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THE EMPLOYMENT TRIBUNALS

Claimant: Mr Ali Wehbi
Respondent: Lidl Great Britain Limited
Heard at: East London Hearing Centre
On: 4 July 2019
Before: Employment Judge Russell

Representation
Claimant: In person
Respondent: Mrs G Williams (Solicitor)

JUDGMENT

- 1 The Claimant's complaint of race discrimination was presented out of time. It is not just and equitable to extend time, the race discrimination claim is struck out in its entirety.
- 2 All remaining complaints proceed.

REASONS

1 By a claim form presented on 15 October 2018, the Claimant brings complaints of age discrimination, race discrimination, disability discrimination and unfair dismissal. The hearing today was listed to consider which, if any, of his complaints were brought out of time and whether it would be just and equitable to extend time for the same to be heard. In order properly to decide this application, it was necessary to the issues in the claim which will may need to be decided. These are as follows.

Direct Discrimination because of age

- 2 Did the Respondent treat the Claimant less favourably in the following ways?
 - 2.1 Mr McKay's comments to the Claimant on 15 October 2017.
 - 2.2 Mr McKay's decision to conduct investigations into the Claimant's performance/conduct and to recommend a disciplinary action.

2.3 Dismissal on 22 June 2018.

3 If so was it because of the Claimant's age? The Claimant is 41 years old. His comparator is the new manager Mr Nee in his 20s and/or a hypothetical manager under the age of 30.

4 The Respondent will not advance the objective justification defence.

Harassment related to age

5 In the alternative, if not an act of direct discrimination, was the conduct above unwanted?

6 If so, was it related to age?

7 Did the conduct have the purpose or the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Direct discrimination because of race

8 Did the Respondent treat the Claimant less favourably in the following ways?

8.1 The way in which Mr McKay spoke to him on 4 December 2017;

8.2 6 February 2018: Mr McKay's instruction that he must work a long shift;

8.3 Dismissing him.

9 If so, was it because of race? The Claimant describes his race as Lebanese/Middle Eastern.

Disability

10 The Claimant relies on mental impairment of depression and anxiety.

10.1 Was it long term? The Claimant says that he first began to suffer from November 2017 and his first medical treatment was in December 2017.

10.2 Did it have a substantial adverse effect upon his ability to carry out day to day activities?

Direct Discrimination because of disability

11 Did the Respondent treat the Claimant less favourably in the following ways?

11.1 14 November 2017 Mr McKay did not hold a return to work interview after the Claimant's sickness absence.

11.2 On 21 November 2017, 3 December 2017 and 2 January 2018 Mr McKay sent emails and WhatsApp messages to the Claimant outside of working hours.

11.3 December 2017 refused the Claimant's request to transfer.

11.4 15 December 2017 Mr McKay told the Claimant that he would start an investigation into performance issues despite the Claimant just

- informing him of his mental health diagnosis.
- 11.5 From January 2018 without prior discussion with the Claimant transferring his staff to other stores. The staff transferred were Daniella, Rahmah, Sohail, Georgina and Gloria.
 - 11.6 5 February 2018 imposing a final warning without a personal development plan or support being provided.
 - 11.7 6 February 2018 Mr McKay instructed the Claimant to work a long shift.
 - 11.8 9 March 2018 requiring the Claimant to attend a grievance appeal hearing whilst on annual leave.
 - 11.9 13 April 2018 Mr McKay failing to conduct a return to work interview following the Claimant sickness absence.
 - 11.10 14 May 2018 Mr McKay failing to conduct a return to work interview.
 - 11.11 15 May 2018 Mr McKay called the Claimant to a performance investigation meeting on his first day back from holiday.
 - 11.12 22 June 2018 dismissing the Claimant. If so was it because of disability.

12 If so, was it because of disability?

Unfavourable treatment because of something arising in consequence of disability

13 The Claimant relies upon the conduct set out at paragraph 12 above as acts of unfavourable treatment.

14 For any conduct found to have occurred, was it because of something arising in consequence of disability.

15 If so, was it objectively justified?

16 In the alternative did the Respondent not know and could it not reasonably be expected to know the Claimant was a disabled person.

Failure to make reasonable adjustments

17 Did the Respondent apply the following provision criterion or practice (PCP)?

- 17.1 A requirement to work long hours.
- 17.2 A requirement to work with inadequate levels of staffing or support.
- 17.3 A requirement to attend hearings whilst on leave.

18 If so did it put the Claimant as a disabled person to a substantial disadvantage?

19 Did the Respondent know or should it reasonably be expected to know that the Claimant was at that disadvantage?

20 Did the Respondent failed to take reasonable steps to avoid such disadvantage? The reasonable adjustments suggested are:

- 20.1 Not imposing disciplinary sanctions for poor performance.

- 20.2 Providing the Claimant with a formal support and development plan.
- 20.3 Transferring him to another store.
- 20.4 Reporting to a different line manager; and/or
- 20.5 Allowing the Claimant to work only his contracted hours.

Unfair Dismissal

21 What was the reason for dismissal? The Respondent will say capability (performance) alternatively conduct.

22 Was the dismissal fair in all the circumstances of the case, applying section 98(4) of the Employment Rights Act 1996?

23 The Claimant denies that there was a reasonable investigation and/or that dismissal was fair in part due to the sanction and in part because he was not given the relevant documents to answer the allegations.

24 If dismissal was unfair should there be any adjustment to reflect:

- 24.1 The possibility that the Claimant could and would have fairly been dismissed in any event.
- 24.2 Any contributory fault on the part of the Claimant.
- 24.3 Unreasonable failure to comply with the ACAS Code of Practice.

Time

25 In so far as the discrimination complaints were concerned, did they form part of a continuing course of conduct?

26 If presented out of time, is it just and equitable to extend time.

The application to be considered today

27 The claim form was presented on 15 October 2018, following a period of ACAS conciliation between 10 July and 10 August. It follows that unless dismissal was included within the race discrimination claim, the case would be significantly out of time as the last act would be in February 2018.

28 Having carefully considered the initial claim form and the two further documents of additional information provided by the Claimant, I conclude that dismissal has not been pleaded as an act of race discrimination, only as disability and/or age discrimination.

29 I declined to grant the Claimant leave to amend his race claim for the following reasons. The Claimant's complaint was that he was treated poorly by Mr McKay generally, alleging that white replacement store managers covering his absences were treated better by Mr McKay than he was. The Claimant only identifies two specific incidents which he alleges are because of his race. I make no finding on the merits of the claim but note that the Claimant was not dismissed by Mr McKay but by a more senior manager against whom no allegation of race discrimination is made. It appears that a significant reason for including dismissal as an act of race discrimination may be

that it would bring all the allegations of race discrimination before the Tribunal at a final hearing.

30 To do so would cause significant additional cost and would prejudice the Respondent. The race claim is very vaguely pleaded despite the Claimant being given two further opportunities to provide detail. Significant evidence would be required to address how the replacement managers were treated, why, how the Claimant was treated differently and why it was due to race (a difference in treatment and a difference in protected characteristic alone not being enough). Time has passed, memories dim and the matters now relied upon were not included in the Claimant's contemporaneous grievance. The prejudice to the Respondent if it were required to meet such a new claim is considerable.

31 By contrast, the Claimant has existing claims which focus on the heart of his concern; namely the handling of his illness, disability and performance during that time. I find therefore that the prejudice to the Claimant of being deprived of the race discrimination claim is far less than the prejudice of the Respondent if it were allowed to proceed.

32 Without the dismissal claim, which I have not allowed to be added, the race discrimination claim is considerably out of time. In considering whether it was just and equitable to extend time, I relied upon the balance of prejudice argument set out above. The Claimant has not advanced any sufficient explanation for his failure to bring a complaint in time. He has not discharged the burden of showing that it is just and equitable to extend time.

33 After giving my reasons orally for not extending time in respect of the race discrimination claim, the Claimant alleged other acts of race discrimination whilst he was on suspension. Considerable time was spent at the outset of the hearing identifying the issues yet these further allegations had not been raised. Rather than changing my decision, it highlights the potential prejudice caused by vague and unparticularised allegations which change over time. ***The claims of race discrimination will not proceed.***

34 Once the issues in the disability claims had been identified, Ms Williams pragmatically decided not to pursue her application to strike them out on time points. As she fairly accepted, that evidence needed to be heard in order to decide whether there was a continuing act which would render the claim in time. ***All disability discrimination claims will proceed to a final hearing where time will be an issue.***

35 Ms Williams did seek to persuade me to strike out the age claim as, she said, the chances of the Claimant establishing a continuing act was slim to non-existent. Ms Williams' submitted that the allegations concerned very distinct matters, different decision makers and the Claimant would struggle to show that there was a policy of forcing out junior managers. By contrast, Ms Williams submitted that to allow the claims to proceed would require the Respondent to spend considerable time and effort evidentially to produce the statistics as to their managers, what age they were, who has left and why.

36 The Claimant disagreed. In essence, his case is that in October 2017 Mr McKay made a comment about managing him out of the business and replacing him

with a younger manager. Within two months of working together, there were allegations about the Claimant's performance that led to disciplinary action, a final written warning, further investigation which ultimately resulted in dismissal (the implementation of the initial decision to remove him because of his age). In his claim form, the Claimant describes the case as "*Mr McKay told me that the company hired more store managers than what they need to replace the long service old store managers, he said most if not all of the store managers LIDL hiring are in their twenties and early thirties*".

37 In order for the age discrimination claim to be in time, the Claimant would have to show that dismissal was part of a continuing course of conduct or discriminatory state of affairs. There is some force in Ms Williams' submission about the different decision makers given that in discrimination it is the reasons for acting or not acting of the decision maker which need to be scrutinised, see *CLFIS (UK) Ltd v Reynolds*. However, the Claimant has alleged that Mr McKay embarked upon a campaign to secure his eventual dismissal and replacement by a younger manager. This he says is the reason for the instigation of the internal procedures which ultimately secured the goal which Mr McKay desired. Unlike the race discrimination claim where the allegations were limited to Mr McKay, for age the Claimant has asserted that this was a company practice or policy. Whether this allegation and any issues arising out of the investigation and disciplinary process leading to dismissal are a continuing course of conduct is best left to the Tribunal at the final hearing after they have heard evidence. This is a discrimination claim and there is a public interest in the evidence being heard and it is appropriate that the claim be permitted to proceed. ***The age discrimination claim will proceed.***

38 The hearing is currently listed to commence on 29 October 2019. The Claimant intends to call at least one witness. That witness will be on sabbatical and will not return to the United Kingdom until 20 January 2020. Some of the Respondent's witnesses are not able to attend that hearing. It is in the interests of justice that that existing hearing date be vacated. I had hoped that the matter could be re-listed relatively swiftly. In the event it has not proved possible and the hearing will take place on **12 – 15 and 19 and 20 May 2020.**

Employment Judge Russell

Date: 11 July 2019