



EMPLOYMENT TRIBUNALS

Claimant: Mr S Gebrehiwot
Respondent: Migrant Helpline Limited
Heard at: CVP **On:** 20 January 2021
Before: Employment Judge R Powell

Representation:

Claimant: In person
Respondent: Mrs J Fairclough-Haynes (Consultant)

JUDGMENT

The Judgment of the Employment Tribunal is:

1. Allegations 1 and 2 of the claimant's Discrimination Schedule were presented out of time and are dismissed.
2. Allegations 1,2, 3 and 5 of the Claimant's Final Harassment Schedule were presented out of time and are dismissed
3. Allegations 3 and 4 of the Claimants Discrimination Schedule and Item 4 of the Final Harassment Schedule are potentially matters which form part of a pleaded continuing course of discriminatory conduct and may proceed to be determined at the final hearing.
4. Items 3 and 4 of the Claimant's Discrimination Schedule each have little prospect of success.
5. The Claimant is ORDERED to pay a deposit of £150.00 (one hundred and fifty pounds) in respect of each allegation not later than 28 days from the date this Order is sent as a condition of being permitted to continue to advance those allegations or arguments. The Judge has had regard to any information available as to the Claimant's ability to comply with the order in determining the amount of the deposit.

The Issues

1. This is the Judgment on a Preliminary Hearing which was ordered by Employment Judge Jenkins and set out his Case Management Order of 5 August 2020 wherein he found at paragraph 10 that the Claimant's application, in respect of unfair and discriminatory dismissal was in time.
2. He also concluded that meant that matters prior to 17 December 2019 were potentially out of time unless a decision was made that there was an act extending over a period of time or it was just and equitable to extend time.
3. The pleaded acts of discrimination which are said to have occurred prior to the 17th December 2019 can be provisionally view in two parts; those allegations which are overtly pleaded as acts assonated with the claim of dismissal the other claims were not, on the face of the pleading, connected with dismissal.
4. On the respondent's application the case has also been listed to determine whether any of the allegations should be subject to a deposit order.
5. Following the hearing before Employment Judge Jenkins the above issue was listed in front of Employment Judge Ryan who was not able to complete the purpose which is before me today because of technical difficulties.
6. I have the benefit of seeing a list which was Employment Judge Ryan's interpretation of the issues which the Claimant had set out in two Schedules in accordance with the Order of Employment Judge Beard. The one is titled "discrimination" the other is titled "harassment". They are not in chronological order I am now going to each identify each allegation by the schedule in which it is pleaded and its place in the order of that schedule. Schedules.

Background

7. The claimant is unrepresented and I have taken something over two hours to discuss each of the relevant allegations in turn to be as sure as reasonably possible that the claimant has been able to articulate additional information or explain the intention of that which he set out in writing.
8. I will first deal with some findings of fact I make based on the answers the Claimant provided to me in the course of the hearing.
9. Mr. Gebrehiwot had been an employee of the Respondent for 6 years prior to his dismissal in January 2020 and his claims range back to 2014 with one incident in 2018. The majority of incidents are alleged to have occurred in

2019; particularly in the period around and after 20 November which is the date upon which he was suspended.

10. I find that the Claimant, when he gave answers in respect of his complaint arising from his non-selection for promotion after his application for a managerial post in April 2018, demonstrates that since 2018 he has been aware of his right to bring an employment claim to court or tribunal. I also find that he was a member of the Trade Union UNISON throughout his employment, and that he had the opportunity to take advice from his union. In particular, with relation to the discrimination claims that are before me, he had done so in September 2019. He had received advice which, from what he described to me, concentrated on the merits of his complaints and he had been challenged by his Union as to how he was going to prove those claims. He has also, in the time before presenting the claim on 1 April 2020, been to the Citizens' Advice Bureau and had advice from a solicitor.
11. I also find that in respect of earlier matters, that the claimant was cautious about bringing a claim for a want of a lack of "boldness"; that caution was based on a perception that there may be some adverse consequence to him if he did so; whether it be in terms of his furthering his career with the Respondent or something worse.
12. The claimant gave two specific examples of the respondent's conduct which he said underpinned his cautions, it was the imposition of a final written warning on 18 September 2019 and then the disciplinary process which commenced with suspension on 20 November of the same year.

Jurisdiction

13. In that context I look first at the issues of jurisdiction i.e., whether any claim is in time and that which is pleaded in respect of an act or omission by the Respondent which occurred before 17 December.
14. There are two themes to this, the first is whether any or all of the relevant allegations form part of a continuing act and the second is whether it is just and equitable extend the time for the presentation of the claim in respect of the relevant allegations.
15. Dealing with matters in number order, with regards to an act extending over a period I find that there is some sufficient connection between elements of alleged discriminatory behaviour that could be associated directly with a manager called Victoria and disciplinary processes. I will deal with each in turn and expand upon that reason by the content of the following.

Discrimination Schedule

16. **Item 1** (The disregard of grievances submitted to HR in London in November 2019).
17. I note that the grievance to which the Claimant referred alleged that an unknown person (not someone the claimant identified as an employee of the respondent) slightly pushed him with cardboard packaging from a newly delivered fridge and then pushed him again with the polystyrene packaging from the same fridge.
18. This grievance is one which the respondent does not have record of receiving it was the London HR whom the claimant asked to deal with it.
19. After my discussion with the Claimant, I could not find any connection between the alleged failure of an HR person(s) in the London Office of the respondent to investigate a grievance concerning an incident with an unidentified person and the “in time claims” against the claimant’s local management decisions to discipline him for misconduct.
20. **Item 2** alleges that the claimant was subject to less favourable/unwanted conduct through the use of chemical, physical and perhaps biological or electrical hazards to make the Claimant poorly in the office he shared with a colleague called Bernier.
21. After a lengthy discussion it was very difficult for the Claimant to identify the actual conduct of the Respondent was. His schedule states:

“they are using invisible weapons to attack all or some parts of our body....”.
22. I can find no connection by the character, the subject matter of this allegation with the personnel or alleged actions set out in the “in time” allegations.
23. **Item 3** states that; “no correct dismissal procedure was followed” The claimant told me that this allegation relates to an appeal which the Claimant made against the imposition of a final written warning on 18 September 2019. The appeal took place in November or thereabouts of 2019. This as I understand it was an appeal against a decision which was imposed, or at least raised, by his manager Victoria. The claimant alleges that this person had an enduring degree of antipathy towards him.
24. I consider that there is a significant nexus between this allegation and those in time. This allegation asserts that the final written warning and the appeal arose from the complaints by the same manager whom the claimant alleges

started the disciplinary procedure which led to his dismissal. There is also a temporal connection; this appeal was taking place at the same time as the early stages of the disciplinary process which led to his dismissal.

25. I find that this allegation could form part of a continuing course of conduct.
26. **Item four** alleges that pressure was put upon witnesses to give evidence against the claimant in the disciplinary hearing which led to his dismissal. This allegation is clearly in time.

The Harassment Schedule

27. **Item 1** asserted act of harassment by not providing the Claimant with a key to the new office and ignoring him when he knocked on the door.
28. That is not something which is levelled at the manager Victoria herself, in fact the list of names of persons who are said to have ignored the Claimant or who may not have had a key themselves, were mostly his peers. I find no nexus between this the issue or the character of the alleged conduct which is set out in the “in time” allegations and I find insufficient nexus between the persons involved in this allegation and the managers of the disciplinary process.
29. **Item 2** alleges that: “Migrant Help in breach of my contract, forcefully wanted to introduce confusing organisation structures and working procedures”.
30. So far as I am able to understand from the Claimant, these were decisions made by the organisation altering their management structure and procedures for undertaking work tasks. None of these decisions, on the claimant’s description before me, appear to have any connection to the allegations which are in time nor to the people relevant to those “in time” allegations. It is difficult to identify how any organizational change could amount to an act of less favourable treatment because of the claimant’s protected characteristics or be related to the same.
31. The claimant’s case, taken at its highest, does not suggest any nexus by reason of a policy or practice, by the character of the alleged conduct or by through the persons involved.
32. **Item 3.** This alleges that the claimant was exposed to an electric shock which was deliberately organised by one member of staff, whom I will identify by the initials NA.
33. There is nothing in the character of the allegation which appears to be associated with the “in time” concerns and nor is there, on the documents

or the description given to me, any association with the claimant's Line Manager.

34. **Item 4** alleges that in January 2020 the respondent failed to make a payment in respect of the claimant's notice period. That is clearly in time in any event.
35. **Item 5** alleges that the Claimant was not appointed to a vacant manager position after his application for such a post in April of 2018. Again, the claimant could not articulate an association between that decision and his "in time" complaints relating to disciplinary procedures, formal warnings and subsequent dismissal in late 2019.
36. I find no association between that act and the in-time issues.
37. **Item 6** alleges that, at some point in 2019, the Claimant had "no chance" to raise a grievance that he had been subject to sexual harassment and was deterred from doing so.
38. He had some difficulty in identifying when he had wished to raise that matter but it certainly seems to be no later than October 2019 albeit I would not be content to say that the Claimant has identified to me with any satisfaction when it could have occurred in the period from 1 January 2019 and 20 November, the date of his suspension.
39. Leaving that point aside, this is a case where, on the Claimant's verbal description to me, he did not feel sufficiently confident to raise a complaint. When an obvious opportunity arose to do so during his disciplinary investigation, he was cautious of doing so for fear of how making such a complaint might adversely impact on the disciplinary process.
40. On this allegation I find, that the claimant's case taken at its highest, does not allege any action or omission by the Respondent. What he is essentially saying is he was uncertain whether raising a grievance would worsen his chances in the disciplinary investigation and due to that uncertainty, he chose not to raise a grievance. He has offered no explanation for his own inaction prior to the late autumn of 2019.
41. First of all, I find that there is no factual assertion by the claimant that could evidence this allegation was part of a course of conduct by the respondent. Further, on the claimant's description of the allegation it is a claim that has no merit because it does not complain of an act or omission by the respondent. What it describes is a consequence of the Claimant's perception of the Respondent's alleged, but not articulated, prior conduct.

Conclusions on a continuing course fo conduct

42. I find that Items 3 and 4 of the discrimination schedule *could* amount to acts which formed part of a continuing course of conduct.
43. I find that 4 Item of the harassment schedule *could* amount to an act which formed part of a continuing course of conduct. It is in any event an allegation which is “in time”.
44. I make it clear that it is not for me to determine whether the claims are part of a continuing course of conduct; that is decision for the Employment Tribunal panel at the final hearing to determine.

A just and equitable extension

45. With the balance of the items within the two schedules I now consider whether or not it is just and equitable to extend time for the presentation of those allegations.
46. I have already dealt with the reasons for the Claimant’s failure to plead and present matters earlier than 1 April 2020.
47. I am also concerned the character of some of some of the allegations may make it exceedingly difficult for the Respondent to address.
48. The assertion for instance, of discrimination through the use of chemical, physical or biological weapons which were invisible, in a period which cannot be narrowed down to anything more precise than 2014 to 2020. Is all but impossible to address beyond a bare denial.
49. I am also concerned that with respect to the allegation that the Claimant was not shortlisted in 2018 is going to be a very difficult matter for witnesses to respond to, particularly when the actual particulars are very limited and the probability that memories of events from two years ago will have deteriorated substantially and, on the information before me, there has been no cause for any record of events to have been created or kept.
50. For those reasons I would not have allowed those to proceed as I consider the issue of prejudice to weigh heavily in favour refusing an application to extend time on these two allegations.
51. On the balance of the claims, I remind myself that the burden of proof lies on the Claimant to establish that it is just and equitable in this case to make an extension.

52. I have taken into account the findings I made with regard to the Claimant's motivation, knowledge and ability to present a complaint to the Employment Tribunal. I have taken into account his explanation for not doing so (his lack of boldness and his fear of an unspecified negative response from the respondent prior to Autumn 2019).
53. I conclude that throughout the past 2 or 3 years he has had sufficient knowledge of his right to bring a claim, the manner in which to bring a claim, and advice from his Trade Union upon the merits of his claims. In those circumstances, the only factor I find that caused the Claimant to delay the timely presentation was his personal view of the potential impact of his employment with the Respondent. There is no indication that he had been threatened or "warned off" in any way. Objectively, the degree of concern which the Claimant expresses is that which is shared by every current employee who wishes to bring a claim against their employer.
54. I have also considered the merits of each allegation which I have set out later in the judgment.
55. Having considered the reason for the delay in presentation, the claimant's explanation, the merits of the claims and the relative prejudice and the burden of proof which lies upon the claimant.
56. I do not consider it just and equitable to extend time for the presentation of those claims. I therefore find that these claims are not within the Employment Tribunal's jurisdiction and are dismissed.

Deposit Orders

57. I turn then to the issue of Deposit Orders. Whilst I must concentrate on the matters which I have said could form part of a continuing course of conduct, but just for completeness I briefly express my conclusions on all the claims in the two schedules.

The Discrimination Schedule

58. With regard to discrimination item 1. The Claimant cannot identify to me when the grievance was sent and I noted that the Claimant was specifically warned by Employment Judge Ryan, at paragraph 7 of his Order, that it would be wise to prepare a list of written details in relation to the issues. Dates were one of the factors on which he was specifically counselled to consider.
59. With regard to item 2, it is difficult to see that the assertion of the use of invisible weapons to attack has any prospect of success whatsoever. The Claimant described sharing an office with his colleague Bernier. They were

asked to swap seats so that Bernier could sit closer to the window light because of his eyesight and subsequently the Claimant suffered a series of illnesses because he moved to sit 2 metres from his original seat, in the same office.

60. I cannot detect any factual allegation which raises a potential prima facie case or could do so. There is simply no suggestion of evidence of an act or omission by any person. The claim is at best a creative hypothesis.
61. With regard to item 3 “no correct dismissal procedure” this is a description on the Claimant’s account that the appeal process failed to take into account his arguments and failed to record them in the notes.
62. The Claimant commenced his explanation to me by saying that he expected that an appeal panel would have acceded to his appeal and agreed with the he points raised.
63. He has not identified any specific failing of logic by the respondent, he has not identified any particular omission from the notes and he had not identified any argument, that he raised, that would lead me to conclude that rejection of his appeal was, in some as yet unknown way, unreasonable.
64. On the claimant’s case it is difficult to detect specific allegation from which it would be possible to infer that the panels’ decision was tainted by consideration of the claimant’s protected characteristic.
65. I find by those matters that the Claimant’s case is rather weak on that point but it is difficult, even with the detailed verbal explanation, to see how the Claimant is going to establish that there has been a detrimental act whether it is direct discrimination or harassment in respect of an appeal being upheld without any particulars to identify properly what the respondent’s relevant act or omission was.
66. Allegation 4 refers to: “deliberately organising the witnesses, maybe threaten them or might have been threatened”.
67. After discussion, the Claimant asserts that the members of staff referred here to as Paul, Bernier, Efles, Claire and Esther had been pressured to give evidence against him.
68. On his account to me, he has no direct evidence of any pressure and none of the witnesses, on his account to me, had said that they had been pressurised. The only point the claimant asserts was that these colleagues had expressed their sympathy with his predicament.

69. The claimant's argument is this:

- (1) he is not guilty of the conduct described by the witnesses.
- (2) Therefore, the witnesses knew he was not culpable.
- (3) Therefore, if the witnesses gave an account of his behaviour which was inconsistent with his own perception of his innocence, they must have been pressurised to do so.
- (4) The pressure placed upon the witnesses was tainted by consideration of his protected characteristic.

It is not a strong allegation when on the face of it the Claimant does not have any evidence to sustain a view which is based entirely on hypothesis.

Moreover, it is not clear how or when or with what method if at all pressure was asserted. The Claimant had no knowledge of that, he was unable to say what was done or not done to put pressure on the witnesses, so item 4 of discrimination is suitable for a Deposit Order because it has little prospect of success.

The Harassment Schedule

70. Turning then to the Schedule of Harassment with regard to the office move had that been a matter I found in time I would have ordered a Deposit Order for the following. The Claimant cannot indicate whether he was the only person that did not have a key, in fact when I asked him how many other people as using as comparators of those who had to knock to get in, he gave a list of his other colleagues and when he was asked who had not allowed him in, again gave me several names, but only wished to focus on one person, his Line Manager. In light of the Respondents case which was that none of the other staff had the keys I find that that element of the claim is difficult to consider that it would be sustained and as to the Claimant having to wait outside rather than use the back door where there was a keypad which allowed access to a key again it is difficult to understand from the Claimant's account how that delay in opening the door for him was a matter which related to his Christian faith or his Eritrean ethnicity.

71. Moving on to the Migrant Help breach of contract, again as that was a policy that appears to have been applied to all members of staff and organisational change I would have considered that merited a Deposit Order because it is not a decision or an omission which appears to have any causal connection with the Claimant's protected characteristics at all. It was an organisational change.

72. The issue with regard to the electric shock, again that is an allegation against a colleague. The Claimant has not articulated why he thinks this was an act which related to his ethnicity and between Judge Ryan and myself there has been a fairly lengthy opportunity for the Claimant to articulate that.
73. Turning to Item 4 I make no reference to that on the point of a Deposit Order simply for this reason. If the Claimant succeeds on his unfair dismissal claim then he will probably also succeed in a claim for notice pay and if his claim for unfair dismissal fails then the notice pay claim will also automatically fail, it is so closely tied to the conclusions on the unfair dismissal allegation that I see no value in trying to judge it independently of that.
74. Turning to item 5, again the Claimant has not identified in any respect why he thinks the conduct was discriminating save for interpreting a discouragement to apply which he indicated to me in his oral submission was a discouragement because somebody told him the job had already been earmarked for somebody else even before it was advertised I suppose could be potentially discriminatory but there is no indication on the pleadings or any oral submission that gave me a cause or connection as to why that might be related to the Claimant's protected characteristics.
75. With regard to item 6, again I simply find on this case that there was no pleaded act or omission and that on the pleaded case is simply incapable of succeeding in the Tribunal for that reason.
76. I turn then to the issue of the Deposit in respect of the two matters which I have identified which are items 3 and 4 of the discrimination schedule and I am now going to pause the Judgment to consider the steps appropriate and the Claimant's finances and the extent I conclude it is just and equitable to make such an Order.

The Deposit Order

77. Having reached a conclusion that in respect of two elements of the claims the merits were such that a Deposit Order was appropriate I then sought to identify the Claimant's means. Somewhat difficult. I understand the following; the Claimant and his wife are both working as she works as a Care Assistant and he is self-employed earning approximately £950 averaged out per month. They have probably about £15,000 equity in their property, but they also have substantial regular outgoings in respect of accumulative £4,000 worth of debt on store cards and £4,000 loan which they took from family when they bought their house and £1,750 overdraft. They have 3 children all of whom are 16 or under. The Claimant has not given me any details of ordinary day to day outgoings and has declined to

give me any indication of his wife's income, but I can have some broad sense of what it is based on the description of the job.

78. The Respondent's position is that a Deposit Order in the sum of £1,000 should be made. I have clearly decided to take into account the Claimant's means but I should first set out my decisions in accordance with the Rule 39 and structure:

(1) I do consider it just and equitable to make a Deposit Order in respect of those 2 matters,

(2) the amount which the Respondent asks on the information I have been given is more than I consider is appropriate for these reasons the purpose of a Deposit Order is to caution a Claimant or Respondent about the merits of proceeding with elements of their claim and it should not be so much that it debars them from proceeding. On the financial scenario that I have in front of me to order a £1,000 on a family with some debts, possibly an income of no more than £2,000 or £3,000 per month with 3 children and all the usual means would to my view be too close to inhibiting rather than deterring or making a Claimant go forward with the appropriate amount of caution.

79. I therefore make a Deposit Order in respect of each of the two allegations in the sum of £150, so that is a total of £300.

80. I will record as well that the impact of a Deposit Order is twofold, (1) if the deposit is not paid within 28 days of receipt of the Order then the Claimant will not be able to proceed with those 2 allegations (2) if the deposit is paid and the Claimant does not succeed in those 2 allegations the deposit will not be returned, but the other risk is the potential Costs Order that is faced by a party who pays the deposit but then loses before the full hearing on liability for the same or related reasons for those to which I have made the Deposit Order.

Employment Judge R Powell

Dated: 16th February 2021

JUDGMENT SENT TO THE PARTIES ON

2 March 2021

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

NOTE:

This is a written record of the Tribunal's decision. Reasons for this decision were given orally at the hearing. Written reasons are not provided unless (a) a party asks for them at the hearing itself or (b) a party makes a written request for them within 14 days of the date on which this written record

is sent to the parties. This information is provided in compliance with Rule 62(3) of the Tribunal's Rules of Procedure 2013.