



EMPLOYMENT TRIBUNALS

Claimant: Mr T Nettey
Respondent: Department for Work and Pensions
Heard at: Birmingham **On:** 7 and 8 January 2020
Before: Employment Judge Hindmarch

Representation
Claimant: In Person
Respondent: Mrs Hodgetts (Counsel)

JUDGMENT ON AN OPEN PRELIMINARY HEARING

1. The application to amend the ET1 is not well founded and is dismissed.
2. The complaints at paragraph 12 of Employment Judge Self's order (following a Case Management Preliminary Hearing on 7 August 2019) at paragraph 12 items 8, 12, 15, 16, 17, 18 (as amended) 19, 22, 25 and 26 are out of time and it would not be just and equitable to extend time.
3. The application by the Respondent for a Deposit Order is not well founded and is dismissed.

REASONS

1. This matter came before me for a 2 day open Preliminary Hearing on 7 and 8 January 2020.
2. By an ET1 filed on 23 April 2019 the Claimant Mr Nettey, who commenced employment with the Respondent in 2009 and remains employed, brought complaints of race discrimination. At a Case Management Preliminary Hearing on 7 August 2019 Employment Judge Self set out the issues agreed by the parties as being pleaded in the ET1.
3. The Open Preliminary Hearing before me was listed by Employment Judge Self to consider a number of matters.

4. The first was any application to amend by the Claimant. Employment Judge Self had ordered the Claimant to make any such application by 28 August 2019. He had not done so.
5. The second matter for me was to consider whether any of the 28 allegations set out in Employment Judge Self's order at paragraph 12 (1) to (28) inclusive were in fact particularised in the ET1 or required an amendment application by the Claimant. Helpfully at the outset Mrs Hodgetts on behalf of the Respondent conceded that allegations 8, 12, 15, 16, 17 and 22 were in fact set out in the ET1. These being (taking the numbering from Employment Judge Self's orders);
 - "(8) on 8/4/16 Martin Buxcey imposing a final written warning for repeated examples of minor misconduct*
 - (12) On 16/8/16 Gail Barnet telling C 'you're a frustrating character, that's why I treat you the way I do'.*
 - (15) On or before 9/10/16, Gail Barnet asking that C provide her with photographic evidence of performing his objectives.*
 - (16) On or before 9/10/16, Gail Barnet giving C the lowest mid-year box marking.*
 - (17) On 14/10/16, Amy Adamson suspending C.*
 - (22) On or before 24/4/17, David Kerr providing information that triggered an internal fraud investigation into C's use of annual leave, special leave and flex-sheets."*
6. During hearing from both Mrs Hodgetts and the Claimant it was agreed allegations 7, 8, 19, 25 and 26 were covered by the ET1. These were as follows (again taking the numbering from Employment Judge Self's order);
 - "(7) Between 16/3/16 and 8/4/16, Martin Buxcey sending emails to C inviting him to discuss his correspondence.*
 - (8) On 28/4/16 Martin Buxcey imposing a final written warning for repeated examples of minor misconduct.*
 - (19) From 6/1/17 until 27/2/18, failing to progress C's appeal against the final written warning.*
 - (25) On 3/1/18, Geraint Lewis dismissing C's grievance (dated 24/10/17) against various managers.*
 - (26) On 9/4/18, Paul Phillips dismissing C's appeal against the final written warning imposed on 5/1/17?*
7. Helpfully the Claimant withdrew allegations 3, 4, 5, 6, 7, 11, 13, 14, 19 and 20, these being background and contextual matters rather than separate allegations of discrimination. Thus allegations withdrawn, again taking the numbering from Employment Judge Self's orders were;
 - "(3) on 3/01/15, Iona Old providing C with a disciplinary letter about his conduct when told about his PPR mark?*
 - (4) On 8/1/16, Iona Old imposing a written warning for breach of the guidance on electronic communications with third parties?*
 - (5) On 23/2/16, Wendy Crayton dismissing C's appeal?*
 - (6) On 8/3/16 Martin Buxcey responding to C's attempt to appeal further his written warning.*
 - (7) Between 16/3/16 and 8/4/16, Martin Buxcey sending emails to C inviting him to discuss his correspondence.*
 - (11) [[On 25/7/16], Gail Barnet requesting to see, and then directing C to provide, his leave chart?]*

- (13) On or before 26/8/16, Gail Barnet raising a grievance/making a complaint in respect of C's failing to provide his leave chart and failing to attend a team meeting.*
- (14) On or before 9/10/16 Gail Barnet alleged that C had called her a liar*
- (20) On or after 6/1/17[date to be confirmed, following C's return from suspension], Gail Barnet failing to invite C to mid-year review."*
8. The parties agreed allegation 18 was within the ET1. It was rephrased as 'On 6/11/17 Mark Whitehouse chose to select part of the Claimants grievance as not worth exploring and arrived at a decision'.
9. This left items 1, 2, 9, 10 and 21 which the Claimant asserted were within the ET1 as part of his general allegations of 'abuse of power' and/or 'bullying'. I expressed some doubt as to whether these were actually covered in the ET1 and the Claimant conceded he would need to make an application to amend. These allegations are set out below, again using the numbering adopted by Employment Judge Self as follows;
- "(1) on 28/1/15 lee Bird (a) shouting "look at me when I'm talking" (b) saying "look at the aggression you are demonstrating" (c) threatening to take flexi-time off C*
- (2) On 27/5/15 Sophie Alker telling C that his People Performance Reporting mark is 'must be improved'.*
- (9) On 21/6/16, Mark Poultney saying that he felt C had insulted him.*
- (10) On or after 21/6/16, Mark Poultney instructing an HEO to document conversations with C, to copy emails with C to him, and advising an HEO to speak to HR.*
- (21) On or after 6/1/17 [date to be confirmed] [David Kerr? Lee Bird?] counter-signing C's end of year mark.*
10. This left allegations 27 and 28 and which the Claimant sought to argue were covered in the ET1 at section 15 'additional information' page 13 of the bundle before me. Allegation 27 was 'on or before 15/05/2018 Bev Beetison "doctoring" the appeal hearing notes'. The Claimant asserted this was covered by the wording in the ET1 which states 'in their role as appeal manager bully and show unconscious bias towards a particular employee making the allegations'. I find the allegation to be a very serious one and found not covered in any way by the somewhat sweeping allegation in the ET1 and an application to amend was needed.
11. Allegation 28 was 'on 8/1/2019 Vince Cotton rejecting Claimant's special payment request'. The Claimant asserted this was covered by the wording in the ET1 as to 'abuse of power'. I found it is a very specific allegation against a named person and attributing a specific act to him which could not be covered by the general wording of the ET1 and an application to amend would be required.
12. This left the Claimant needing to make an application to amend in respect of 7 allegations numbered 1, 2, 9, 10, 21, 27 and 28 from the list in Employment Judge Self's order.
13. It was agreed we would hear from Mrs Hodgetts first who spoke to a comprehensive Skeleton Argument. She opposed any application to amend.

14. She reminded me that the Tribunal Rules, Rule 29, give me a broad discretion in whether to allow any amendment and that my discretion must be exercised in accordance with the overriding objective in rule 2. Mrs Hodgetts also referred me to the Presidential Guidance and the principles in Selkent and Abercrombie. Rule 29 ET (Constitution Rules of Procedure) Regulations 2013, 'the Rules' provides as follows:
"Case Management Orders
The Tribunal may at any stage of the proceedings, on its own initiative or on an application, make a case management order"
Rule 2 deals with the 'overriding objective' and requires that *'the Tribunal shall seek to give effect to the overriding objective ... in exercising any power given to it by these Rules.'*
15. The principles set out in Selkent Bus Co Ltd v Moore (1996) ICR 836, EAT and Abercrombie v Aga Range Master PLC (2013) EWCA 1148 must be considered and can be summarised as follows:-
- The nature of the amendment must be considered. This case before me was not a relabelling of the existing claim, but rather an application to adduce new facts and new complaints. It was a number of major rather than minor amendments. All circumstances would need to be considered, including any injustice or hardship to either party.
 - Time limits would then need to be considered. I would need to consider whether any of the complaints were out of time and whether time should be extended.
 - I would need to consider the timing and manner of the application.
16. The relevant time limits for discrimination claims are set out in S123 Equality Act 2010 as follows:
"s123 Time Limits
(1) Subject to [sections 140A and 140B], Proceedings on a complaint within section 120 may not be brought after the end of –
a) The period of 3 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;
17. The Tribunal must make a distinction therefore between 'one-off' acts and 'continuing acts'. The Tribunal might also have to decide, if a complaint is out of time, whether time should be extended having regard to any reason put forward for delay and all other circumstances.
18. The amendments being sought here were clearly substantial. I needed to carry out a careful balancing act and to consider the nature of the amendment, the applicability of time limits and the timing and manner of the application.
19. Selkent established that I must firstly consider the nature of the amendment. Essentially here the ET1 makes broad allegations of race discrimination, harassment and victimisation (amongst others) but does not specifically

plead the facts surrounding the 7 allegations which form the amendment application. What we have is the Claimant making entirely new factual allegations which add to the basis of the existing claim. These amendments if allowed would amount to a substantial alteration to the factual matrix already before the Tribunal.

20. The second factor to consider is the whether these allegations are out of time and if so whether time should be extended. The claim form was presented on 24 April 2019. Anything occurring before 3 January 2019, allowing for early conciliation, is potentially out of time. The only one of the 7 allegations that is on the face of it in time is 28 (that being 'that Vince Coton rejected the Claimant's special payments claim').
21. Allegation 1 dates back to 28 January 2015 and is 4 years out of time. Allegation 2 against Mrs Alker dates back to 27 May and is 2015 3 ½ years out of time. Allegation 9 against Mr Poultney is dated 21 June 2016 and is 2 ½ years out of time. Allegation 10 against Mr Kerr is January 2016, 3 years out of time. Allegation 27 against Betison is May 2018, 6 months out of time.
22. What I am told is the Claimant had the benefit of Trade Union advice throughout these matters. Documents in the bundle show him in June 2015 referring to 'racism and harassment' in the company of his Trade Union representative at a grievance meeting. The Claimant told me his Trade Union representation wanted to attend with him today so no doubt he is still receiving some form of advice and assistance.
23. The Claimant confirmed he first realised there was discrimination when he was suspended which was in 2016. He says he did not bring his claim earlier because he was seeking to exhaust internal processes however, the bundle reveals the Claimant brought a number of grievances. The one against Gail Barnet was concluded in June 2017 (page 139), the one about his preferred grading was concluded in August 2017 (page 148) and another one about various matters was conducted May 2018 (pages 233-234). The Claimant had every opportunity thereafter to present his claim in time.
24. I have to consider whether any of the allegations amount to a continuing act. They are not pleaded as such. Mrs Hodgetts' Skeleton Argument has directed me to the relevant law. The individuals against which the Claimant make these new allegations do not appear to have any nexus or to be acting in concert. The allegations all occurred at discrete points in time. I cannot see any basis for finding any continuing act as regards these 7 allegations. I also have not been taken to any argument on the part of the Claimant as to why I might use any my discretion to extend time.
25. The third factor from Selkent is the timing and manner of the application. The Claimant was ordered by Employment Judge Self to make an application to amend and he did not. The later the application, the greater the risk of the balance of hardship.
26. I have not tested the merits of the claim. It seems there is much material in the Claimant's possession which is not before me today. What I must consider is prejudice. Applications to amend claims, based on allegations which occurred many years ago, are always difficult when weighing up

prejudice. It is an indisputable fact that memories do fade in time; that is why we have time limits. On balance, and weighing up all factors, justice, proportionality and all matters within the overriding objective, I am minded not to grant the application.

27. After I gave my decision on this point, Mrs Hodgetts made the point the Claimant was only ordered by Employment Judge Self to make an application to amend if there were any new matters; other than those set out in his Order. I thanked her for her concession but this did not alter my decision.
28. The second matter I had to consider was whether the remaining claims were in time and thus whether the Tribunal had jurisdiction to hear them. The allegations to consider were those as set out in Employment Judge Self's list of issues at paragraphs 4 and 5 along with the additional matters at paragraph 12 items 8, 12, 15, 16, 17, 18 (as amended), 19, 22, 25 and 26.
29. As regards the 'Monks' appeal (paragraph 5) Mrs Hodgetts accepted allegations concerning this were in time. She contended however that allegations regarding the 'Billington' investigation (allegation 4), which concluded on the decision being delivered to the Claimant on 2 November 2018, were out of time as were the remaining allegations in paragraph 12 of Employment Judge Self's Order which dated from 8 April 2016 (allegation 8) to 9 April 2018 (allegation 26).
30. Whilst I had a large bundle of agreed documents I was not taken to all of them and determined with the parties I did not need to read them. What appears to have occurred is that the Claimant had exhausted the Respondent's usual grievance and appeal procedures by May 2018. He then made direct contact with the Permanent Secretary (it appears this was on 3rd July 2018- page 269-280 of the bundle) who instigated a fresh process, outside of the normal internal procedures, to address the Claimants concerns. An investigation and decision maker outside of the Department for Work and Pensions, a Mr Billington, was appointed, his investigation commenced on 10 July 2018 and his final report is dated 23 October 2018 and a copy is at pages 282-670 of the bundle. Mr Billington met with the Claimant as part of the investigation on 25 July 2018. Mr Billington's decision was sent to the Claimant on 2 November 2018.
31. The Claimant takes issue, in terms of allegations of race discrimination, with the conduct of the Billington investigation and the outcome thereof. Mr Billington offered him a right of appeal and he did so. The appeal was heard by a Mr Monks, said to be an independent HR practitioner, and the allegations the Claimant makes about his conduct of that appeal are agreed by the Respondent to be in time.
32. The Claimant has not specifically pleaded the Billington/Monks investigations to be a continuing act. Mrs Hodgetts accepted they could be argued to be connected but says there was no nexus or concert between Messrs, Billington and Monks and that, if the Claimant had concerns about Billington, either when he met with him to be interviewed or when he received his conclusion, time began to run then. She says he should have

presented his claim on receipt of the conclusion and is therefore out of time.

33. Given the Permanent Secretary agreed to allow the Claimant to have this independent (outside normal processes) investigation I am content to find for the purposes of today's hearing, it is all one continuing act; it is all part of the same process. I find it was perfectly reasonable for the Claimant to await the outcome of the Monks appeal, an appeal offered to him and which he no doubt hoped would overturn the Billington decision, before issuing these proceedings.
34. The Claimant has to show the acts, the alleged discrimination in both the conduct and outcome of the Billington and Monks investigations and outcomes, are linked for there to be a continuing act. Hendricks v Metropolitan Police Commissioner (2002) EWCA Civ1686 makes clear the Claimant must show this entire independent process was an act extending over a period. I note that Mr Monks was tasked to review the 'decision making process of Mr Billington and to determine whether these were reasonable'. In his decision letter (page 701-702) dated 24 January 2019 Mr Monks confirmed he had done this. I am satisfied at this preliminary stage the Claimant can show a commonality; a link between the Billington and Monks investigation; that being they were part of the same independent process. It therefore can be said to be an act of extending over a period of time until Mr Monks reached and conveyed his decision.
35. As regards the other 10 remaining allegations from paragraph 12, the last act complained of is dated 9 April 2018. There is no nexus between these acts and the alleged perpetrators of these acts that I can find. They are discrete acts, are not continuing acts and I have not heard any just and equitable reason why I should extend time. As stated earlier in this Judgement, the Claimant had Trade Union advice throughout and was aware in 2016 that he had a potential race discrimination complaint or complaints. There is no good reason why these allegations were not presented in time.
36. We then moved on to the remaining issues which were set out in Employment Judge Self's orders at paragraphs 1-10 enclosed. As regards to paragraph 2 the Claimant confirmed his case was that Mr Billington's interpretation of the evidence, and his preference of the evidence of the 13 witnesses over his own, was an act or acts of race discrimination.
37. In relation to the victimisation complaint the only alleged protected act now in play was 7d which the Respondent accepted was a protected act, the date of which is 3 July 2018. For clarity the protected act is as follows:
"Email on 3/7/18 to Permanent Secretary and Cabinet Minister about HMRC's refusal to handle C's upheld appeal".
38. After an adjournment Mrs Hodgetts confirmed she was no longer applying for a Strike Out but was pursuing a Deposit Order. Details of the Claimants means were given in the ET1 and she made reference to recent orders she had experience of and would be satisfied of, in the sum of £50-£100. The Claimant accepted he would meet this sum if ordered to do so.
39. Deposit Orders can be made under Rule 39 where an Employment Tribunal

consider any allegation has little reasonable prospects of success. Mrs Hodgetts application was in respect of all the remaining allegations made by the Claimant.

40. Rule 39 provides:-

“(i) Where at a Preliminary Hearing ... the Tribunal considers that any specific allegation or argument in a claim has little reasonable prospect of success, it may make an order requiring a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument”.

41. Mrs Hodgetts Skelton Argument referred me to the relevant case law on such matters. I am able to take into account the credibility of the facts asserted and the likelihood they can be established at a hearing.

42. The Claimant would have the Burden of Proof in accordance with S136 Equality Act 2010 in respect of his allegations that the investigations and conclusions of Billington and Monks amounted to race discrimination. It is not enough for him to say he has the protected characteristic of race and has suffered some detriment or less favorable treatment namely Messrs Billington and Monks not finding in his favor. There must be something else, some causative link between his race and that treatment. In Mrs Hodgetts submissions she asserted the Claimant has little prospects of success in establishing such a link. He had not pointed to a link and the Respondent's witnesses would have perfectly good and non-discriminatory explanations for reaching the conclusions that they did. In support of this, and in response to the Claimants submissions, Mrs Hodgetts took me to a number of the transcripts of interviews Mr Billington conducted with witnesses (Bird, Alker, Bettison, Keen and Barnet). She says these witnesses gave fair and balanced answers to open questions, sometimes favouring the Claimant and sometimes stating him to be unreasonable, unprofessional and/or rude. She says Mr Billington was entitled to prefer their evidence over the Claimants and to reach the decision he made which has nothing to do with the Claimants race.

43. The Claimant says he can demonstrate Billington and Monks discriminated against him. He says the causative link can be inferred in a number of ways. Firstly he says the HR team at the Department for Works and Pensions were initially reluctant to allow him to continue to pursue grievances once the internal procedures had been concluded, and only did so when he made entreaties to the Permanent Secretary, and then a member of that HR team conducted the investigation with Mr Billington such that it was not truly independent of the Department for Works and Pensions and that HR had some influence in either the conduct of that investigation and/or the decision. Secondly he says Mr Billington failed to interview witnesses he put forward as capable of assisting him. Thirdly he says procedures were not followed in his case and he cites the examples of Mr Billington initially failing to send him appendices to the investigation report, those being the transcripts of interviews with witnesses, albeit Mr Billington did eventually send them.

44. Now I need to have a proper basis for doubting the likelihood of the Claimant being able to establish the facts essential to the claim at the trial. I have not seen all of the documents in the case, nor have I read all of the documents in the bundle before me. I am reminded of Anyanwu v South Bank Students' Union (2001) UKHL 14 and the view that discrimination cases should, as a general rule be decided only after hearing all the evidence, a principle that applies both to strike out and deposit applications.
45. Whilst I have sympathy with the Respondent's position, I am not however persuaded I can say there is little reasonable prospects of success having heard the Claimants submissions. It is my view the assertions made by the Claimant, in particular as to the alleged undue influence of the Respondent's HR team, and the extent to which Mr Billington may not have interviewed witnesses favorable to the Claimant, do need airing and may give rise to a possible discharge of the Burden of Proof of the Claimants part. I do not however in any way express a view on these matters that binds the trial judge. These are only observations on the Deposit Order application.

Employment Judge **Hindmarch**

Date 17 JANUARY 2020