



EMPLOYMENT TRIBUNALS

Claimant

Mr D Loobie-Rocque

v

Respondent

Britannia Services Group Limited (1)
Ashraf (2)

Heard at: Central London Employment Tribunal On: 22 October 2021
Before: Employment Judge Norris, sitting alone (via Teams)

Representation:

Claimant – In person

Respondent – Mr P Roberts, solicitor

JUDGMENT WITH REASONS

Background to the claims

1. The Claimant worked as a cleaner for the First Respondent between 27 July 2020 and 24 August 2020, in the former Topshop premises at 214 Oxford Street. His manager was the Second Respondent Mr A Estafanous. The First Respondent is the Respondent in claim number 2204167/21 (“First Claim”) only. Mr Estafanous is the Respondent in claim number 2204177/21 (“Second Claim”) only. Both claims relate to the Claimant’s employment in that four-week period in 2020.
2. On 2 April 2021, the Claimant entered Early Conciliation (EC) against Topshop. His EC Certificate was issued on 5 May 2021. On 27 May 2021, he entered EC against the First Respondent. His EC Certificate was issued the same day.
3. On 2 July 2021, the Claimant lodged the First Claim citing the correct EC Certificate number. The names of the Respondent on both the EC Certificate and the ET1 claim form were the same. He had ticked that he was bringing a claim of race discrimination and that he wished to make another type of claim. He contended in the box at question 8.2 (in summary) that his manager had made him (and only him) wear black clothing and that this was a subtle reference to his race.
4. In answer to question 8.2, the Claimant went on to say that on 24 August he asked to have a quick conversation with his manager after his shift, but Mr Estafanous said they could have the conversation straight away. Mr Estafanous asked what the problem was and the Claimant replied that he wanted to complain about a lady who had been and was continuing to bully him, and that he wanted Mr Estafanous to help him fill in the necessary form to complain. Mr Estafanous told him to go back to work. Two minutes later, Mr Estafanous asked the Claimant to come into his office, where he told the Claimant he was going to move him to another location

because he thought the Claimant did not like it there. The Claimant replied "OK".

5. That was all that could be set out in the answer to question 8.2 on the claim form. All this detail was however also included in the first page of an additional document that the Claimant uploaded. The second page continued that after a further two minutes, Mr Estafanous came back and asked to see the Claimant again, whereupon Mr Estafanous told him that after what the Claimant had said, he had changed his mind and was giving the Claimant a week's notice.
6. The Claimant appeared to acknowledge in answer to question 15 (Additional Information) that the First Claim was out of time. He said he suffers from a mental health issue, i.e. psychosis, so that it had not been possible to launch the claim within the necessary time limit. I explained in the hearing that the requirement is to enter EC within three months of the act complained of, i.e. the Claimant should have commenced it by 23 November 2020¹. Since he did not do so, he did not benefit from the extension of time afforded by the EC process, and so the First Claim was lodged just over seven months late. The Claimant did not produce any evidence related to his mental health condition and had ticked the box at question 12.1 to say he does not have a disability.
7. On 3 July 2021, the Claimant lodged the Second Claim citing the EC Certificate number for the certificate against Topshop. However, the Respondent named in the claim form was Mr Estafanous (though referring to him by his first name only, as set out above). In the Second Claim the Claimant ticked a single complaint of disability discrimination. He had gone on in the answer in box 8.2 to give details of what he said was indirect discrimination under section 19 Equality Act 2010, namely that the Second Respondent had said if the Claimant passed his trial period, he would make him kill himself. Again, the Claimant relied on his psychosis, although again he had ticked the box at 12.1 to say he does not have a disability. In the additional information box at question 15, he said his mental health had caused him anxiety and insomnia which stopped him staying awake in the day and thus he was prevented from seeking legal advice or going to ACAS for EC purposes.
8. While the Claimant did not give the date on which the Second Respondent allegedly made the comment in question, the inference is that it was at the latest on 24 August 2020 and similar considerations apply as set out in paragraph 6 above (and the statutory provisions in the footnote below) to the question of whether the claim is out of time; he did not enter EC within a three-month period from his dismissal, and therefore does not gain the time extension to submit the claim so that the Second Claim is similarly out of time by over seven months.
9. The Respondents submitted responses to both claims on 26 July 2021 seeking strike out on the time point. In relation to the substantive claims, the First Respondent said the Claimant was required to wear the same uniform as all the other staff; it denied that he was dismissed for saying he wanted to make an allegation of bullying. The Second Respondent denied that the Claimant is disabled, but in any event also denied making the comment alleged.

Hearing 22 October 2021

10. A preliminary hearing was listed for 10.00 on 22 October 2021 and on 13 October EJ Brown directed that consideration would be given to whether the two claims should be consolidated and whether, if the claims (or either of them) had been brought out of time, to permit them to proceed.

¹ See section 18A(1) Employment Tribunals Act 1996, sections 111(2)(a) and 207B Employment Rights Act 1996 and sections 123 and 140 Equality Act 2010.

11. Mr Roberts attended the hearing which took place by Teams, starting at 10.00. We began discussing the issues in the Claimant's absence. I noted that under Rule 47 of the Rules of Procedure ((Schedule 1, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013)) the Tribunal could either dismiss the claims or proceed with the hearing in a party's absence, but must first make enquiries as to the reasons for that absence. Mr Roberts explained that he had been in touch earlier in the week by email with the Claimant, who had sent him the first page of a care plan from May 2021. This did not mention any mental or other disabilities. I therefore decided not to dismiss the claims in the Claimant's absence as it appeared that he did intend to pursue them, but instead said I would proceed and indicated that if he joined subsequently, I would recap. In the event that was what happened.
12. I consolidated the two claims and had discussed with Mr Roberts the fact that the Claimant's place of work had been the Topshop outlet in Oxford Street. I noted the difficulties in the Second Claim in that the name of the Respondent in the EC Certificate was different from that in the claim form. Mr Estafanous does not work for Topshop and nor was Topshop the Claimant's employer at any stage. In addition, there was the time point with the claim being over seven months out of time as well as the issue of the Claimant's disability status.
13. Mr Roberts was just in the process of showing me the care plan that the Claimant had sent him when the Claimant himself joined the hearing. I had had time to note down that the appointment was in fact for an annual physical health check up and as Mr Roberts had said, made no mention of either a physical or mental impairment, though it recorded that the Claimant had told the clinician that he had, in terms, low mood (expressed as 4/10).
14. Once the Claimant joined, I explained what we had covered to that point. He said that he did not want to pursue the Second Claim.
15. We then discussed the First Claim. The Claimant said that he had been made to wear a black uniform but did not have any evidence to prove it.
16. I noted that as well as race discrimination he had said there had been a lady at work who had been bullying him. He confirmed there had been, and that she worked for Topshop. He then went on to confirm that he had been given a week's notice by Mr Estafanous and paid in lieu of that week. However, he then said that he had made a complaint about training that he had received and that this related to health and safety.
17. I asked him when this occurred and he said it was in the same meeting where Mr Estafanous had given him a week's notice. He said that he mentioned words to the effect that the training was "too informal" and that this could be "a little bit dangerous for people not trained on how to use dangerous chemicals". He said again that the words he used were that the training was too informal and that he had said he was going to seek government advice. However, he also said that he could not remember the exact words he had used but Mr Estafanous took offence to what he had said because he thought the Claimant was going to "blow the whistle" on him.
18. I asked why he had not put any of this detail in his claim form. He said it was because space on the form was limited. I asked him about the additional two-page document, in which it was also not mentioned. He said he did not think he would have to mention it. He has sent in by post an agenda for the hearing which he thought the Tribunal should have received by now and in which he said he had

explained his concerns very briefly. I explained that although I had not seen his agenda, that did not disadvantage him because he was being given the opportunity to tell me in this hearing what his claim is about.

19. We then tried to identify where in the conversations between the Claimant and Mr Estafanous as quoted in the ET1 information about health and safety breaches was said to have been given. The conversation appears to have taken place in three stages; as I have noted above, the Claimant initially said the information about the inadequate training was given in the same meeting where he had been given the week's notice, i.e. the third stage. He said all of the things he had set out had happened and he had written them in chronological order, and might have suggested "right at the end" that he might have done something similar to blowing the whistle, though he did not use those words to Mr Estafanous; what he said was that he would get the relevant body, or "the government" involved.
20. Then the Claimant said that the reason he said he was going to seek advice was the conversation he had had with the lady in Topshop. The conversation with Mr Estafanous was an informal meeting in which he wanted to raise a grievance. He didn't write a letter but instead decided to speak to his manager about the problem. He told Mr Estafanous that the same lady was still bullying him and asked if he could help. Then he said to Mr Estafanous that he was going to get the government involved by seeking government advice about having an indemnity at work in the form of somebody defaming his character. The conversation was long, he said.
21. I explained that in his claim form however, he had said that in fact the conversation was only four minutes in total and he had set out the dialogue in speech marks so that it was very difficult to see where he was saying the whistleblowing had occurred. I displayed the relevant section of the additional document on the screen and asked him to show me where it was. He told me that after he had said the sentence "the same lady is still bullying me", there was then a "sentence filler" and it was then that he mentioned the informal training that he was receiving from Mr Estafanous and also his (the Claimant's) homelessness and other problems. This would have been at the first stage of the conversation.
22. In the claim form and the additional information document, there is no mention of health and safety at all, nor any assertion that Mr Estafanous retaliated against the Claimant's blowing the whistle about such dangers by dismissing him. The Claimant said that he wants to pursue a claim for automatic unfair dismissal for covering up health and safety breaches and defamation (I explained that the Tribunal does not deal with claims for defamation). However, he also said that he wants to pursue the complaint of race discrimination.

Conclusion

23. I decided not to allow the First Claim to go forward, because it had been presented very substantially out of time and it was not just and equitable to extend time. There was no medical evidence before me to support the assertion by the Claimant that he had not been awake at all during the day throughout the period between his employment ending on 24 August 2020 and the first date he entered EC on 2 April 2021; and in any case, that was the EC period in relation to the Second Claim. He did not enter EC for the First Claim until 27 May 2021 and still delayed a further 36 days before submitting the claim, knowing that it was out of time.
24. Further, the Claimant could, if he had been struggling with his sleep patterns, have completed the online EC form by the deadline of 23 November 2020 and requested that the certificate be issued immediately (as he apparently did on 27 May 2021), with no requirement to speak to anyone in person during working hours.

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25. I also refused the Claimant permission to amend the claim to add or substitute a complaint about whistleblowing (detriment or dismissal for making a protected disclosure). The initial claim itself had been lodged substantially out of time; this would have required a wholesale replacement of the grounds of complaint more than three and a half months later, with no reasonable explanation for the omission of the cause of complaint on which he now seeks to rely.
26. So far as a complaint of unfair dismissal is concerned, the test is whether it was reasonably practicable to present the claim in time (section 111(2)(b) Employment Rights Act 1996). I find it was reasonably practicable for the Claimant to do so. Even if it was not reasonably practicable, the claim would have had to be presented within a reasonable period thereafter. I find it was not.
27. I also did not accept that the Claimant had run out of space in the claim form, firstly because the point in the conversation in which he finally said he had raised the training/health and safety issue was 22 lines down his answer, with a further 10.5 lines visible beneath that on the claim form and/or he could have put the details in the "Additional Information" box at 15 where plenty of space remained; but in any event, the additional document that he had uploaded replicated the details given in the claim form and was unlimited in length but still made no mention of the whistleblowing or health and safety breaches now relied on.
28. In addition, the Claimant's suggestion that he still wanted to rely on the original particulars did not make sense because in those particulars he had said, "As you can see from the dialogue the reason he [Mr Estafanous] terminated my contract was because I wanted to make a complaint against a lady who worked for another company who kept bullying me... and he didn't give me a chance to file a grievance as you can see it happened all within 4 minutes". What he is now saying is that the reason for his dismissal was that he had made a protected disclosure about health and safety breaches during a much longer conversation, and that Mr Estafanous dismissed him in order to conceal those breaches. The two assertions are incompatible with each other. If the Claimant had genuinely thought his dismissal was because he had blown the whistle, expressly or by inference, I cannot see any reason why he would not have said so in his claim form. There is however nothing in there that would give rise to such a complaint and the complaint would accordingly require more than mere relabelling even if the original claim had been in time.
29. Accordingly:
- a. The First Claim was presented out of time and time is not extended.
 - b. The Claimant's application to amend the First Claim to add a complaint of automatic unfair dismissal for making a protected disclosure is refused.
 - c. The First Claim is struck out. The Second Claim is dismissed on withdrawal.

Employment Judge Norris
Date: 22 October 2021
JUDGMENT SENT TO THE PARTIES ON

25/10/2021.

FOR THE TRIBUNAL OFFICE