Case No: 2300802/2018
2204546/2018
2304005/2018
2304163/2018

EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Mr F Lamptey		**Transport for London**

Heard at: London South Employment Tribunal **On:** 25 February 2020

Before: Employment Judge Hyams-Parish

Representation:
For the Claimant: In person
For the Respondent: Ms R Thomas (Counsel)

JUDGMENT ON PRELIMINARY ISSUE

The claim of unlawful deductions from wages arising from non-payment of salary during the period from November 2017 to the Claimant's dismissal are struck out as they have no reasonable prospects of success.

The Tribunal does not have jurisdiction to hear the breach of contract claim pleaded in claim form number 2204546/2018 and therefore this claim is dismissed.

All claims of discrimination occurring prior to 11 August 2017 are dismissed as they are out of time and the Tribunal does not have jurisdiction to hear them.

REASONS

Claim(s)

1. The Claimant has issued four separate claim forms in the Tribunal as follows:

Number	Claim
2300802/2018 ("CF1")	Indirect discrimination (s.19 EQA 2020) Health and safety detriment (s.44(1)(d) and (e)) ERA 1996 Harassment (s.26 EQA 2010) Failing to make reasonable adjustments Victimisation (s.27 EQA 2010)
2204546/2018 ("CF2")	Unlawful deductions from wages (s.13 ERA 1996) Breach of contract
2304005/2018 ("CF3")	Unlawful deduction from wages (s.13 ERA 1996) Wrongful dismissal (notice pay) Victimisation (s.27 EQA 2010)
2304163/2018 ("CF4")	Unfair dismissal (s.98 ERA) Automatic unfair dismissal (s43B and s.101 ERA 1996) Victimisation (s.27 EQA 2010)

2. The Respondent invited the Tribunal at today's hearing to do the following:

   (a) Strike out the unlawful deduction from wages claim arising from the alleged non-payment of salary for the period between November 2017 and the Claimant's dismissal;

   (b) Dismiss the breach of contract claim in CF2 as the Tribunal does not have jurisdiction to hear it; and

   (c) Dismiss the discrimination and detriments claims in CF1 as they are out of time.

3. Whilst the focus of the applications were on claims pleaded in CF1 and CF2, the Tribunal noted some repetition of these claims in CF3 and CF4.

Evidence

4. The Tribunal heard evidence from the Claimant and Ms Ejenavi Agbonkpolo on behalf of the Respondent in relation to matters relevant to the applications. Both witnesses had prepared a short witness statement which stood as their evidence for the hearing and they were both cross examined by the opposing party.

5. Counsel for the Respondent had prepared and provided to the Tribunal a skeleton argument.

Findings of fact

6. On 25 July 2014, the Claimant underwent surgery to repair his Achilles tendon. Following surgery, the Claimant's ankle was in a cast and he was signed off work. The Claimant said that he informed his then manager, David Walker, that his recovery could be up to a year.

7. In the months that followed, the Claimant says that pressure was placed on him to continue to perform his role when he was not fit to do so. He alleges that he was forced back to work. No findings are made by the Tribunal in respect of such issues.

8. On 2 April 2015 the Claimant raised a grievance with his employer complaining about the conduct of Mr Walker and Mr Keogh (Mr Walker's line manager). He complained, *inter alia*, of bullying and harassment, ignoring medical instructions, breach of duty of care and breach of health and safety. By this stage, Mr Walker had left the Respondent's business on 13 March 2015.

9. The Claimant received an outcome to his grievance during a meeting on 9 September 2015 and this was confirmed by letter dated 14 September 2015. Certain of the Claimant's complaints were upheld and others were not.

10. The Claimant said in evidence that in or about April 2016 he was diagnosed with Irritable Bowel Syndrome ("IBS") together with depression and anxiety disorder. The Tribunal did not view any medical evidence as part of this hearing and makes no finding as to whether the Claimant was at all material times a disabled person within the meaning of the Equality Act 2010. This issue is currently contested by the Respondent.

11. On 29 April 2016 the Claimant raised a further grievance. On 6 May 2016, Nick Cooper wrote to the Claimant informing him that as he had repeated matters previously investigated and dealt with as part of his April 2015 grievance, that the matter would not be re-opened. The Tribunal was informed that Mr Cooper left the Respondent's employment in 2016.

12. On 11 August 2017, over a year later, and as a consequence of a reorganisation of the Respondent business, the Claimant's role was changed to Finance Business Partner and he was required to move from the 6th floor, where he was then based, to the 7th floor of the same building. This decision was conveyed to the Claimant by Pritesh Patel and Mathew Driessen.

13. The Claimant objected to what he considered as the imposition of a new role and refused to move to the 7th floor as he said it would trigger stress associated with his disability. Asked by the Tribunal why the Claimant would not move to the 7th floor, he said, in terms, that on the 6th floor he was working with a team he enjoyed working with and that on the 7th floor there were people who had dealt with and been involved in his previous grievance and, to use the Claimant's words, "*had been involved in a campaign of discrimination against me*". The Claimant said that a move to the 7th floor would exacerbate his disability. The Tribunal makes no findings on these issues.

14. When asked who he objected to on the 7th floor, the Claimant named a number of people including Tim Keogh, Tim Goode, Neil Guy and Muriel Purkiss.

15. On 13 October 2017 Mr Patel informed the Claimant that he could face disciplinary action if he did not attend for work on the 7th Floor as instructed.

16. No formal grievances were raised after 29 April 2016, until 16 October 2017 when the Claimant submitted a further formal grievance. That grievance, which was included in the bundle of documents for the hearing, contained references throughout to breaches of legislation and also referred to case law. Indeed, it was difficult for the Tribunal to identify what the factual complaints were. The Claimant said that he obtained a template letter from the internet which he used as a basis for his grievance.

17. Following the submission of his grievance on 16 October 2017, the Claimant went home as he said he was not feeling well. He subsequently submitted a sick note for the period to 31 October 2017 stating, "*recurrence of abdominal problems and chest pains due to stress at work*".

18. The Claimant raised a further grievance on 20 October 2017. In this grievance, the Claimant complains, in broad terms, about a failure to make reasonable adjustments and to safeguard his health and safety.

19. The Claimant's grievance was investigated by David Knight, Head of Finance, and someone who had not been involved in the Claimant's previous 2015 and 2016 grievances. The grievance outcome, relayed to the Claimant by letter dated 20 December 2017, was that his grievance was not

upheld.

20. On 21 December 2017, the Claimant wrote to the Claimant to explain that the adjustment he required was to be kept in his then "existing role" and to work on the 6th floor.

21. The Claimant appealed against the grievance outcome by letter in January 2018. Amanda Hopkins, Head of Business Strategy, was appointed to hear the appeal. The outcome, relayed to the Claimant by letter dated 10 May 2018, was that the appeal did not succeed.

22. The Claimant did not attend work between 17 October 2017 and his dismissal. Apart from the initial period when he provided a sickness certificate, the Claimant accepts that he was not sick but that he was asserting what he claimed to be his rights under s.44(1)(d) ERA. The Respondent says that he was absent without leave. The Claimant believes he was entitled to payment of salary during such absences; the Respondent contends that as he was absent without leave, he was not entitled to any payment of salary.

23. The Claimant presented the Claims to the Tribunal on 5 March 2018 (CF1), 11 May 2018 (CF2), 10 November 2018 (CF3) and 19 November 2018 (CF4).

24. Asked why the Claimant did not bring claims following his 2015 or 2016 grievances he said that he approached a union and he asked whether he could bring a claim at that point. He was informed that he was time barred at the point that the union came back to him, but he didn't check that advice himself.

Legal principles

25. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations sets out the following power to strike out:

> ***(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—***
>
> ***(a) that it is scandalous or vexatious or has no reasonable prospect of success;***
>
> ***(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;***
>
> ***(c) for non-compliance with any of these Rules or with an order of the Tribunal;***

> ***(d) that it has not been actively pursued;***
>
> ***(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).***
>
> ***(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.***

26. When considering whether to strike out, a tribunal must (a) consider whether any of the grounds set out in rule 37(1)(a) to (e) have been established (first stage); and (b) having identified any established ground(s), the tribunal must then decide whether to exercise its discretion to strike out, given the permissive nature of the rule (second stage).

27. Section 48 Employment Rights Act 1996 ("ERA") sets out the time limits for detriment claims brought under s.44 ERA as follows:

> ***(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.***

28. Section 123 of the Equality Act 2010 sets out the time limits for bringing claims as follows:

> ***(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.***
>
> ***(2) Proceedings may not be brought in reliance on section 121(1) after the end of—***
>
> ***(a) the period of 6 months starting with the date of the act to which the proceedings relate, 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;***
>
> ***(b) failure to do something is to be treated as occurring when the person in question decided on it.***

29. Guidance on what constitutes a continuing act was provided in the case of **Hendricks v Metropolitan Police Commissioner [2003] IRLR 96** which held that the question is whether that was an act extending over a period, as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed.

30. It is clear that the granting of an extension of time under s.123 EQA should be the exception rather than the rule (**Robertson v Bexley Community Centre [2003] IRLR 434**). The factors that may be taken into account are broad but may include (a) the length and reason for the delay; (b) the extent to which the cogency of the evidence is affected by delay; (c) the extent to which the Respondent has cooperated with any requests for information; (d) the promptness with which the Claimant has acted on steps taken to obtain advice; and (e) the balance of prejudice between the parties. This does not represent a mandatory checklist.

31. The right not to suffer an unlawful deduction from wages is set out in s.13 ERA which provides as follows:

> ***(1) An employer shall not make a deduction from wages of a worker employed by him unless—***
>
> ***(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or***
>
> ***(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.***
>
> ***(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—***

> ***(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or***
>
> ***(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.***
>
> ***(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.***

Analysis and conclusions

Strike out

32. The Tribunal concluded that the claim for unlawful deduction from wages arising from the non-payment of wages during the period when the Claimant stayed at home to assert what he claimed to be his right under s.44 ERA had no reasonable prospects of success. There was nothing contained in any documents produced to the Tribunal giving an entitlement to payment in such circumstances or where an employee is absent without leave. The Tribunal considered that the Claimant would have no reasonable prospects of success in a claim for unlawful deduction from wages, given the requirement under s.13(3) ERA that the sums deducted must be "*properly payable*". The Claimant was informed that this was quite separate to claiming such sums as compensation for a detriment claim. In the circumstances it was right that this claim should be struck out. The Tribunal considered the fact that strike out is a draconian measure, not a power to be exercised lightly, but the Tribunal considered that this was one of those cases where a strike out was the correct approach to take.

33. The Tribunal concluded that it had no jurisdiction to hear a breach of contract claim given that it was not a sum that was outstanding on the termination of the Claimant's employment bearing in mind that the Claimant's employment had not ended when CL2 was submitted. Accordingly, the Tribunal decided that this claim should be dismissed.

Continuing act

34. The question the Tribunal asked itself was whether the allegations or acts of discrimination between 2014-2016 formed part of a continuing act of discrimination ending on the date of dismissal.

35. The Tribunal concluded that it was dealing with two quite distinct and

separate groups of allegations: those detailed in the grievances in April 2015 and 2016 and those which were the subject of the grievances starting in October 2017. In the Tribunal's view the two groups of allegations were not sufficiently connected such as to satisfy the Tribunal that there was a continuing act. Factors which the Tribunal considered were important in reaching its decision included:

(a) The fact that different people's actions were the subject of complaint by the Claimant in each group of allegations;

(b) The time period that had elapsed between the two groups; and

(c) The subject matter or trigger for the complaints in April 2015/2016 was very different to that which triggered the complaint in October 2017

Extension of time

36. The Tribunal then turned to the question whether it was just and equitable to extend time to allow the Claimant to bring claims of discrimination which arose prior to 11 August 2018. The Tribunal concluded that it was not just and equitable when it considered the following factors:

(a) The Claimant did not present very persuasive or good reason for the delay. The Tribunal did not find the Claimant's evidence credible that he had not researched time limits when he clearly presented a grievance which was full of legislation and case law and therefore, he was familiar with looking up legal provisions;

(b) The Respondent would suffer prejudice because their witnesses would need to give evidence relating to matters which were very old (up to five years). The Tribunal accepts that some of these witnesses have left the employment of the Respondent.

(c) The balance of prejudice, bearing in mind that a decision not to extend time leaves a number of significant claims intact, and also what is said at (b) above, was clearly in favour of not allowing the extension.

37. The conclusion reached by the Tribunal means that all discrimination and detriment claims arising prior to 11 August 2017 are out of time and are dismissed as the Tribunal does not have jurisdiction to hear them. Noting the Respondent's contention that any acts of discrimination arising prior to 5 October 2017 are prima facie out of time, the parties were informed that any time issues in respect of allegations of discrimination or detriment arising between 11 August and 5 October 2017 should be dealt with at the final hearing.

....
Employment Judge Hyams-Parish
27 February 2020

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