. **Hendricks** refers to continuing or individual incidents.

18. There was one incident in the prayer room and one on 23 January 2017 regarding an arrest. These are very much minor incidents. The case against the Respondent must be pleaded. By **Chapman v Simon** the Employment Tribunal is restricted to consideration of matters in the pleadings. **Owolabi** just applies **Hendricks** to the facts of that particular case. In that case there was an incident and a failure to deal the complaint arising from that incident. The question was whether these two interactions were connected given they were a short time apart. Omissions can be taken into account but there is no allegation of any omission here. The pleading does not indicate any common connection of people. Sergeant Hughes was involved in Ramadan 2017. Gale Craig and Shapley were involved in the prayer room incident and Sinclair and Benson in Ramadan 2018. Although Sergeant Hughes was present at the incident in January 2017 it primarily concerned Sergeant McGill.

19. The Respondent's representative formally objected to the Claimant's representative giving evidence in relation to continuing acts. The Claimant's witness statement went far beyond what is pleaded. It gives however no evidence in relation to the delay in bringing the claim. The Claimant had chosen not to attend.

20. The case of **Gilham** related to the issue or whether a judge is a worker but said nothing about employment status. It was misconceived to argue that **Gilham** might allow resurrection of the Claimant's unfair dismissal case.

The Law

21. Section 123 of the Equality Act 2010 ('EQA") provides that complaints must be made to the Employment Tribunal within 3 months of the act complained of. In the event of conduct extending over a period the time runs from the end of the period.

22. The ACAS early conciliation provisions allow for an extension of time by disregarding the period spent in early conciliation. If the three months expires during conciliation the time is extended by one month after the conclusion of conciliation. If the reference to ACAS is not made within the primary limitation period of 3 months the benefit of the extension is lost.

23. If time has expired it may be extended on the grounds that the tribunal considers it just and equitable to do so. The leading case of **Robertson** states that this is the exception not the rule. It would be wrong however to look for exceptional circumstances, rather than to apply the words of the statute. The case of **British Coal v Keeble** sets out some factors in consideration of extension of time in Limitation Act cases which it has been helpful to read across to this jurisdiction. These include the length of and reasons for the delay, the extent to which the cogency of the evidence may be affected by the delay, the extent to which the party sued has cooperated with requests for information and the balance of prejudice in granting or not granting the extension required.

Conclusion

24. The first document to consider in this case, as in any case, is the claim form. The Claimant completed this and presented it on 9 March 2019. The case appears to be argued on the basis that he wrote the document himself although his Counsel on 19 September a appears to have been under the impression that he had the benefit of legal advice from the time that he resigned up to the presentation of his

complaint on the 9th of March 2019. Assuming that the claimant did not have legal advice, he has given us no insight into the circumstances in which he became aware of the employment tribunal, his knowledge of the time limits involved and his understanding of the early conciliation process. Whatever the state of the advice received by the Claimant the form ET1 produced sets out the fact that he is a police constable and has been so it is said from the 30th of August 2018 to the 20th of October 2018. Those dates cannot be correct. At page 6 of the form setting out his claims he indicated that he had been unfairly dismissed and discriminated against on the grounds of his religion or belief and race. He also claimed that he was owed other payments. At the point where he was required to set out background and details of his claim he wrote: “please see attached document.” The attached document contains 3 pages of close typescript. It is headed: “Below are some examples of my claim of my discrimination.” There is a subsequent heading in the body of the document: “In relation to the overtime unpaid.” This section which is a little over a page long does not contain any allegations of discrimination on the grounds of race, religion or belief. That claim and the unfair dismissal claim have been dismissed on withdrawal.

25. The examples in relation to discrimination in the earlier part of the document start in June 2017. They run chronologically to 23 May 2018. There is then a complaint about the events of 23 January 2017. The first issue to be determined is therefore whether the Claimant is limited by what he has said in his claim or can treat that as examples to be added to without restriction. The leading authority on this point with which the parties will be familiar is **Chandhok v Tirkey 2015 ICR 527 EAT.** The President, Mr Justice Langstaff stated at paragraph 16: “ The Claim as set out in the ET1 is not something just to set the ball rolling, as an initial document to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely on their say so. Instead it serves not only a useful but a necessary function. It sets out the essential case. It is that to which the Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document but the claims made under the ...Rules of Procedure.“

26. For this reason I asked the Claimant’s counsel at the outset if there was an application to amend. There has been none. It follows that my consideration is

directed to the claim form and the allegation made in it. The last date cited as discrimination is 23 May 2018. I cannot substitute the Claimant's witness statement for the claim form. I do not see how the presence or absence of legal advice can affect the outcome of this aspect.

27. It must follow from that conclusion that the discrimination claims brought should have been made by 23 August 2018. The Claims were brought on 9 March 2019. Disregarding the issue of early conciliation that amounts to a delay of in excess of six months.

28. Is it appropriate to grant an extension to allow this case to be considered? I apply the **British Coal** factors as a starting point. The delay is very long. No attempt has been made to explain it save an assertion based on time running form the expiry of the claimant's notice of resignation. There is no material provided to me about the Claimant's understanding of the process, or of the difficulties he encountered despite the Claimant having had the benefit of counsel since at least 19 September 2019. Indeed on this central aspect the Claimant's position is unclear. His Counsel on 19 September 2019 appears to have understood he had legal advice from September 2018 to March 2019. The Claimant has immediately before this hearing indicated he did not have that advice but has told us nothing further. I find it difficult to see what assistance the Claimant can be given in relation to the delay in light of his failure to provide some explanation. The delay is therefore long and there is no explanation given for it.

29. Turning to the cogency of the evidence, the events in this case date from January 2017 to May 2018. We are 18 months from the allegations of Ramadan 2018. By the time the case comes to trial the delay will be at least 2 years to the later events and 3 to 3.5 years to the earliest events. It seems highly likely that the memories of busy police officers will have dimmed in that time. This is not a case where the Claimant brought a grievance and so there are no notes and no internal enquiry records to rely on. I find this factor weighs against the Claimant.

30. The question of cooperation by the party to be sued does not weigh in the Claimant's favour. I do not take it to be irrelevant. It is a possible source of assistance which is not available to the Claimant.

31. Finally in consideration of the balance of prejudice the claimant will lose, if an extension is not granted, the possibility of a claim against the Respondent. If he would have succeeded he has lost a potential remedy. If he would have failed he has lost nothing. The Respondent will benefit if the extension is not granted in being relieved of the defence of a difficult and complex claim. If the extension is granted it may have lost a case where it would be found liable, or a case where it might successfully defend the case but at management and financial cost. I have formed no view of the merits and it would be wrong to do so on the material presently available. That is not a factor which assist either party.

32. I consider it is right to have regard to the fact that the Claimant has expressed a clear wish not to attend the hearing. That unusual aspect must at the least negate any benefit normally accruing to a claimant under the balance of prejudice heading.

33. Weighing all those factors together I conclude that there is no basis here for me to say it is just and equitable for time to be extended to consider claims over 6 months out of time.

34. The Claims are therefore struck out, the Claimant having withdrawn the non-discrimination claims.

Costs

34. The Respondent has indicated an intention to apply for costs in relation to the withdrawn claims and in respect of this decision in the event that it was decided in the respondent's favour. In light of the Claimant's expressed intention not to return for the hearings in this case those applications are to proceed on paper. The Claimant is to be given ample time to respond to the applications made, in the event they are pursued by the Respondent.

Employment Judge Hildebrand

28 October 2019

Sent to the parties on:

30/10/2019

For the Tribunal: