



EMPLOYMENT TRIBUNALS

Claimant

Mr John Skoyles

v

Respondents

Defence Equipment and Support
Ministry of Defence

Heard at: Watford (by CVP)

On: 21 October 2020

Before: Employment Judge S Moore

Appearances

For the Claimant: Mr I Ahmed, Counsel

For the Respondent: Ms L Robinson, Counsel

JUDGMENT ON PRELIMINARY ISSUES

- (1) The claim of age discrimination under s. 13 Equality Act 2010, namely that the Respondent treated the Claimant less favourably by awarding him an unmerited score in his end of year review, was not brought within three months, but it is just and equitable to extend that time limit so that the Tribunal has jurisdiction to hear the claim.
- (2) The claim(s) of discrimination under regulation 5 of the Part Time Workers Regulations 2000 that the Respondent treated the Claimant less favourably by awarding him an unmerited score in his end of year review and/or not paying him a pay-rise or bonus, were not brought within three months, but it is just and equitable to extend that time limit so that the Tribunal has jurisdiction to hear the claim(s).
- (3) The claim of harassment on grounds of age under s. 26 Equality Act 2010 was not brought within three months and it is not just and equitable to extend the time limit. Accordingly,

the claim is struck out because the Tribunal has no jurisdiction to hear it.

- (4) The claim of discrimination under regulation 5 of the Part Time Workers Regulations 2000 that the Respondent treated the Claimant less favourably by increasing his workload to an amount that was not sustainable in a part-time role was not brought within three months and it is not just and equitable to extend the time limit. Accordingly, the claim is struck out because the Tribunal has no jurisdiction to hear it.
- (5) The application that the Tribunal make a deposit order as a condition of the Claimant continuing any or all of his discrimination claims is dismissed.
- (6) The Claimant's application to amend his Claim Form so as to make further claims of direct age discrimination (proposed new paragraphs 44-46) is dismissed.
- (7) The Claimant's application to amend his Claim Form is in all other respects allowed.
- (8) The list of issues agreed at the Preliminary Hearing on 28 February 2020 is amended so that:
 - a. paragraph 2 (under the heading Constructive Dismissal) has inserted a new subparagraph 2c: "The failure of the Respondent to revise the Claimant's score as requested having informed the Claimant that no improvement action was required", and the numbering of the remaining subparagraphs is modified accordingly;
 - b. paragraphs 12-16 and subparagraph 17c are deleted.
- (9) The Respondent has 21 days from receipt of this judgment to amend its Response, if so advised.

REASONS

Introduction

1. This hearing was listed to determine whether the Tribunal has jurisdiction to hear the Claimant's complaints of age discrimination under the Equality Act 2010 (EqA), and discrimination under the Part Time Workers Regulations 2000 (PTWR), and/or whether they have been brought out of time; further if the Tribunal found that it did have jurisdiction to hear any or all of those claims whether the Claimant should be ordered to pay a

deposit order as a condition of pursuing any of them on the ground they have little reasonable prospect of success.

2. At a Preliminary Hearing before Judge Tynan on 28 February 2020, the complaints of discrimination were identified to be as follows:
 - (a) The complaint of direct age discrimination was that the Respondent had treated the Claimant less favourably by awarding him an unmerited score in his end of year review;
 - (b) The complaint of harassment on grounds of age was that in October 2017 the Respondent had commented that the Claimant “has ability to advance further to the next level but has not the ambition due to impending retirement” (the “impending retirement comment”);
 - (c) The complaint under the PTWR was that the Respondent had treated Claimant less favourably by:
 - i) Awarding him an unmerited score in his end of year review;
 - ii) Not awarding him a bonus or pay rise; and
 - iii) Increasing his workload to an amount that was not sustainable in a part-time role.
3. Judge Tynan listed the matter for a Preliminary Hearing to consider whether these complaints should be struck out as having no reasonable prospect of success, or whether the Tribunal should make a deposit order in respect of them. I understand that the reference to strike out on grounds of no reasonable prospect of success followed from the Respondent’s submission that the claims had been brought out of time.
4. By letter of 13 March 2020 the Claimant’s solicitors made an application to amend the Claim Form “to provide further and better particulars of his claim”. The Claimant now seeks to rely on the failure of the Respondent to change his PIR score in the course of the grievance process for the purpose of both his complaint of unfair dismissal and of age discrimination. In the context of his claim of age discrimination he also asserts the Respondent failed to afford him the opportunity to improve in line with his score and failed to provide him with an explanation for awarding him the score in question yet requiring no remedial action to be taken.
5. The Respondent objects to these proposed amendments on the basis they constitute an attempt to bring the age discrimination claim into time by making new allegations that the discrimination continued until the grievance appeal.
6. Judge Postle subsequently ordered that the application to amend also be considered at this Preliminary Hearing.

Evidence

7. The Claimant gave evidence at the hearing and was cross-examined. I was also referred to a bundle of documents. On the basis of that evidence I make the following findings for the purpose of this hearing:
8. The Claimant was employed by the Respondent as a Delivery Team Quality Manager from 5 August 2013 until 28 February 2019.
9. The Respondent's performance review year runs from 1 April to 31 March.
10. In October 2017 the Claimant received his mid-year review from his Functional Development Officer, Mr Robson. The review was very positive, and the Claimant was told his performance was of a high standard. In the course of that review Mr Robson also made the impending retirement comment.
11. In 2018 the Respondent instituted a new performance assessment, known as the calibration process, which involved a review of the performance of a group of employees at the same level by calibration panels, and a mandated distribution of performance rankings across the full spectrum of 5 possible performance rankings.
12. The Claimant's end of year review was commenced in April 2018. This entailed the Claimant meeting with his Delivery Manager, Mr Gary Maycock, and then submitting evidence to support his performance. The guidance he received as to the matters to include and the criteria according to which he would be judged were vague.
13. In May 2018 the Claimant's hours were reduced to 30 per week, the fact and timing of which was because of a request made by him the previous October.
14. On 30 May 2018 the Claimant attended a teleconference at which he says he was allocated additional duties.
15. Following the submission of his evidence the Claimant's end of year review was considered by a calibration panel. At the meeting of the calibration panel the Claimant was represented by Mr Tilley, rather than Mr Robson who was the Claimant's Functional Development Officer and had a better understanding of the Claimant's performance.
16. On 23 August 2018 the Claimant was informed by Mr Robson that he had been awarded "Performance Improvement Required" ("PIR"). This was the lowest of the 5 possible performance rankings. As a result of being scored PIR the Claimant was not entitled to a pay rise or bonus.
17. On 28 August 2018 the Claimant challenged his PIR score via email to Mr Robson.

18. On 29 August 2019 the Claimant raised a formal grievance. He did not suggest that he had been discriminated against on grounds of age, but he did state that he did not consider he had been “treated with appropriate levels of impartiality or in a fair, balanced and reasonable manner.”
19. A grievance meeting took place on 9 October 2018. The Decision Manager was Mr Stevenson. The minutes record the Claimant stating that the calibration outcome caused him distress due to a flawed assessment process and the use of “forced distribution”, and that forced distribution promoted “unconscious bias”.
20. By letter of 16 October 2018 the Claimant was informed that his grievance had not been upheld.
21. On 19 October 2018 the Claimant approached ACAS.
22. On 22 October 2018 the Claimant appealed the grievance decision.
23. On 12 November 2018 the Claimant commenced Early Conciliation. However sometime in November 2018 the Claimant says he was advised by ACAS that he should wait for the Respondent to conclude the grievance procedure before starting a tribunal claim. He said he was told the Respondent could change their decision and amend his PIR on appeal, and that the conclusion of the grievance and appeal process would be the “significant event” from which the time limits would begin. Although that language is consistent with the Claimant receiving guidance as to the bringing of a claim of constructive dismissal, he says that he was also speaking to ACAS about bringing a claim of age discrimination, describing, to them, his age as part of a “cumulative effect” on the Respondent’s decision-making process.
24. On the basis of what the Claimant understood ACAS to have told him, he withdrew from the Early Conciliation Process. A certificate was issued on 23 November 2018.
25. The grievance appeal was heard by Mr Inge on 28 January 2019. The delay was initially due to delay by the Respondent and then due to the difficulty of finding a mutually convenient date over the Christmas period when the Claimant could present his appeal in person.
26. Following the hearing the Claimant considered it clear his grievance would not be upheld, and he tendered his resignation with notice on 31 January 2019.
27. By letter dated 18 February 2019 the Respondent rejected the Claimant’s grievance.
28. On 28 February 2019 the Claimant’s employment terminated.
29. On 4 March 2019 the Claimant commenced Early Conciliation and a certificate was subsequently issued dated 18 April 2019.

30. On 1 July 2019 the Claimant brought claims of constructive unfair dismissal, age discrimination, harassment on grounds of age and less favourable treatment contrary to the PTWR.

Conclusions

Jurisdiction

31. Pursuant to section 123 Equality Act 2010 a complaint of discrimination must be brought within three months of the act to which the complaint relates or such other period as the Tribunal thinks just and equitable. For the purpose of this section conduct extending over a period is to be treated as done at the end of the period. That time limit is extended by section 140B Equality Act 2010 to facilitate conciliation proceedings. There is no material difference in the time limit under the PTWR.
32. Mr Ahmed and Ms Robinson were in agreement that in the light of the chronology set out above any claim prior to 4 December 2018 is out of time.
33. The first issue is whether the award of the Claimant's PIR score in his end of year review was an act that occurred on 23 August 2018 when that score was communicated to him or whether it continued until the rejection of his grievance appeal on 18 February 2019.
34. Mr Ahmed submitted that the Respondent continued to fail both to give a reason for the score and to amend the score, and this treatment continued until the dismissal of the Claimant's appeal. Ms Robinson argued that the PIR award was a one-off act, namely the award of a score, and that there was no continuing act or state of affairs. The grievance process didn't remake the scoring decision, rather it considered whether it was properly made the first time.
35. On this point I accept Ms Robinson's submission. The Claimant has not claimed in his (unamended) claim form that the calibration process was inherently discriminatory on grounds of age, rather that the particular way the process was applied to him and the decision to award him the PIR score was discriminatory: "The Claimant asserts that the fact that the Claimant was approaching retirement age was a factor in the Respondent's decision to award him an unmerited score in his end of year review" (unamended Claim Form paragraph 42)." In my judgment, that was a one-off act with continuing consequences rather than a continuing act, and a one-off act of discrimination cannot be converted into a continuing act simply by an employee bringing a grievance in respect of it.
36. The next issue is whether, since the complaint of age discrimination is out of time, it would be just and equitable to extend time.
37. In this respect Mr Ahmed relies upon the fact that the Claimant was advised by ACAS to await the outcome of the internal grievance procedure

and that he did so in good faith whilst he genuinely believed and hoped that process might resolve the problem. Ms Robinson submits the claim has been brought 5 months out of time and the Claimant's explanation is not good enough; even if the Claimant failed to put his claim in on time because of negligent advice or because he was awaiting an internal grievance outcome, those factors are not determinative" **Chohan v Derby Law Centre [2004] IRLR 685, EAT; Apelogun-Gabriels v Lambeth London Borough Council [2001] EWCA 1853.**

38. On this point I accept Mr Ahmed's submissions. I accept the Claimant's evidence that he terminated the first Early Conciliation in November 2018 and did not bring proceedings because he understood ACAS to have told him he should await the outcome of the internal grievance procedure. I further accept that the Claimant pursued that internal procedure with genuine hope that it would resolve matters, that his PIR score would be changed and that he would not have to bring tribunal proceedings at all (see **Vodafone Ltd v Winfield UKEAT/0016/16/JOJ** at [22]). Those are good reasons for delaying bringing a claim. It cannot be sensible to require prospective claimants who genuinely and with reasonable grounds believe there is a good chance an internal procedure will resolve their complaint to rush to the tribunal. Further, the delay has not prejudiced the Respondent. In this respect the Respondent's alleged failure to award the Claimant a fair score lies at the heart of the complaint of constructive unfair dismissal, and is articulated in detail in subparagraphs 36b-e of the unamended Claim Form, so it is clearly a matter they will have to address at the hearing in any event.
39. Turning next to the harassment claim, the impending retirement comment was plainly a one-off act that occurred sometime in October 2017 and I do not consider it would be just and equitable to extend time by one year and three months to allow it to proceed. First, the delay is considerable. Secondly, even if the comment has been recorded in writing it will be difficult for witnesses to remember the context and tone in which it was said, which will be prejudicial for the Respondent. Thirdly, the Claimant never complained about the comment at the time and it never formed part of his grievance. The reasons for extending the time limit in respect of his complaint about the award of his PIR score therefore do not apply. Fourthly, and in any event, the comment appears, on the face of it, a weak basis for a claim of harassment.
40. Turning to the complaints under the PTWR:
41. As regards the complaint that the Claimant was awarded an unmerited score in his end of year review, this is the same factual allegation as that made under section 13 EqA. Accordingly, for the reasons set out above, I find this is a complaint in respect of a one-off act and that it is made 5 months out of time. However, again for the reasons set out above, I consider it is just and equitable to extend time to allow it to proceed.

42. As regards the complaint that the Claimant was not awarded a bonus or pay rise, from the evidence I heard today this appears to have been a consequence of the fact the Claimant was awarded the PIR score, rather than a separate decision. Nevertheless, if any separate decision was taken it was inextricably linked with the Claimant's PIR award and therefore his subsequent pursuit of the internal grievance procedure. Accordingly, I consider it just and equitable to extend time to allow the claim to proceed for the same reasons I consider it just and equitable to extend time in respect of the complaint the Claimant was awarded an unmerited score.
43. As regards the complaint in respect of increase in workload, this came about, according to the Claim Form, during a teleconference on 30 May 2018 when Mr Horrocks allocated the Claimant specific additional duties. This again was a one-off event that caused the Claimant an on-going detriment, rather than a continuing state of affairs (see **Ikejaku v British Institute of Technology UKEAT/0243/19/VP at [24]-[25]**). Accordingly, the complaint is about seven months out of time. Again, the Claimant never complained about the matter at the time and it did not form part of his grievance, consequently the reasons for extending time in respect of his complaints about the award of his PIR score do not apply. In addition, as regards prejudice to the Respondent, the delay will inevitably weaken memories as to what was said in the course of the conversation on 30 May 2018 and the reason(s) for any additional allocation of work to the Claimant at that time. I note the Claimant has listed the matter as one of the matters he relies upon in his constructive dismissal claim, however it was plain at the hearing that the focus of the Claimant's constructive dismissal claim is the award of the PIR score (which pertained to his previous year's performance). Accordingly, I do not consider it would be just and equitable to extend time to allow the discrimination claim in respect of increase in workload to proceed.

Deposit Order

44. Ms Robinson submitted that if I did not strike out the discrimination claims for want of jurisdiction then I should make a deposit order on the grounds they stand little reasonable prospect of success.
45. Ms Robinson submitted the Claimant struggled to explain how he thought his PIR score had been tainted by age discrimination and that the claim was obviously weak. As regards the remaining claims under the PTWR, Miss Robinson submitted that they did not fall within the scope of those regulations. Further the Claimant was not a part-time worker during the period of time to which the end of year score applied.
46. Mr Ahmed submitted that the Claimant did not have to establish that the Respondent was consciously motivated by age or the Claimant's new part-time worker status when it reached its decision to award the Claimant PIR. The Claimant had received a positive mid-year appraisal, he had never been told during the course of the year that his performance needed to

improve, and he had never received an adequate explanation for his PIR score. Further, the Respondent knew that the Claimant was approaching retirement and that he had recently commenced part-time working in preparation for that. These were matters capable of reversing the burden of proof. Accordingly, it could not be said the discrimination claims had little reasonable prospect of success.

47. I do not consider it is appropriate to make a deposit order in respect of the remaining discrimination claims. The disparity between the Claimant's previous performance and his PIR score in August 2018 clearly throws up a number of questions, and while the answer to those questions may well be nothing to do with the Claimant's age or his part-time worker status, given his age, his approaching retirement, and the fact that he had newly become a part-time worker, I am not able to say on the evidence before me that these claims have little reasonable prospect of success. In particular I haven't heard any evidence as to the criteria according to which the Claimant was scored in his end of year review and/or any submissions as to whether they were capable of being applied in a way that discriminated against the Claimant. In any event the reasons for the Claimant's PIR score will be investigated as part of his constructive dismissal claim and so these associated discrimination claims will have little impact on the evidence required at the hearing.
48. Finally, as regards, Miss Robinson's argument that the claim under the PTWR does not fall within their scope, her very brief submissions on the point have not convinced me that the primary allegation (that the Claimant was awarded an unmerited score in his end of year review) is not an allegation of a detriment within the meaning of regulation 5.
49. Accordingly I dismiss the application for a deposit order.

Amendment

50. In the context of his claim for constructive dismissal, the Claimant seeks to add to the list of matters constituting alleged breach of the implied term of mutual trust and confidence the following matter: "The failure of the Respondent to revise the Claimant's score as requested having informed the Claimant that no improvement action was required" (new paragraph 37c).
51. The Claim Form already contains the factual allegation (which is not disputed) that the Respondent did not uphold his grievance and refused to amend his end of year performance score and further that the Claimant resigned when he considered it "clear and obvious" that his grievance appeal would not be upheld. In these circumstances the addition of new paragraph 37c is a minor matter which does not raise a new course of action or prejudice the Respondent.
52. I therefore allow the amendment.

53. In the context of his claim for age discrimination, the Claimant now asserts that the failure of the Respondent to change his PIR score in the course of the grievance process, to afford him the opportunity to improve in line with his PIR score, and to provide him with an explanation for awarding him the PIR score (new paragraphs 44-46) was direct age discrimination under s. 13 EqA.
54. These are additional and discrete complaints of age discrimination directed at the grievance process and grievance outcome, rather than at the calibration process and the award of his PIR score. Further although the Claimant has already pleaded the fact that he followed the grievance procedure, and that his grievance was rejected, he has not pleaded any facts from which a complaint that the grievance process or its outcome was discriminatory on grounds of age may be inferred. Accordingly, they are entirely new complaints and therefore considerably out of time. Miss Robinson submitted that raising such issues would impact the cost and length of the hearing because the Respondent would have to defend the grievance procedure against the claim that the process and outcome was itself discriminatory, which is a different matter from the Claimant simply relying on the fact that his grievance was not upheld for the purpose of his claim of constructive dismissal. I agree with this submission. Further, the proposed new pleadings do not set out any basis for the assertion that the grievance process and/or outcome was itself discriminatory and Mr Ahmed was not able to provide one at the hearing. In this latter respect he stated that it would be relevant to consider how the calibration panel came to their decision and what information they were given in the calibration process, and that if this was discriminatory the grievance process itself would be tainted by the same discrimination. However, assuming Mr Ahmed is right about this, the new claims sought to be made would in that case add nothing to the existing claim that the award of the Claimant's PIR score by the calibration panel was discriminatory. I therefore reject the application to amend the claim form to add new paragraphs 44-46.
55. The other amendments sought are merely correct typographical errors or add background information and the Respondent did not object to them. They are therefore allowed.

Employment Judge S Moore

Date:23/10/2020

Sent to the parties on: ...13/11/2020..

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For the Tribunal Office