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EMPLOYMENT TRIBUNALS

Claimant: Mr H Mahmoud Ali
Respondent: STM Group (UK) Limited
Heard at: East London Hearing Centre
On: 28 August 2019
Before: Employment Judge M Martin

Representation

Claimant: In person
Respondent: Mr G Young (HR Manager)

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that:-

- 1) The Claimant's complaint of age discrimination was presented in time. The Tribunal has jurisdiction to hear the Claimant's complaint of age discrimination.
- 2) The Respondent be permitted to defend these proceedings.
- 3) The case be relisted for a further preliminary hearing to consider whether the Claimant should be required to pay a deposit order as a condition of continuing to pursue his complaint of age discrimination and thereafter to make further directions for the future conduct of these proceedings.

REASONS

1 The issues to be considered at this Preliminary Hearing were set out in the Employment Tribunal's letter to the parties dated 26 June 2019, namely whether the

Claimant's complaint of age discrimination was presented outside the three months' time limit set out in Section 123 of the Equality Act 2010 and if it was whether it would be just and equitable to extend time. If the Tribunal found the claim had jurisdiction to hear the claim then the Tribunal had to consider whether the Respondent should be allowed to defend those proceedings because the ET3 Response Form had been filed late.

2 The Claimant gave evidence on his own behalf. Mr Guy Young, Head of HR for the Respondent gave evidence on behalf of the Respondent. The Tribunal was provided with a bundle of documents from the Respondent and then certain additional documents were produced by the Claimant on the day of the hearing and added to the bundle which was marked Appendix 1.

3 The law which the Tribunal considered was as follows.

"Section 123 of the Equality Act 2010(1) proceedings on a complaint of discrimination may be brought after the end of (a) the period of three months starting with the date of the act to which the complaint relates or (b) such other period of that Tribunal thinks just and equitable."

4 The case of *Barclays Bank Plc v Kapur [1991] IRLR 136* where the House of Lords held that continuing a regime which adversely affects an employee is an act which continues so long as it is maintained.

5 The case of *Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96* where the Court of Appeal held that, in determining whether there was an act extending over a period of time, the focus should be on the substance of the complaints and whether the employer was responsible for an ongoing situation or a continuing state of affairs; the concept of policy, rule, practice, scheme or regime are examples of when an act extends over a period.

6 The case of *Robertson v Bexley Community Centre [2003] IRLR 434* where the Court of Appeal held that to establish a continuing act it must be shown that the employer had a practice, policy, rule or regime governing the act said to constitute it.

7 That case also held that time limits are to be exercised strictly in employment claims and that there is no presumption that time will be extended on just and equitable grounds. The exercise of discretion is for the Tribunal and is the exception rather than the rule.

8 The case of *British Coal Corporation v Keeble [1997] IRLR page 336* set out guidelines, pursuant to Section 33 of the Limitation Act 1980, of the factors that should be taken into account in considering whether it is just and equitable to extend time. Those factors include the length of and reasons for the delay; whether there is any prejudice to either of the parties; the extent to which the parties might have

cooperated; the promptness with which the Claimant acted once he knew the facts upon which to pursue a claim; and the steps which the Claimant took to obtain professional advice as well as balancing any prejudice to the parties and consideration of the merits of the case in generic terms.

- 9 The Tribunal also reviewed Rules 18 – 20 Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and noted the steps which should be taken if a response form was presented late. The rules state that a Response shall be rejected by the Tribunal if it is received outside the time limit unless an application for extension has been made at that stage. In that case, the Response should be returned to the Respondent with a note of rejection explaining that it had been presented late and then explain how the Respondent can apply for an extension of time and how to apply for a reconsideration. The rules then set out the basis on which a reconsideration of the rejection can be made and how applications for extensions for time for presenting a response can be determined.
- 10 The Claimant commenced work with the Respondent on 5 August 2017 on a fixed term contract for a period of three weeks on a zero hour's contract. The Respondent said that the Claimant was recruited as part of a project. They said that they issued fixed term and zero hours contracts because they could not guarantee any work was required or for long because their clients did not guarantee work to them. The Claimant signed his contract of employment as is noted at page 73 of the bundle.
- 11 The Claimant attended a few days of induction with the Respondent. The Respondent said in evidence to the Tribunal that he was given instructions on rules and procedures. In his evidence, the Claimant suggested that he was not given any information about grievance procedures. The Respondent indicated that would have been part of his induction process.
- 12 The Claimant commenced work with a number of other employees who were employed on similar contracts to him. The Claimant says that most of these other employees were younger than him.
- 13 After the Claimant's three week contract had terminated the Claimant was called into the office and asked to give back his keys. He was then told that he would continue to be given work on a shift basis. He said that he was told that he would be issued with a contract, although he does not indicate in his written statement to the Tribunal nor in his claim form any details about this matter. When he gave evidence to the Tribunal he mentioned the names of two people who he said were in the office at that time.
- 14 The Claimant said that two of his other colleagues were issued with contracts of guaranteed hours of 20 hours. He said that they were younger than him. He did not provide the names of those employees, although he did suggest that one of them was a team supervisor now.

- 15 The Claimant carried on working and was working a lot of hours with the Respondent.
- 16 The Claimant said that, after he attended the meeting on 5 September he chased the Respondents on a number of occasions on 10 and/or 11 September about his contract. He does not refer to this in his written witness statement nor his claim form. He did not know the names of the people whom he said he chased about the matter. In his evidence to the Tribunal he suggested that his contact was initially with HR and then said that it was with the scheduling team.
- 17 In his evidence to the Tribunal, the Claimant indicated that he then contacted Ola Odobe who worked in HR people at the site. He sent an email to her on 15 September 2017 reminding her about his contract. He produced this email during the course of his evidence to the Tribunal. That email has been added in at page 120 in the bundle.
- 18 The Claimant did not receive any response to that email. He did not follow it up. The Claimant said that he continued to ask about his contract at all the sites where he was sent. He said that others, although again he did not provide any details, got contracts of guaranteed hours of 20 hours. Again he did not provide details of who those people were nor when they were given those contracts.
- 19 The Claimant went off on long term sick leave in May 2018. He was paid SSP.
- 20 In about late November 2018, the Respondent contacted the Claimant about his sick leave and to find out if he was fit to return to work. At that stage the Claimant sent an email regarding his SSP.
- 21 The Claimant attended a meeting with regard to his sick leave absence in February 2019. He then wrote a number of emails to the Respondent following that raising issues about his SSP and holiday pay. He also initially raised an issue about disability discrimination and then subsequently referred to age discrimination. In the emails, he went on to complain about the fact that he did not know he was on a zero hours contract and complained that other younger employees were given guaranteed 20 hours contracts.
- 22 In January 2018 the Claimant contacted ACAS. The note from the ACAS Conciliation officer is at page 1 of the bundle. It indicates that the Claimant is complaining about being on a zero hour's contract and complaining about being dismissed in December 2018. He also refers to concerns about disability. He is seeking his holiday pay; SSP; a guaranteed 20 hour week and an issue about being contacted during his sickness absence.
- 23 The Respondent arranged a grievance meeting for the Claimant on 7 March 2018 to consider the various complaints raised by the Claimant in February 2018. The Claimant did not attend the grievance hearing. The Respondent dealt with it in his absence. As part of that grievance, Mr Young who dealt with the grievance reviewed the statistics for the employees who were employed on the same contract as the Claimant. He noted that the employees issued with 20 hours guaranteed

contracts were of various different age groups. The evidence from the Respondent showed that consistently 50% of employees offered guaranteed hours were from all the different age ranges.

- 24 Mr Young said that guaranteed contracts were only given on certain contracts. He said he did not know details of the people whom the Claimant said were issued with guaranteed contracts. He said that there was a process for applying on the Respondent's website for a guaranteed contract.
- 25 Ms Odobe and the other HR person who were based at the site subsequently left the Respondent.
- 26 The Claimant issued his proceedings to the Tribunal on 1 March 2019, following a period of conciliation between 21 January and 21 February 2019.
- 27 The claim form did not include a great deal of detail about the Claimant's complaint. The Respondent was sent the claim form together with the agenda for the Preliminary Hearing. The Respondent filed the agenda, but not the response form because no prescribed response form was attached (as indicated) for them to complete. They thought this might be because of the lack of details in the claim form. They were then contacted by the Tribunal. The Preliminary Hearing was originally to be heard on 7 June, but was then subsequently adjourned until today. The response form was filed by the Respondent on 31 May. The response form was not sent back to them asking them to make an application for an extension of time or telling them to make an application for reconsideration, as it appears that a Preliminary Hearing to deal with the matter had already been fixed by that stage.
- 28 The Claimant said in evidence that he had sent emails to the Respondent and telephoned them about his contract, although he has not produced any emails to this Tribunal other than the email of 15 September 2017, which was only produced today, nor could he provide details of any dates or people whom he said he contacted or when that contact was made.
- 29 The Respondent submits that the claim is out of time namely over 19 months after the alleged act of discrimination. In any event they submit they should be allowed to defend the proceedings.
- 30 The Claimant submitted that his claim was in time. He said that the act of discrimination was continuing until his employment terminated. He said the Respondent should not be allowed to defend the proceedings.
- 31 This Tribunal has considered the case law and concluded that this alleged act of discrimination could potentially amount to a continuing act. The Claimant's evidence suggests that he asked about a new contract over a period of time, although his evidence in that regard was vague. It would appear that the Respondent issued these types of contracts at various times. The continued failure to provide the Claimant with a guaranteed hour's contract could amount to a continuing act. On

that basis, the Tribunal is not minded to determine that it has no jurisdiction to hear the claim at this stage and strike out the claimant's claim on that basis.

- 32 This Tribunal has also considered the rules of procedure as referred to above. It also heard evidence from Mr Young. The Tribunal notes that the Respondent clearly intended to defend these proceedings. That is clear from the agenda submitted on their behalf. The Tribunal accepts that the agenda was the only form sent to the Respondent and that, contrary to what was stated in the letter, they were not sent the prescribed response form when they were sent the agenda. The Tribunal finds that, although the Response was filed late, it was never formally rejected. Significantly, the Respondent was never informed that they had to apply for an extension of time to file their Response late, nor informed about applying for a reconsideration of the rejection of their claim form. Accordingly, the Tribunal accepts the Respondent's Response and will allow them to continue to defend this claim.
- 33 Having heard some evidence in this case, this Tribunal considers that this claim has little merit and little prospect of success. Accordingly, the case should be listed for a further preliminary hearing to consider whether a deposit order should be made and to make further directions for the future conduct of these proceedings.

Employment Judge M Martin

Date: 30 September 2019