# EMPLOYMENT TRIBUNALS

**BETWEEN**

**MR B. JIMENEZ**

Claimant

**- and -**

**FIRMDALE HOTELS PLC**

Respondent

**Heard at**: OPH, held London Central, by CVP

**On**: 12 January, 2021

**Before:** Employment Judge O Segal QC

**Representations**
**For the Claimant:** In person
**For the Respondent:** Mr K Wilson, Counsel
**Interpreter:** Ms T Mclintock

## JUDGMENT

(1) This case proceeds, as amended, with the sole claim that the Respondent victimised the Claimant, in breach of s. 27 Equality Act 2010, by subjecting him to the detriment of not including him within those of its employees in respect of whom it made claims under the CJRS from about late March 2020 and continuing thereafter, because he had done a protected act (having presented a tribunal claim against the Respondent alleging inter alia discrimination in 2018).

(2) The other claims and proposed amendments are, respectively, struck out or not allowed.

(3) The parties must comply with the Directions set out as the Appendix to this Judgment and Reasons.

## REASONS

1. This Preliminary Hearing was ordered by EJ Henderson following a PH on 20 November 2020. Unfortunately, the tribunal did not send out a Case Management Summary or Case Management Orders following that PH.

2. I therefore spent the first half hour or so of today's hearing clarifying and securing the parties' agreement to the issues and matters which required determination at this hearing, as set out below. There was no dispute as to those.

3. The Claimant ("**C**") brought an earlier claim against the Respondent ("**R**") in 2018, which is due for final hearing in late March 2021. Nothing in what follows is intended to influence the progress of that claim. It is common ground that the presentation of that claim constituted a protected act within the meaning of s. 27 ("**the Protected Act**").

4. The present claim was presented on 28 May 2020 and claimed for personal injury, breach of duty and victimisation. In an attachment headed 'Basis of Claim', C set out various allegations. I was told, and C confirmed, that all but the victimisation claim had been rejected by the tribunal on initial consideration and that this had been clarified and confirmed at the PH on 20/11/20.

5. The surviving allegation of victimisation, as clarified by C today, is that because of the Protected Act R required C to attend a 'meeting of concern' on 10 July 2018 on the basis that he had not provided an up to date fit note, despite R knowing anyway his state of health at that time ("**the Original Allegation**").

6. C, at around the same time as he presented this claim, submitted another claim ("**the Submitted Claim**"), which appears to have been lost in the Tribunal system. EJ Henderson directed that the approach to be taken to the Submitted Claim was that it would be considered as an application to amend to the present claim. The Submitted Claim contained two allegations of victimisation, that C had been subjected to the following two detriments because of the Protected Act:-

    a. Failing to pay the Claimant for his full holiday allowance for the year Jan 2020 to Jan 2021 in about April 2020 ("**the Holiday Pay Allegation**");

b. Failing to include C within those of its employees in respect of whom it made claims under the CJRS from about late March 2020 and continuing thereafter ("**the Furlough Allegation**").

7. Prior to the PH before EJ Henderson, C provided a document dated 26 October 2020 headed *"Request for determination of the case"*. I am told that, after discussion with EJ Henderson, C indicated that he wished to rely on the matters at paragraphs 10.2-10.5 of that document (10.1 repeats the Original Allegation) as further alleged acts of victimisation by way of amendments to this claim. In fact, the allegations set out at 10.4 and 10.5 of that document repeated the Holiday Pay and Furlough Allegations.

8. The remaining two allegations of victimisation because of the Protected Act (again, as clarified by C at today's hearing) are:-

   a. That in late 2017, R had wrongly sent medical records provided to it by C in confidence to an OH practitioner; and

   b. That by letter of 17/10/19, R had required C to attend a capability review meeting on the false basis that C had refused an OH referral.

9. EJ Henderson ordered C to provide a witness statement dealing with why any claim/proposed amendment out of time had not been presented within time. C provided that statement and I took account of it.

10. R contends that all of the claims/proposed amendments should be struck out or not allowed, respectively, as being well out of time without adequate explanation and/or as being *"inherently plausible"*

**Law**

Time limits

11. The primary limitation period under s.123 EqA 2010 is three months from the date of the act complained of. Time can be extended on a just and equitable basis.

12. In deciding whether or not to exercise the jurisdiction to extend time on a just and equitable basis, Simler J summarised the relevant principles in ***Bowers v. National Institute for Health and Clinical Excellence*** **[2014] UKEAT/1073/14** at [38]. In particular:

a. The onus is on the party seeking an extension of time to persuade a Tribunal to do so. That is the case because an extension of time is an indulgence. It is the exception and not the rule. It is not an entitlement nor even an expectation;

b. At best a party seeking the exercise of discretion in his favour can expect that the discretion will be exercised judicially in accordance with established principles, but it is incumbent upon the party seeking that exercise in his favour to provide a full and acceptable explanation for his delay;

c. In the ordinary case a failure to provide a good explanation for delay may well lead to the discretion being exercised against him, absent compelling reasons why that should not be the case.

13. In deciding whether or not to extend time, the question is whether it is just and equitable in the all the circumstances. Section 33 Limitation Act 1980 provides some helpful considerations, in particular the balance of prejudice to each party, but it should not be slavishly followed at the expense of the statutory test being ignored – see ***Adedeji v University Hospitals Birmingham NHS Foundation Trust*** **[2021] EWCA Civ 23**.

Striking out

14. The courts have repeatedly warned of the dangers of striking out discrimination claims, particularly where *"the central facts are in dispute"* e.g., in ***Anyanwu v. South Bank Student Union*** **[2001] ICR 391** at [24] and [37] and ***Ezsias v. North Glamorgan NHS Trust*** **[2007] ICR 1126** at [29].

15. However, Lord Hope in ***Anyanwu***, at [39], noted that the Tribunal's resources should not be taken up by hearing cases which are bound to fail. Langstaff P in ***Chandhok v. Tirkey*** **[2015] ICR 527** referred to the decision in ***Anyanwu*** at [20] and concluded:

> *"There may still be occasions when a claim can properly be struck out—where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery LJ in* ***Madarassy v Nomura International plc*** *[2007] ICR 867, para 56):*

*'only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'"*

16. The question of striking out discrimination claims was considered by the Court of Appeal in ***Ahir v. British Airways Plc*** **[2017] EWCA Civ 1392**, where Underhill LJ stated at [16]:

*"Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment"*

Amendment

17. The ***Selkent*** factors are well known. The focus is on the balance of prejudice, which, particularly if a claim is out of time, can include whether a proposed amended claim has any reasonable prospect of success.

18. The Court of Appeal in ***Abercrombie v Aga Rangemaster*** **[2014] ICR 209** stressed that a focus of the Tribunal in determining amendment applications should be on *"the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old"* and stated that *"the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted."*

**Discussion**

C's understanding of the law and time limits

19. It is clear that from the time of the presentation of the 2018 claim, C understood the process of presenting a tribunal claim and must be taken to have understood the time limits applicable to such claims, and he does not say differently in his statement produced for today.

20. C suggests in that statement that he was not aware of his entitlement to bring a claim of victimisation. However, in Answers to Requests for Further Particulars of the 2018 claim, served in November 2018, there is extensive reference to victimisation.

Further, in about September 2019 C sought, but was refused, permission to add claims of victimisation to the 2018 claim.

21. C gives no other explanation for why any out of time claims were not presented in time.

The Original Allegation

22. This claim is some 19 months out of time, without any compelling explanation.

23. The contemporary correspondence sets out a plausible and reasonable explanation for convening the meeting. I consider that this claim, even if in time, would have no reasonable prospect of success.

24. In the circumstances, I consider it clear that it would not be just and equitable to extend time in respect of this claim.

25. Applying the above legal principles, I therefore strike it out on the basis that the tribunal does not have jurisdiction to hear it.

The Holiday Pay Allegation

26. This claim was brought in time, or at least there was an attempt to bring it in time.

27. However, it seems to me that it has no reasonable prospect of success, having regard to the contemporaneous correspondence. The explanation given at the time by R, that it could only pay for the holiday accrued by the date of the request, is not only reasonable but predictable. C says that R extended him the indulgence of paying some holiday in advance in November 2019 (and, he believes, also at some point in 2018). That may be so; but it does not give rise to any inference that declining to pay three-quarters of a year's holiday pay in advance in 2020 was because of the Protected Act. Indeed, as Mr Wilson pointed out, the reverse inference is equally likely: that if R had made that concession in 2019, after the Protected Act, it is all the less likely it had refused to make the advance payment in 2020 because of the Protected Act. I also note that C did not, it seems, raise any inconsistency in R's treatment of him, as between 2020 and 2019, with R in 2020, which might have resulted in an explanation at that time for any such inconsistency.

28. Finally, I note in passing that the alleged detriment was slight. C was paid for all his holiday in the relevant year, just not in advance of it accruing.

29. I therefore strike out this claim pursuant to r. 37(1)(a) of the 2013 Rules, as having no reasonable prospects of success (having, in so far as is necessary, allowed it to be introduced by way of amendment).

The Furlough Allegation

30. It is not contested that R did not include C within those of its employees in respect of whom it made claims under the CJRS from about late March 2020 and continuing thereafter ("the Furlough Allegation").

31. On the basis of emails sent to C on 20/4/20, 26/8/20 and 27/8/20, that was because R considered that C, being on long term sick and not on SSP, was "not eligible" for the CJRS – and, additionally, in the later emails, that it was now too late since he had not been furloughed before June 2020.

32. Without purporting to make a judicial determination of the point, I believe that R's position in that regard was wrong and that it could have furloughed C.

33. I note that, despite requests, R did not explain, or not sufficiently, why it considered C was not eligible to be furloughed. Indeed, C says that an early communication to all employees indicated that they would all be furloughed without exception for those off long-term sick.

34. Mr Wilson argues that it is very likely that if R made an error, it was an honest mistake. Further, he told me on instructions just before the end of the hearing that other employees of R off long-term sick at the material time (and who, one assumes, had not done protected acts) were treated in the same way as C. Clearly, if the latter is right and there is no other indication of differential treatment of C, that will be compelling evidence that C was not subjected to the material detriment because of the Protected Act.

35. However, there is at present, I find, sufficient material to shift the burden of proof on to R. Therefore, given C attempted to bring this claim in time, I have no hesitation in allowing it in by way of amendment to the present claim. For the avoidance of doubt, I considered but do not believe it appropriate to order C to pay a deposit as a condition of pursuing this claim.

36. I have ordered R to make early disclosure of documents material to how relevant comparators were treated by R. C will consider those documents and will

subsequently inform R whether he wishes to pursue this claim to a final hearing. It may be that, on consideration of those documents, C will want to apply to amend the claim to allege a breach of s. 15, rather than s. 27; as to that, I seek to imply nothing as to whether such an application to amend would be granted, or if granted whether a claim pursuant to s. 15 would succeed.

The other two allegations

37. The allegation that in late 2017, R had wrongly sent medical records provided to it by C in confidence to an OH practitioner is hopeless. The alleged detriment preceded the Protected Act.

38. For that reason alone, I do not permit an amendment to include that allegation in the present claim.

39. The allegation that by letter of 17/10/19, R had required C to attend a capability review meeting on the false basis that C had refused an OH referral was made some 9 months out of time.

40. Having reviewed the relevant correspondence (some of which was helpfully provided by C during the course of the hearing), it is also an allegation which has no reasonable prospect of success. By email of 17/9/19, C had expressed reservations about consenting to an OH referral. By email of 24/9/19, R asked C to consent by 1/10/19. C did not respond to that email before 17/10/19. It was therefore predictable and unobjectionable that on the latter date R would write to C requesting that he attend a capability review meeting to discuss his state of health, etc. It is not plausible that this decision was because of the Protected Act.

41. For both those reasons, I therefore do not permit an amendment to include that allegation in the present claim.

**Directions**

52. The parties confirmed that the existing directions were sufficient and appropriate.

53. The parties confirmed that they would cooperate to agree a List of Issues and file that with the tribunal.

Oliver Segal QC
Employment Judge

Date: 12 February, 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

18 February 2021

FOR THE TRIBUNAL OFFICE

**Appendix – Directions**

1. By 5 March 2021, the Respondent shall send the Claimant copies (redacted only in so far as is essential) of all documents it relies on to demonstrate that it did not furlough other or all other employees who were off long-term sick in March/April 2020.

2. By 9 April 2021, the Claimant will write to the Respondent confirming whether he wishes to pursue the Furlough Allegation, in light of those documents.

3. If the claim is to proceed:

   3.1. The parties are to disclose copies of all relevant documents to each other by 16 April 2021;

   3.2. The Respondent is to provide an electronic copy of a hearing bundle to the Claimant by 7 May 2021;

   3.3. The parties are to exchange witness statements by 28 May 2021;

   3.4. The claim is listed for a 1 day hearing, commencing 10.00 a.m, in person unless otherwise advised, on **29 June 2021**.