



EMPLOYMENT TRIBUNALS

Claimant: Mr S Takhar

Respondent: Boots Opticians Professional Services Limited

Heard at: Bristol

On: 12 October 2020

Before: Employment Judge Oliver

Representation

Claimant: In person

Respondent: Mr A Graham, solicitor

JUDGMENT having been given orally on 12 October 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant has brought claims for detriment for making a protected disclosure, harassment on grounds of race, and direct discrimination on grounds of race.

2. There was a Preliminary Hearing on 18 December 2019. This hearing was listed consider if the claims had been brought within time and, if not, whether time ought to be extended. It was also listed to consider whether the claimant should be permitted amend his claim. The previous Preliminary Hearing had asked the claimant to set out any further allegations in writing. The claimant had not done this, but he made an oral application at the hearing to add one extra allegation.

Evidence

3. There was a bundle of documents prepared by the respondent, and some character references from the claimant. There was no witness evidence. I heard oral submissions from both parties, and I also considered written submissions from the respondent.

Applicable law

4. **Amendment application.** *Cocking v Sandhurst (Stationers) Ltd and anor* [1974] ICR 650 NIRC laid down a general procedure for Tribunals to follow when deciding whether to allow amendments to claim forms involving changing the basis of the claim, or adding or substituting respondents. The key principle was that in exercising their discretion, Tribunals must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it. This test was approved in subsequent cases and restated by the EAT in *Selkent Bus Company Ltd v Moore* [1996] ICR 836 EAT, which approach was also endorsed by the Court of Appeal in *Ali v Office of National Statistics* [2005] IRLR 201 CA.

5. In *Selkent* the EAT held that, in determining whether to grant an application to amend, the Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Relevant factors would include:

- 5.1 The nature of the proposed amendment - applications to amend range, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action; and
- 5.2 The applicability of time limits - if a new claim or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that claim or cause of action is out of time and, if so, whether the time limit should be extended; and
- 5.3 The timing and manner of the application - an application should not be refused solely because there has been a delay in making it as amendments may be made at any stage of the proceedings. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery.

6 **Time limits - public interest disclosure.** Under section 47B of the Employment Rights Act 1996, a claim must be presented within 3 months beginning with date of the act or failure to act or, where the act is part of series of similar acts or failures, the last of them. The Tribunal can extend time where it was not reasonably practicable to present the claim within time.

7 **Time limits – discrimination.** Under section 123 of the Equality Act 2010 (“EA”), complaints of direct discrimination or harassment, “*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.*” Under section 123(3), conduct extending over a period is to be treated as done at the end of the period.

8 In *Hendricks v Metropolitan Police Commissioner* [2002] EWCA Civ 1686, the Court of Appeal stated that the test to determine whether a complaint was part of an act extending over a period was whether there was an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably. Where a continuing act is alleged, the Court of Appeal made clear in *Hendricks* that it was not appropriate to strike out the relevant complaints on time grounds at a preliminary stage and that all the matters, including whether there was a continuing act, should be considered at a full merits hearing.

9 In *Lyfar v Brighton and Sussex University Hospitals Trust* [2006] EWCA Civ 1548, the Court of Appeal held that, in order to avoid a strike-out at a preliminary stage, the claimant was required to show a prima facie case, that is, the tribunal had to ask itself whether the complaints were capable of being part of an act extending over a period. In *Aziz v FDA* [2010] EWCA Civ 304, the Court of Appeal referred to *Lyfar* and went on to say that another way of formulating the test to be applied at a pre-hearing review is that "*the claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs*". If there is an arguable case for a continuing act, that claim (or part of a claim) should be allowed to proceed, although the burden will be on the claimant to prove that.

Conclusions

10. **Amendment application.** The claimant wishes add one final further incident to his list of discrimination/harassment complaints. This is alleged treatment at a back to work meeting by Mr Philip Weeks, on 21 March 2019. He says this was bullying behaviour by his manager. His explanation for not including this earlier is that he is dyslexic, meaning he found it difficult to put everything into his claim, and he had no support at the last Preliminary Hearing. He says this allegation is made clear in documents now disclosed to the respondent. He says he is a lay person who does not understand the court process, and he found it difficult go through the large volume of documents to prepare a list of allegations for the Tribunal due to his dyslexia.

11. The respondent objects, and says the claimant had every opportunity to amend his claim earlier. The Tribunal asked for further detail of the claims in May 2019, and the claimant provided a list. There was a detailed case management hearing in December 2019, which listed the claims. This included an opportunity to apply to amend his claim in writing, which he has not done. The claimant has only added a new date once he was facing the out of time point.

12. I have considered this carefully. The nature of the amendment is adding another example of alleged discrimination/harassment, not simply relabelling existing facts in the ET1. But, it is the same type of claim in relation to treatment by managers. As new cause action, it is out of time. As this is a discrimination claim, time can be extended if it is just and equitable to do so. I have taken into account the claimant's argument that he has difficulties due to dyslexia, and find that it would be just and equitable to extend time in this case. In relation to the timing and manner of the application, this is not based on new facts, but the claimant says the claim was only clarified through the process of putting together

documents for disclosure. The claimant did have the opportunity to do so earlier in writing following the last hearing, but it appears from our discussions that he had not fully understood this part of judge's orders.

13. I have also looked at the interests of justice and the overall hardship to the parties. The respondent is facing a further claim, which is more than 1 year out of time, and this may cause difficulties with evidence about what happened. I have taken account of the claimant's dyslexia and his difficulties in understanding the process, and I accept his explanation that the disclosure process showed he needed to add to his claim. If I do not allow the amendment, this deprives the claimant of the opportunity to bring his final allegation in his discrimination claim. I find that this outweighs the hardship to the respondent in facing an additional discrimination/harassment claim of same nature as claims already brought. On balance, I accept the claimant's application to amend his claim to add this one further final incident of discrimination/harassment. I do make it clear that the claimant should now understand the process, and the Tribunal does not expect him to add any further claims once the list of issues is fixed.

14. **Time limits - public interest disclosure claims.** The claimant contacted Acas for Early Conciliation on 18 March 2019, the certificate was issued on 18 April 2019, and the claim was issued on 15 May 2019. This means that events from 10 December 2018 onwards are potentially within time.

15. I have considered the list of issues from the case management Preliminary Hearing. Paragraph 8.5 sets out the list of detriments. The last one relied on is suspension in September 2017 in response to an alleged data breach. The 3-month time limit would expire in December 2017. The claimant provided no evidence at the hearing as to why it was not reasonably practicable to submit his claims within time. I agree with the respondent's submissions that there was no final act within time that could be the last act in series of continuing acts. The public interest disclosure claims were not submitted within time, and so should be struck out.

16. **Time limits - discrimination and harassment claims.** The respondent submits that all of the claims are out of time, and there is no last incident within time which is capable of being the last in a series of continuing acts. The respondent also submits that these were all discrete acts involving different managers, and so there is no continuing act.

17. The claimant says that there was a continuing act, not a series of isolated events. He says there were continuous acts of discrimination by managers in a particular region on the south coast, and he has no problems now he is working in a different region. There was a pattern of behaviour by managers in this region, which stopped him from being a productive member of the team.

18. Was there a final act within time? According to the list of issues, the last alleged act of discrimination was the dismissal of the claimant's grievance and rejection of his appeal, which was finally rejected on 7 February 2019. This act would be within time. The respondent says this is a claim about previous conduct, not about the grievance. But, this is clearly included in list of issues as an example direct discrimination and harassment. I have also allowed the claimant to amend his claim to add a further claim relating to March 2019, but I

would have found a final act within time even if not I had not allowed this amendment.

19. Has the claimant shown a prima facie case that there was a continuing act? I note the respondent's submissions that the claim involves events occurring a number years ago, involving different managers, and this is likely to cause difficulties with evidence. I do have some sympathy for this position.

20. However, I mindful that I am considering strike-out at a preliminary stage. I have looked at caselaw, and in particular Aziz – is there “*a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs*”? The claimant's case is that there was a campaign by a series of managers in a particular region, these are all linked together, and things have changed now he has moved regions. I find that this does amount to a reasonably arguable case, meaning it is something that can only fairly be finally determined at a full hearing after hearing evidence. It is not appropriate to strike out the discrimination and harassment claims at this stage. The question of time limits and whether there was a continuing act remains a live issue for final hearing. I also note that it will be necessary for one of acts within time to be found discrimination or harassment, in order for the other allegations to be brought within time as series of continuing acts.

Employment Judge

Date 31 October 2020

REASONS SENT TO THE PARTIES ON
.....13 November 2020.....
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FOR THE TRIBUNAL OFFICE