



EMPLOYMENT TRIBUNAL  
England and Wales  
London Central Region

Claimant: Mr B Sarkar

Respondents: Tesco Stores Ltd  
Mr E Dagem

Before: Employment Judge Mr J Burns

Representation  
Claimant: Mr Bidnell-Edwards (Counsel)  
Respondent: Ms R Kight (Counsel)

JUDGMENT

1. The Claimant's application dated 3/11/2020 to strike out the Respondents' response is dismissed on withdrawal by the Claimant.
2. The claims for holiday pay, arrears of pay and other payments are dismissed on withdrawal by the Claimant.
3. By consent, to the extent necessary, the Claimant is granted leave to amend his claims so that the claimed unfair constructive dismissal is included as an allegation of direct race discrimination.
4. The claims of unfair constructive dismissal and direct race discrimination are struck out as having no reasonable prospect of success under Rule 37.

REASONS

1. This was an Open Preliminary Hearing held on CVP. There were no technical problems.
2. I heard evidence on oath from the Claimant and was referred to an electronic bundle and a separate skeleton argument for the Claimant drafted by Mr Bidnell-Edwards. I also received oral submissions.
3. The OPH was somewhat unusual in that the claims had been previously fully prepared for trial in 2019 and again in 2020 (which trials however had been delayed and frustrated by the Claimant's previous ill health). I therefore had the benefit of full witness statements on both sides and also many relevant extracts from the trial bundle.
4. The Claimant who is from Bangladesh, was employed as a customer assistant by the First Respondent from 19/6/2006 to 17/11/18. He resigned on the latter date. On 4/4/19 he presented his ET1, claiming constructive unfair dismissal, race discrimination, holiday pay, arrears of pay and other payments.

5. At the beginning of the hearing today he withdrew his claims for holiday pay, arrears of pay and other payments. Those claims (which had never been properly particularised or calculated) and which had been disputed by the First Respondent, have now been dismissed on withdrawal. When I asked the Claimant today about monies due, he told me he now agreed that he had been paid in full by the First Respondent.
6. In the light of this I find (as a consequence of both issue estoppel and concession) that it is no longer open to the Claimant to contend that any payments were overdue to him when he resigned and he cannot rely on any such contentions in support of his race discrimination and unfair constructive dismissal claims, in respect of which claims the OPH today continued.
7. On 22/10/2019 EJ Palca had conducted a PH in the presence of the Claimant and recorded a list of issues in a case management summary. The Claimant was then ordered to provide further particulars of the dates and perpetrators pertaining to the matters in the list. The Claimant provided (somewhat inadequate) particulars by letter dated 14/11/2019.
8. The following is summary of the alleged matters complained of, derived from the list of issues as supplemented by the further particulars, the Claimant's witness statement and the summary in paragraphs 15 to 17 of the Claimant's skeleton argument (but excluding the complaints about unpaid wages and other sums, which have now been abandoned or estopped as indicated above).
  - absence review meetings "leading to disciplinary proceedings" between 7/12/2013 and 8/10/2018
  - being "humiliated at work" between 11/4/2018 and 28/10/2018
  - unreasonable complaints about his performance "since October 2016". (it is disputed whether the last such incident was on 7/11/2018 or earlier).
  - failures to address C's "stress at work" on 17/12/2016 and 2/9/2017 (perpetrator Wayne Barnes)
  - C's suspension from work for failing to provide "right to work" documents on or around 6/2/2013 and in January 2016 (alleged perpetrators Ms Gunalingam and Mr Subra respectively)
  - R2 allegedly changing C's shifts without reasonable notice between 12/12/2016 and 12/11/2018
  - R2 allegedly calling C for investigatory meetings or "initial disciplinary meetings" because of C's sickness absences and complaints about salary payments between 11/8/2016 and 8/10/2018
  - R2 allegedly refusing C's "request for unpaid holiday" on 30/10/2018 and 10/11/2018
  - Shobana Gunalingham and R2 instructing C to jump on roll pallets. The allegation against Shobana Gunalingham must predate Spring 2014 when she ceased working at the Claimant's work place). The Claimant claims that R2 insisted that the Claimant jump on roll pallets in August and September 2018.
  - The Claimant's resignation in response to the above matters, resulting in him having been constructively unfairly dismissed on 15/11/2018

Time points

9. The Claimant resigned on 15 November 2018 and presented his ET1 on 4 April 2019. But for any extension of time provided by ACAS Conciliation, limitation would have expired on 14 February 2019. The Claimant entered into ACAS Conciliation with the First Respondent on 6 February 2019, and received his certificate on 6 March 2019. Limitation in respect of constructive unfair dismissal therefore expired during the currency of ACAS Conciliation so that the Claimant then had a further one month after the end of ACAS Conciliation to bring his claim.
10. The Claimant's claim for Constructive Unfair Dismissal therefore is in time, since it was brought on 4 April 2019.
11. The Claimant's claims of race discrimination are pursued against both Respondents. The Claimant entered into ACAS Conciliation with the First Respondent on 6 February 2019, and received his certificate on 6 March 2019. Therefore, acts which occurred on or before 7 November 2018 would be prima facie out of time unless they are part of a continuing act ending with the resignation. The Claimant entered into ACAS Conciliation with the Second Respondent between 11 February 2019 and 11 March 2019. Claims against the Respondent which occurred on or before 12 November 2019 would prima facie be out of time unless they are part of a continuing act ending with the resignation.
12. As a matter of substance, the main allegation in the direct race discrimination claim is that the Second Respondent as the Claimant's manager conducted a campaign of various direct race discrimination as a continuing act which only ended with the resignation.
13. Insofar as the time point is concerned, that is a reasonable argument covering the matters alleged against R2, (who started work as the Claimant's manager in the Claimant's work place in March 2016).
14. The continuing act argument would, in my judgment, be untenable insofar as it relates to the allegations against managers and employees other than R2. These allegations against other people are stale, miscellaneous and wholly or mainly unrelated to the allegations against R2. They are out of time. It would not be just and equitable to extend time insofar as those allegations are concerned. At least two of the claimed perpetrators (Ms Gunalingam and Mr Subra) have long since left the First Respondent's employment.
15. The Claimant has held an LLB degree for many years and since 2016 has shown knowledge (in his correspondence for example) of UK employment law. He has been working part-time for a firm of solicitors since 2017. In that firm's website the Claimant has been held out as an employment-law expert. If the Claimant wanted to bring a claim based on old allegations against other employees of the First Respondent, then he should have done so at the proper time. It would be highly prejudicial for the First Respondent to be expected to deal with these allegations now.
16. The race discrimination claims based on any allegation prior to March 2016 and any allegation against any employee or former employee of the First Respondent (other than the Second Respondent) are struck out as out of time in any event.

17. Apart from the time issues, I find that the claims as whole have no reasonable prospect of success in any event because of their obvious lack of merit, as follows:

The Merits

18. Although discrimination claims should not be struck out except in the most obvious and plainest cases (Anyanwu v South Bank Students Union [2001] IRLR 305), in a proper case of discrimination a claim can be struck out Jeffrey v Department of the Environment [2002] IRLR 688.
19. I have seen the Claimant being cross-examined over material points. I found his oral evidence to be vague and implausible.
20. His pleaded claims are generalized to a large extent. His witness statement for trial is a bald and unconvincing narrative.
21. I have seen many relevant contemporaneous documents in the bundle (which is a curtailed version of the main trial bundle). None of the documents I have seen support the Claimant's complaints and many of them contradict them. Numerous specific details of this are set out in section 5.15 of the Respondent's written application before me today, none of which were contradicted by or on behalf of the Claimant.
22. The Claimant's main original complaint in his ET1 was short pay or withholding pay. The Claimant told me that the only matter he complained about in writing before resigning was a pay issue. That aspect of the claim has been abandoned and the Claimant has now moved on to focus on other alleged matters.
23. The real subject of the complaint now is the fact that the Second Respondent sought to manage the Claimant's numerous sickness and other absences, which absences the Claimant does not dispute, and which the Second Respondent had a duty to manage under the First Respondent's policies. The suggestion that these interactions amounted to either discrimination or a breach of contract is far-fetched.
24. The Claimant agrees (per his oral evidence today) that with the consent of the Respondents he took "lifestyle leave" from 19 May until 19 August 2018 to manage his personal circumstances. He was looking after his wife and children and studying for Bar exams during this period. On his return to work the Second Respondent (together with a notetaker) held a "Let's Talk" meeting with the Claimant on 20 August 2018 to catch up following his leave and to find out if any additional support was needed. It was agreed that no further actions were needed and that the Claimant was ready to come back to work. The Claimant accepted all this.
25. Even if there had been a breach of contract by the Respondent prior to 19/5/2018, (of which there is no objective evidence despite the claim having been fully prepared for trial) the elapse of time during the "lifestyle leave" followed by the Claimant's return to work on 20 August 2018 without demurrer would amount to a waiver of any prior breach and an affirmation of the contract.

26. Thereafter the Claimant's exchanges with the Second Respondent by text and email between 20/8/2018 and his resignation on 15/11/2018 do not suggest or provide evidence to support any breach of contract or other problems between them during that period.
27. The Claimant agrees that when he resigned he was about to sit Bar exams and pursue a legal career, he having already secured a position with Clifton Law Ltd by that date. It appears obvious that this is the real reason why he resigned.
28. Whilst C asserts that the reason for the various alleged treatment he relies upon was his race/nationality, he has not explained why he believes this to be the case. He claims that while he is from Bangladesh, the Second Respondent is a black person from an African background. He said in his oral evidence that he observed that the Second Respondent appeared to prefer and get on better with other (unnamed) employees of other nationalities such as Sri Lankans and Somalis. Beyond this, he has not identified any real or hypothetical comparators. He says he infers that the reason for his being treated less advantageously was the fact that he (the Claimant) was from Bangladesh. He was unable to offer any explanation why R2 should prefer Sri Lankans, for example, to Bengalis.
29. Put in this way, the direct race discrimination claim is simply an assertion unsupported by any specific fact or matter and it is contrary to common sense.
30. When looked at as a whole, C's ET1, his further and better particulars and his witness statement (which largely repeats his further and better particulars), demonstrates neither a prima facie case of direct race discrimination, nor that R1 committed a fundamental breach of C's contract of employment entitling him to resign and claim that he was dismissed.
31. For these reasons I find that this is an obviously and plainly a case which would be bound to fail at trial, and so I strike it out.

Mr J S Burns Employment Judge  
London Central  
6/11/2020  
For Secretary of the Tribunals

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date sent to the Parties – 09/11/2020