



EMPLOYMENT TRIBUNALS

Claimant: Mr R L Molyneux

Respondent: Royal Mail Group Ltd

Heard at: London South Employment Tribunal **On:** 13 January 2020

Before: Employment Judge Ferguson (sitting alone)

Representation

Claimant: Mr J Neckles (union representative)

Respondent: Mrs L Roberts (legal executive)

RESERVED JUDGMENT

It is the judgment of the Tribunal that:

1. The Claimant's complaints of direct race discrimination and harassment related to race are dismissed because the Tribunal has no jurisdiction to hear them.
2. The Claimant's complaint of unauthorised deductions from wages is dismissed because the Tribunal has no jurisdiction to hear it.

REASONS

INTRODUCTION

1. By a claim form presented on 25 July 2017, following a period of early conciliation from 25 June to 10 July 2018, the Claimant brought complaints of direct race discrimination, harassment related to race and unauthorised deductions from wages.
2. This preliminary hearing was listed to consider whether the claim had been presented in time and if not whether the time limits should be extended.
3. The Claimant has been employed by the Respondent as an Operational Postal Grade (post person) from 26 September 2005. He remains employed. He

describes himself as Black British of Caribbean origins.

4. The complaints set out in the claim form are as follows:

4.1. Direct race discrimination and/or harassment related to race:

- (a) Failure to record overtime worked by the Claimant between 30 September 2016 and 3 December 2016 and failure to pay the Claimant for that work.
- (b) Failure to record a work-related accident on 13 September 2014 and further failure to comply with the Respondent's policies and procedures on rehabilitating an injured staff member.
- (c) On the Claimant's return to work in March 2015, requiring him to carry out outdoors or full work schedule whilst injured or incapacitated.
- (d) "Issuance of contrived Stage 1 notices for absence without knowledge or notice of the Claimant".
- (e) "Failure to resolve Claimant's grievance competently and appropriately and within procedural guidelines"... "The Claimant went through Stage 1 and 2 procedures. They all failed to address or acknowledge or admit the wrong doings which it was clear that the Respondent was guilty of. On each occasion, the Respondent resorted to deny or frustrate his complaints. It took until the Stage 3 stage, before the Respondent carried out proper and competent investigations, and thereby started to admit to their respective wrong doing. The Claimant thereby claims that there was been a concomitant failure to address or deal with his grievance complaints competently or appropriately."

The claim form does not mention any comparator or explain why the Claimant believes the above conduct was related to his race.

4.2. Unauthorised deductions from wages, in that the Claimant was not paid for overtime worked between 30 September 2016 and 3 December 2016.

- 5. In the claim form the Claimant accepted there had been a delay in bringing the proceedings but asserted "it was not reasonably practicable or possible (as the case may be) to bring the complaints". It was said that the complaints "required that proper internal investigations take place" and that it was "reasonable to give the Respondent ample opportunity to deal with or address his concerns".
- 6. At the start of the preliminary hearing Mr Neckles sought to clarify the complaints. He said the accident in (b) in fact happened on 17 September 2014 and that the failure to record it continued until January 2015. As to (d), there were two Stage 1 notices complained of. He said that in 2009 the Claimant was issued with a "made up" Stage 1 notice for a period of absence without his knowledge. The Claimant became aware of this in 2015. The Claimant also complained of another Stage 1 notice issued to him in 2015, which he says was unjustified because the absence was related to an accident at work. As for (e), Mr Neckles asserted that this complaint was "ongoing".

7. As the Claimant contacted ACAS on 25 June 2018, any act before 26 March 2018 is in principle out of time.
8. The issues to be determined are:

Direct race discrimination/ harassment

- 8.1. When did the acts complained of take place or, to the extent that the Claimant has shown a prima facie case of “conduct extending over a period”, when did it end?
- 8.2. In respect of any acts that took place (or conduct extending over a period that ended) before 26 March 2018, is it just and equitable to extend the time limit?

Unauthorised deductions from wages

- 8.3. Was it reasonably practicable for the Claimant to present his claim in time, and if not did he present it within a further reasonable period?

9. I heard evidence from the Claimant.

FACTS

10. The Claimant said all of the acts relied upon as direct race discrimination or harassment related to race were part of a continuing act from 2014 until 29 May 2018, when the Respondent delivered his grievance appeal outcome. This was because “all the detrimental/ less favourable acts pleaded within my claims were the subject of a Grievance Complaint which was not dealt with by the Respondent within the procedure and procedural timescales contained within the contractual Grievance Procedure, was thereafter resubmitted upon the instructions of the Respondent for investigation instead of going forward via an appeal process.” He said that if necessary time should be extended taking into consideration the fact that he was pursuing his complaints by way of an internal grievance. He also said it was not reasonably practicable for him to have submitted the claim any earlier because he was pursuing his complaints by way of an internal grievance.
11. In cross-examination, the Claimant accepted that he has been aware of the basis of complaints (a) to (d) since July 2017 at the latest. He also accepted that Sean Kelly was the manager who issued the Stage 1 notice in 2015 and the Claimant has not raised any other allegations of discrimination against him.
12. The Claimant is a member of the Communications Workers Union and said he took advice from them about time limits, including in December 2017. He did not conduct any research into time limits himself, but accepted he “possibly could have done”. The Claimant claimed that ACAS told him over the phone that as he still had internal processes going on, he “couldn’t do anything”, and that his union representative said if the Respondent was not dealing with matters he had to keep putting in another grievance.
13. It was put to the Claimant that in his last grievance, which considered all matters he had complained of up to that point, he did not complain of race

discrimination. The Claimant said he believed he had done. It was agreed that the matter could be left to re-examination. At the end of cross-examination Mr Neckles confirmed there was no re-examination and said he could not see any reference to race discrimination in the grievances.

14. The Claimant accepted that the grievance appeal outcome, issued on 29 May 2018, broadly upheld all of the complaints he has made to the Tribunal. He said his complaint was that there has been no action as a result of that letter.

THE LAW

15. Section 123 of the Equality Act 2010 provides, so far as relevant:

123 Time limits

(1) Subject to sections 140A and section 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;

...

16. It is well established that there is a difference between a continuing act for the purposes of s.123(3) and an act that has continuing consequences. A decision, such as a decision not to promote someone, may have continuing consequences but it will not constitute a continuing act unless the Claimant can show the existence of a discriminatory policy, rule or practice. In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 the Court of Appeal made it clear, however, that Tribunals should not take too literal an approach to this issue and where (as in that case) there are allegations of numerous discriminatory acts over a long period, the Claimant may be able to establish that there was an ongoing situation or continuing state of affairs which constituted a continuing act. Ultimately, the Tribunal should look at the substance of the complaints in question and determine whether they can be said to be part of one continuing act by the employer (Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548).

17. The correct approach to the jurisdiction issue at a preliminary hearing, where the claimant argues there was a continuing act, is as set out in the recent judgment of the Employment Appeal Tribunal in Caterham School Limited v Rose UKEAT/0149/19. If the Tribunal is satisfied that there is a prima facie case of a continuing act, the matter should be determined at the final hearing, i.e. the Tribunal should not determine that there was a continuing act without

hearing all the evidence. If, however, the Tribunal is satisfied there is no prima facie case of a continuing act it can determine the jurisdiction issue on that basis.

18. The Tribunal has a broad discretion in deciding whether it is just and equitable to extend time under s.123(1)(b) (Southwark London Borough v Afolabi [2003] IRLR 220). Factors that may be considered include the relative prejudice to the parties, the length of the delay, the reasons for the delay and the extent to which professional advice was sought and relied upon. The onus is on the claimant to show that it is just and equitable to extend the time limit.
19. There is no general principle that it will be just and equitable to extend the time limit where the claimant was seeking redress through the employer's grievance procedure before embarking on legal proceedings. A delay caused by a claimant awaiting completion of an internal procedure may justify extension of the time limit but it is only one factor to be considered in any particular case (Apelogun-Gabriels v Lambeth London Borough Council and another 2002 ICR 713).
20. Complaints of unauthorised deductions from wages are also subject to a primary three-month time limit, pursuant to s.23 of the Employment Rights Act 1996. The Tribunal only has jurisdiction to consider a complaint presented outside the time limit if it was "not reasonably practicable" to bring the claim in time and it is brought within a further reasonable period.
21. It is well established that ignorance or mistaken belief as to rights or time limits will not render it "not reasonably practicable" to bring a claim in time unless that ignorance or mistaken belief is itself reasonable. It will not be reasonable if it arises from the fault of the employee in not making inquiries that he or she should have made, or from the fault of the employee's solicitors or other professional advisers in not giving all the information which they reasonably should have done (Wall's Meat Co Ltd v Khan 1979 ICR 52). Trade union officials are considered skilled advisers in this context, so an action of a union adviser would be treated as attributed to the employee (Times Newspapers Ltd v O'Regan 1977 IRLR 101).
22. In the context of unfair dismissal, where the same test for extending the time limit applies, it has been held that the existence of an impending internal appeal may not in itself be sufficient to justify a finding that it was not reasonably practicable to present a complaint to a Tribunal (Bodha v Hampshire Area Health Authority 1982 ICR 200; Palmer and another v Southend-on-Sea Borough Council 1984 ICR 372).

CONCLUSIONS

Direct race discrimination / harassment

23. The Claimant appeared to accept in the claim form that the claim was out of time, but sought an extension. He now argues that the discrimination complaints are in time because the matters complained of at (a) to (d) formed part of a continuing act because he lodged internal grievances about them which the Respondent failed to deal with "competently or appropriately" until the grievance appeal outcome on 29 May 2018. He does not complain about

the grievance appeal outcome itself; as noted above, the letter of 29 May 2018 upheld all of the Claimant's complaints on the issues that form the basis of this claim. It is also acknowledged in the claim form that the investigation at this stage was "proper and competent". The case is therefore put on the basis that complaints (a) to (d) are part of a continuing act of direct race discrimination and/or harassment that includes the Respondent's failure to address (i.e. uphold) the Claimant's grievances until 29 May 2018.

24. There are a number of difficulties with that argument, not least the lack of any detail about the grievance process and the alleged failings. Although Mr Neckles purported to clarify the complaints at the preliminary hearing, no further detail was given about complaint (e) relating to the grievance process, other than to allege the failures were "ongoing". The Claimant has not explained in his claim form or subsequently, or in his evidence for this preliminary hearing, in what respect(s) or on what date(s) the Respondent's approach to his grievances was unreasonable or amounted to direct race discrimination or harassment. The claim form simply asserts that, "They all failed to address or acknowledge or admit the wrong doings which it was clear that the Respondent was guilty of."
25. The only factor relied upon by the Claimant as linking the complaints is the fact that he raised grievances about them. The Claimant has not given any other information to suggest that the complaints are connected to each other or to any alleged failings in the grievance process. Although complaints (c) and (d) would appear to have a potential link in that they concern the Claimant's fitness to work and sickness absence, the Claimant accepted that the 2015 Stage 1 notice was issued by a manager who is not involved in any of the other complaints. The Claimant has given no details about the managers involved in the other complaints, the nature of the grievances raised, the dates on which any grievances were submitted or responded to, or the managers who dealt with them.
26. The Claimant accepts that none of the grievances alleged that the matters complained of at (a) to (d) were acts of race discrimination or harassment. It is also notable that there is nothing in the claim form to suggest that these matters had anything to do with the Claimant's race. It is simply asserted that they were acts of direct race discrimination or harassment.
27. In light of the above, there is no basis to find even a prima facie case of an "ongoing situation" or "state of affairs" that was discriminatory. Nor, on the basis of the case presented by the Claimant, can it be said that any of the complaints were part of a continuing act, or that any of them continued beyond the dates on which they occurred. The mere fact that a grievance has been raised does not transform a one-off act into a continuing act even if it were established that the Respondent wrongly failed to uphold it. I therefore conclude that all of the complaints at (a) to (d) are out of time.
28. As noted above, complaint (e) is vague and unparticularised. The only date given for any act of the Respondent is the outcome of the grievance appeal on 29 May 2018, but the Claimant does not complain about that. There was a suggestion of failings after that date, but any such allegations do not form part of the claim. The complaint in the claim form may be vague, but it clearly relates only to the Respondent's conduct prior to the grievance appeal outcome. In the

absence of any detail as to the alleged failings and when they took place, complaint (e) is either out of time or it is not a valid complaint of discrimination because it does not identify any alleged less favourable treatment or act of harassment.

29. I conclude, therefore, that the Claimant has not put forward a prima facie case of any discriminatory act taking place, or ending, on or after 26 March 2018. The claim under the Equality Act 2010 is out of time and the Tribunal only has jurisdiction to hear it if it is just and equitable to extend the time limit.
30. I do not consider it is just and equitable to extend the time limit in this case. The length of the delay is considerable. The Claimant contacted ACAS in June 2018, having been aware of the basis of all of his complaints since July 2017 at the latest. The only reason put forward for the delay is the fact that the Claimant was pursuing the internal grievance procedure. There was a suggestion in his evidence that he may have been given wrong advice by ACAS or his union representative, but the Claimant's evidence was too vague to make a finding that that was an operative cause of the delay and in any event I would not accept that either ACAS or the union gave incorrect advice without more evidence.
31. There is a logical difficulty with the Claimant's position. He did not complain of race discrimination in the grievances, so the outcome would have little or no bearing on a Tribunal claim of race discrimination. Further, given that the grievance appeal outcome upheld the Claimant's complaints, it is unclear why he waited before commencing proceedings. If he was intending to bring a claim whatever the outcome, there was no reason to wait. I do not accept, therefore, that the fact the Claimant was pursuing the internal grievance process was a good reason for the delay.
32. Further, even if it was reasonable to await the outcome of the grievance process, there was a further delay of almost one month before the Claimant contact ACAS and he did not present his claim until 15 days after the end of the early conciliation period. The Claimant did not act promptly.
33. If the claim were allowed to proceed the Respondent would have to defend allegations relating to events between 2009 and 2016, all at least two years before the claim form was presented. It is for the Claimant to show that it is just and equitable to extend the time limit. In all the circumstances I consider that the prejudice to the Respondent in allowing the claim to proceed would be greater than the prejudice to the Claimant, who presented his claim knowing that it was out of time, if the claim is dismissed.
34. All of the discrimination complaints are therefore dismissed because the Tribunal has no jurisdiction to hear them.

Deductions from wages

35. It is not in dispute that this claim was presented outside the primary time limit. There is no basis on which I could find that it was not reasonably practicable for the Claimant to bring his claim in time. He accepts he knew the basis of claim in December 2016. The fact that he chose to pursue an internal grievance was no obstacle to him bringing a claim within three months of the alleged

deductions. Further and in any event, as noted above there was no reason to await the outcome of the appeal in May 2018 if the Claimant intended to bring a claim whatever the outcome. Even if the Claimant was given incorrect advice by his union representative (which I have not accepted), any failing is attributed to him (Wall's Meat, etc).

36. This complaint is also, therefore, out of time and the Tribunal has no jurisdiction to hear it.

Employment Judge Ferguson

Date: 5 February 2020