Case No: 2300410/2020/V

EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Mr A Adegbite		**Mitie Ltd**

Heard at: London South Employment Tribunal **On:** 17 September 2020

Before: Employment Judge Hyams-Parish (Sitting alone)

Representation:
For the Claimant: In person
For the Respondent: Mr S Harris (Solicitor)

JUDGMENT ON PRELIMINARY ISSUE

The Tribunal does not have jurisdiction to hear the claims as they have been brought outside the permitted time limit and it would not be just and equitable to extend time. The claims of race discrimination are therefore dismissed.

The application to amend the claim form is refused.

REASONS

Background to claim

1. By a claim form presented to the Tribunal on 14 January 2020, the Claimant brings claims of race discrimination.

2. This hearing before me was listed to consider three matters:

    a. Whether I have jurisdiction to hear the claims because they are out

of time? If they are out of time, I am asked to consider whether it is just and equitable to extend the time limit for bringing the claims?

b. Should I strike out the claims on the grounds that they have no reasonable prospects of success?

c. If I allow the claims to proceed, should I make a deposit order for such claims that have little reasonable prospects of success?

3. At the hearing, the Claimant sought to introduce a completely new allegation of race discrimination (i.e. not set out in his claim form) and therefore I also considered whether to allow the Claimant to amend his claim to add this new allegation.

4. During the hearing, I took a considerable amount of time discussing the claim form with the Claimant so that I could understand precisely the claims he was bringing. Mr Harris informed me during his submissions that a similarly lengthy discussion about the claims took place at a previous case management discussion before Employment Judge Wright on 18 June 2020.

5. From the order produced by Employment Judge Wright, and the discussion at the above hearing, I understand the first discriminatory act occurred on 3 November 2018 when the Claimant's team leader, Mr Salif, asked the Claimant irrelevant questions regarding the work he was doing, something which the Claimant considered to be an act of racial harassment.

6. The second discriminatory act occurred in February 2019 when the Claimant alleges that a colleague and friend of his, a person called Samantha Blatch, discriminated against the Claimant on the grounds of race by placing a tea cup on his desk with the words "*You are dirty, go and wash up yourself*" written on it. At the same time there was some dark chocolate scattered around it.

7. Employment Judge Wright ordered the Claimant, within 14 days of the date of the order, to confirm whether or not he agreed with the above two allegations. The Claimant did not provide the confirmation requested.

8. When I asked whether the November 2018 and February 2019 were the only acts of discrimination, the Claimant gave details of a further act of discrimination occurring on 21 August 2019. The Claimant said he went to another room to take a call from the nursery looking after his child when Mr Jackson came in and said why are you making calls in here. When given the reason by the Claimant, it is alleged that the Claimant left and slammed the door.

9. Looking carefully at the pleadings, whilst there is reference to some facts relating to this incident, there is no sense that this is pleaded as an act of discrimination. Mere reference to Mr Jackson, when the Claimant is simply referring to a letter he has written - and does not include this incident with

his other allegations of discrimination - does not mean that there is an allegation of discrimination included in the claim form. I considered it to be a completely new race discrimination claim, for which permission to allow the Claimant to amend his claim was needed.

Law

(a) Extension of time limits in discrimination claims

10. The time limits for bringing claims of discrimination are set out in s.123 EQA which states:

> ***(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.***

11. What is clear from s.123(1)(b) EQA is that the three-month time limit for bringing a discrimination claim is not absolute: tribunals have a discretion to extend the time limit for presenting a complaint where they think it is 'just and equitable' to do so. Tribunals thus have a broader discretion under discrimination law than they do in unfair dismissal cases. That said, in the case of **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434 CA** the Court of Appeal stated that when employment tribunals consider exercising the discretion "*there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule*". Of course, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require this but simply requires that an extension of time should be just and equitable.

12. In exercising a discretion to allow out-of-time claims to proceed, Tribunals may also have regard to the checklist contained in s.33 of the Limitation Act 1980 (as modified by the EAT in **British Coal Corporation v Keeble and Others [1997] IRLR 336**). Section 33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case — in particular, the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

(b) Strike out

13. 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.***

14. When considering whether to strike out, a Tribunal must approach its task in two stages: first it must consider whether any of the grounds set out in rule 37(1)(a) to (e) are made out; secondly the tribunal must then decide whether to exercise its discretion to strike out, given the permissive nature of the rule.

(c) Amendment

15. When deciding whether a formal amendment is required, case law makes clear that reference must be made to the claim form as a whole.

16. If a formal amendment is required, the factors I must take into account are those which the court stated in the case of **Selkent Bus Co Ltd v Moore [1996] IRLR 661** which include:

- The nature and type of amendment.
- The applicability of time limits.
- The timing and manner of the application.

17. As well as the above factors, it is important to balance the hardship and injustice of allowing the amendment, against the injustice and hardship of refusing it.

Analysis and conclusions

18. Looking at the three allegations as set out today, it is quite clear to me that they are three completely separate allegations against different people and a significant period of time between each incident. There is no suggestion by the Claimant that there is a continuing act of discrimination; neither is there evidence from which I can reasonably conclude that there is a continuing act. I therefore look at these three allegations as three separate allegations of race discrimination.

19. There is no doubt that the November 2018 and February 2019 allegations are significantly out of time. I heard no reason at all, let alone a good reason, why the claims were not brought sooner. However I am conscious that I cannot simply look at the reasons for bringing the claim late but I must also look at the balance of prejudice.

20. When considering the prejudice to the Claimant, I take into account the merit and strength of his claims. I am mindful that my decision could prevent the Claimant from continuing to pursue his claims in this Employment Tribunal. I consider that the above allegations have no reasonable prospects of success. The alleged discriminator of the cup and plate incident was not the person who the Claimant expected. It was his friend and colleague. When I asked him why he believed either was an act of discrimination, he did not provide me with any cogent reason which could lead a Tribunal to conclude that discrimination had occurred. He could not point to a difference in treatment or any other factors which could lead a Tribunal to conclude that what the Respondent did was because of race.

21. With regards the prejudice to the Respondent I take into account the very significant delay and the potential knock on effect to the quality of evidence by witnesses, being so long after the discriminatory act, and taking into account the fact sensitive nature of the allegations.

22. Weighing up each, I considered there to be greater prejudice to the Respondent in allowing the claims to be pursued out of time, compared with the prejudice to the Claimant in preventing him from pursuing what on the face of them appear to be weak claims.

23. In considering the application to amend, I looked at the timing and manner in which the application to amend was made. The amendment has been made very late, in circumstances where there has already been a lengthy case management discussion before Employment Judge Wright. I consider the allegations to have little prospects of success, a factor that is relevant when considering the relevant prejudice to the parties. For the same reasons as set out at paragraphs 20 and 21 above, I consider there to be greater prejudice to the Respondent in allowing this amendment. In addition to the above factors taken into account, I have considered the fact that the Respondent would need to amend its response to respond to the claim. This would incur a cost to the Respondent and the additional allegation is likely to result in a longer hearing.

24. For the above reasons, I am not satisfied that it is just and equitable to allow the Claimant an extension of time to bring his November 2018 and February 2019 claims. In any event I would have concluded that such claims have no reasonable prospects of success.

25. I refuse the application to amend for the reasons above. Had this allegation not been a new claim and been included in the claim form, I would have concluded that this claim had no reasonable prospects of success and struck it out.

26. For these reasons, the above claims are dismissed.

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Employment Judge Hyams-Parish
12 October 2020