EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100123/2021

Heard in Edinburgh on 27 and 28 January 2022

Employment Judge J D Young
Tribunal Member Ms Jean Grier
Tribunal Member Ms Mary Watt

Ajing Jipur	**Claimant** **In Person**
Keasim Events Ltd	**Respondent** **Represented by:-** **Mr J Anderson of Counsel** **instructed by Markel Law**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is to dismiss the claim presented to it under section 13 of the Equality Act 2010.

REASONS

Introduction

1. The claimant presented a claim to the Employment Tribunal complaining that he had been unfairly dismissed and discriminated against because of the protected characteristic of his race being Black/East African. The respondent

denied these claims. They maintained that the Tribunal had no jurisdiction to hear the claimant's claim of unfair dismissal as he was engaged as a "worker" and not as an "employee"; and in any event he resigned and there was no unfair (constructive) dismissal even if an "employee". They also denied the allegation of discrimination and raised an issue of time bar in that claim.

2. By Judgment issued to parties on 7 June 2021 the Tribunal concluded that there was no jurisdiction to hear the claimant's claim of unfair dismissal. It was decided that the claimant was an employee of the respondent only in the period between 14 November 2018 to 8 January 2019 and that the claimant had the status of a worker in the period between August 2019 and 16 December 2020 when he resigned from work. That left for consideration the claim of race discrimination wherein the claimant believed that he had been a "victim of direct discrimination" on two grounds namely (1) he had been treated less favourably than his work colleagues who were all of Caucasian/European descent and who had been placed on the Coronavirus Job Retention Scheme ("furlough") by the respondent but he had not; and (2) there was less favourable treatment in that his work colleagues had written contracts whereas he had a verbal agreement and believed that placed him at a disadvantage compared with his work colleagues.

The Hearing

3. At the Hearing the Tribunal heard evidence from:-
   (a) the claimant;
   (b) Neil Bowie, Manager of Malones, operated by Keasim Edinburgh Ltd a sister company of the respondent, and Cask Smugglers operated by the respondent. He adopted as true and accurate his witness statement of one page and answered supplementary questions and questions in cross examination; and
   (c) Simon Keane, Director of the respondent and Keasim Edinburgh Ltd. He adopted as true and accurate his witness statement dated 26 January 2022 extending to 5 pages and also answered supplementary questions and questions in cross examination.

Documents

4. The parties had helpfully liaised in providing a Joint Inventory of Productions paginated 1-126 (J1-126).

Issues for the Tribunal

5. There was no list of agreed Issues. The essential discrimination claim by the claimant was clear enough being direct discrimination because of race and the less favourable treatment being that he had not been placed on furlough whereas his work colleagues of Caucasian/European descent had; and the lack of written contract compared with those work colleagues. On comparators the claimant had made particular mention of an individual who had been put on furlough and he was also entitled to rely on a hypothetical comparator. The respondent's Further Particulars indicated that the jurisdictional issue of time bar to be determined was that if there was an act of discrimination that occurred around 20 March 2020 and the claimant had not made an approach to ACAS until 23 December 2020 with the claim being lodged 11 January 2021 and so the claim was well outside the three month time limit.

6. The issues for the Tribunal were:-

(1) Was the claimant treated less favourably than the respondent treated others by not placing him on furlough; and not providing a written statement of terms and conditions;

(2) What was the correct comparator (actual or hypothetical) who did not share the claimant's protected characteristic and was in not materially different circumstances from him;

(3) What was the reason why, in factual terms, the respondent acted as it did on these issues in (1) above;

(4) Was that because of the protected characteristic of race;

(5) Is the claimant's claim of direct discrimination time barred

(6) If the claimant is successful what award should be made by way of remedy

7. From the evidence led, admissions made and documents produced the Tribunal were able to make findings on the issues. Given that in such claims a Tribunal may require to deal with inferences which arise from the evidence some rehearsal of evidence is inevitable.

Findings in fact

8. The respondent operates a "pop up bar" business in Edinburgh which operates seasonal venues consisting of bars, food stalls and entertainment. Simon Keane and his father Robert Keane are Directors of the respondent. They are also Directors of the sister company named Keasim Edinburgh Ltd which operates Malones Irish Bar ("Malones"). That is a permanent operation that specialises in live music, sport and food. Neil Bowie an employee of Keasim Edinburgh Ltd manages Malones and "Cask Smugglers" being a "pop up bar" operated by the respondent under occasional licences.

9. Cask Smugglers operated from the former Information Centre in Waverley Market, Edinburgh. Initially the respondent would erect and dismantle the necessary infrastructure in the operation of the "pop up bar" when permitted to occupy. However an opportunity arose with the owners to have a lengthier term of occupation and since beginning August 2019 those arrangements meant that there was no need to erect and dismantle infrastructure. The business operated on occasional licences and was then open 7 days a week through to 18 March 2020.

10. The claimant was engaged by third party security company who provided security services and in that capacity was assigned to the respondent to supply security at the door at “pop up venues” of the respondent. Around late October 2018 he asked Simon Keane if he could be put on the “direct pay roll” as he was not happy with the pay received from the third party company. It was agreed that he would be paid directly by the respondent at the Festival Village “pop up bar” open at Christmas and in summer. His role was to provide security services at the door welcoming guests, checking identification, signs of intoxication and pre-empting any potential difficult issues. That continued through to January 2019 when he left the employment of the respondent.

11. He then approached the respondent in summer 2019 to enquire if he could work some hours and was given hours on an “as and when required basis”. In terms of the pay slips produced that work commenced 1 August 2019 (J96) and he worked various irregular hours over the period through to 18 March 2020 when Cask Smugglers closed as a result of the lockdown occasioned by the Covid pandemic. In that period, as found, the claimant was a “worker” and not an “employee” of the respondent. He was the only “worker” engaged by the respondent at Cask Smugglers. All other staff were “employees”. That was also the position at Malones.

12. At that time the claimant continued to receive security assignments from Allander Security Ltd and was assigned to security duties with Edinburgh Council. He had fluctuating hours in that role. He commenced that work from around 3 March 2020 and it ceased in August/September 2020. In the period April/June 2020 the claimant worked about 55/60 hours per week in that role. While there was still work in July it was anticipated that thereafter the hours he was required to work for the security company would dip.

13. Due to the global pandemic a number of staff of the respondent resigned prior to the decision to close the business on 18 March 2020 a few days before national lockdown was advised by government.

14. When the business closed no intimation had been made on the proposed furlough scheme. That came shortly after. On 26 March 2020 the respondent sent an email to staff (including the claimant) of both Malones and Cask Smugglers (J71) which advised that the respondent was "working on everything we can to bring you guidance and information" in the unprecedented situation. It was advised:-

> "We want to avoid redundancies and one way to do this is furloughing staff. There are no guidelines as of yet on how to implement a furlough procedure and how to go about "furloughing" staff. Only the headlines of this concept have been released".

15. It was stated that:-

> "For anyone experiencing urgent financial difficulties while we wait to hear from the government, please contact Neil (Bowie) directly".

16. In common with many businesses the respondent's income stream had stopped as a result of closure. They were uncertain what "furlough" entailed but did wish to protect jobs and save costs. Rather than entering a redundancy process they drew up criteria to decide whether or not members of staff would be furloughed. Those were stated as:-

> "(a) Whether the member of staff was an employee or a worker. The reason for that was there was no obligation for us to provide work to the workers, there was an obligation for us to provide work to employees.

(b) Did they have any other work, if they were working elsewhere they still had income and at the time, we understood that they would not qualify for furlough.

(c) Were they staying in Scotland, the reason for this is that as part of furlough we understood they needed to be ready for work so if they were going elsewhere they would not be ready to work when we could reopen.

(d) Length of time they have been working for us.

(e) Whether they had children.

(f) Whether they were a student as a lot of students had bursaries to tide them over; and

(g) Whether they were in financial difficulty"

17. The claimant was contacted on 30 March 2020 by Neil Bowie by text and asked how he was "getting on – just see what your situation is in terms of your other job" and he responded "Hey mate very slow, had like 10 hours" last week and "Would I be able to get any sick payments if possible?" and gained the response "Ah mate tough times eh! We are just going through that now – seeing what we can do. I'll let you know today". The claimant was not ill at that time and had no entitlement to sick pay.

18. In March 2020 all other staff at Cask Smugglers had written terms of employment which specified their working hours. A similar position existed at Malones. In March 2020 approximately 11 individuals were furloughed who worked at Cask Smugglers and who had not resigned. Two individuals were not furloughed (apart from the claimant). One was of Irish nationality who returned to Ireland and the other of Scottish nationality whose working hours were low and was better off on benefits.

19. It was not disputed that all staff furloughed were Caucasian while not necessarily of European descent in that one was of Argentinian nationality.

20. The respondent's stated reason for not selecting the claimant for furlough was:-

> "(a) He was a "worker" and therefore we were not required to offer him shifts.
>
> (b) Even though he was a "worker" before the decision was made we also checked that he was working elsewhere. Ajing confirmed by text message on 30 March 2020 that he was working elsewhere; and
>
> (c) At the time I understood that Ajing was a student although I note that since proceedings commenced he has confirmed that he was not".

21. Mr Keane advised that although he was now aware that a "worker" could be placed on furlough at the time the decision was made that was not at all clear and the status of the claimant was taken into account. Also in discussion with the claimant he had spoken of studies and had thought he was a student.

22. A number of staff at Malones were also placed on furlough. They were all employees of the sister company Keasim Edinburgh Ltd. The same factors were applied in selecting those for furlough.

23. The respondent were able to reopen as from 20 July 2020. Further contact was made by the claimant with Mr Bowie on 21 July 2020 when he sent him a text asking if there was "Any good news yet?" and "Hope you manage to speak to Simon/accountant" (J73). There was no word from Mr Bowie at that time and on 23 July 2020 the claimant sent a text to Simon Keane asking if he could meet to discuss "something with you that's really distressing me …" (J75). That resulted in a meeting between them on 25 July 2020. At that

time both Cask Smugglers and Malones had reopened. The hours that the claimant was able to achieve on security assignments were dropping. By that time he had contacted colleagues who had worked in Malones/Cask Smugglers to find that certain individuals had been "furloughed".

24. At the meeting on 25 July the claimant asked whether he was able to be put on furlough. Mr Keane said he would need to speak to his accountant to ascertain if the claimant qualified as he was aware there were certain strictures in place. He did confirm that another member of staff who was going to leave but was not able to take up that post due to lockdown had been placed on furlough and that arrangements might be made with the claimant.

25. There was a suggestion from Mr Keane that at this meeting the claimant had said that he required money to "go travelling". The claimant disputed that issue. He had said he was going to Reykjavik for 4 days to stay with a friend who provided free accommodation. He stated he was feeling "burnt out" and that was the reason for that break. He disputed that he said he was going on "holiday or travelling". The Tribunal did not consider anything turned on that issue.

26. Mr Keane checked with his accountant and ascertained that in terms of the rules on furlough those who had not been on furlough prior to end June 2020 could not be placed on furlough thereafter. He so advised the claimant after the claimant texted him on 2 August 2020 asking if there was "Any news from the accountant? Or possibility of putting me on furlough between now and the end of furlough?" The response from Mr Keane included the suggestion that it may be that work could be organised for the claimant if that assisted (J77).

27. In his response (J78) the claimant clearly thought at that time that a claim by end July may have been possible. However he stated that he would like to come back for work and "If I can make a kind suggestion to increase my rate by £1.50 to £2.50 … that will lift a lot of weight off my shoulders also can quit my other job and have peace of mind …"

28. Mr Keane responded to confirm that the deadline to claim had expired and that the next round of furlough only applied if there had been a previous claim. (J78).

29. When Cask Smugglers had reopened from 20 July 2020 after the initial period of lockdown the respondents had placed the staff on "zero hours contracts" as they considered that was more appropriate given the possibility of further lockdown occurring. They were still regarded as employees and offered shifts which were available. The respondents considered that it was better for the business not to be committed to providing a certain number of hours each week to staff given the uncertainties. A dividing line between those who were placed on zero hours contract and those who were not related to management positions. Assistant Managers and Managers were not placed on zero hours contracts as from end July 2020.

30. The furlough arrangements at that time were that new claims after 1 July 2020 would only be possible for employees who had previously been furloughed. The last possible date for an employee who had not been previously furloughed to be furloughed and qualify under the scheme was 10 June 2020. Accordingly it would not be possible to make a claim for furlough for the claimant at that point. The arrangements from 1st July 2020 allowed a "flexible furloughing" arrangement but it was still necessary to have been furloughed prior to 10 June 2020 to be able to take advantage of any flexible furloughing arrangement.

31. Further arrangements anticipated that from 1 August 2020 employers would be expected to pay the pension and employer's National Insurance contributions; from 1 September the government would contribute 70% of gross salary with employers contributing 10%; and from 1 October the government would contribute 60% of the gross salary with the employers contributing 20%. The intention at that time was that the scheme would close at end October 2020.

32. Mr Keane made enquiry about work for the claimant with Managers (J113.1-J113.2) but was advised that there was no work for him at that time.

33. The claimant was not advised of the lack of work but on 24 September 2020 approached Mr Keane indicating that he had been off work since early September and while he hoped to get back to work that did not seem possible. He had seen an announcement on "Job Support Scheme" and asked if there was any way to be "kindly included". Mr Keane advised that he would check the position. The claimant then repeated the request on 12 November 2020 stating "Are you able to put me on furlough please" and again Mr Keane advised that he would check with his inhouse accountant to see if "you qualify" (J83/84).

34. On 30 November Mr Keane returned to the claimant after reminders indicating that he was "sorry I have not come back to you sooner" but that the "last few months have been a complete nightmare …" and that it would not be possible to put the claimant on furlough as "we are currently in the process of having let staff go as we are not trading and furlough is now costing us thousands a month …" and "sorry we couldn't help but I am afraid we have no other choice" (J86).

35. That brought a response from the claimant on 16 December 2020 indicating "We both know furlough doesn't cost anything and you said that to me when we last met at your office end of July. I believe there was no intention of putting me on furlough from the start, you have put others on furlough and I'm left under the bus despite making a plea as early as April, July and now. The only difference others had written contracts and we verbally agreed. There is no need to go in circles so that's the end of the road for me and I would like to formally resign and I must receive my P45 and Statement of Employment". (J87).

36. Mr Keane responded indicating that there was no cost for furlough initially but as time had progressed there was a substantial cost for furlough and they had to let around "30 staff go as we can't afford to keep them with lack of

grants and loan holidays available" and they were "struggling to survive". He disputed that the claimant had been left "under a bus" as this was the "worst crisis I have ever experienced in any business and we are fighting every day to keep the business alive".

37. The business had closed again on 16 October 2020 as a result of pandemic measures and remained closed for a number of months. Redundancies had been effected by the respondent towards the end of December 2020.

38. On 5 November 2020 the government announced that the furlough scheme would run until 31 March 2021.The announcement in November 2020 advised that employees did not need to have been furloughed prior to 1 November 2020 to be eligible for furlough. Mr Keane was aware of that change but advised that even although the claimant may have been eligible there was a cost to the business by that stage and redundancies required to be considered and were in fact implemented. Accordingly furlough for the claimant was not considered as feasible in the circumstances.

39. The claimant advised that he made enquiry to find that many others had been furloughed and that they had "zero hours contracts". He could see no reason for not being furloughed other than his protected characteristic of colour and national origin. He also considered he had been treated unfairly and so made an approach to ACAS for the appropriate Certificate on 23 December 2020 and which was sent to him on 30 December 2020. He presented his claim on 11 January 2021.

40. Mr Keane emphasised that he and the claimant had socialised often and there was no ill will toward the claimant on account of his colour or nationality. The working relationship at the time was that the claimant advised he was available for work and if there was work available then he would be given it. He recognised the claimant as a very good worker but this was very much an "ad hoc working relationship".

41. The pay slips for the claimant in the period between November 2018 - January 19 were produced (J92/96); along with pay slips in the period 7 August 2019 – 1 April 2020 (J96/107). His P45 showing a leaving date of 1 April 2020 was produced (J108/109) showing earnings in that period.

42. The claimant was on Jobseekers Allowance following a claim on 14 September 2020 until January 2021 when he commenced his studies (J114/116).

43. He had obtained work with Keith Gunn Electrical Solutions in the period 28 September to 4 October 2020. However he left that job because he did not consider he was being paid the appropriate SJIB national wage rate (J118/119).

44. His earnings with Allander Security Ltd who found security assignments for him in the period between 30 April – 30 September 2020 amounted to £13,164.68 (J117).

45. The claimant explained that he had commenced study in January 2021 to qualify as a Master of science in sports management. He was presently engaged in presenting his thesis.

Submissions

46. Each party made submissions and no disrespect is intended in making a summary.

For the Claimant

47. The claimant submitted that he had been treated less favourably because he was the only person in the Cask Smugglers operation who had been available for furlough but was not furloughed. He maintained that he could have been furloughed in March 2020. The respondent was mistaken in thinking that “workers” could not benefit from furlough.

48. In any event Mr Bowie was not clear on the difference between those on "zero hour contracts" who were placed on furlough and his own position. Those on "zero hours contracts" could also be offered no work which was the alleged point of distinction with him.

49. So far as the criteria were concerned then he certainly had service which was longer than others and he had hardship. He would not have been asking if he could be entitled to sick pay if he had not been suffering from hardship.

50. There was no difference between the Malones operation and the Cask Smugglers operation as each had a permanent presence and so to try and draw a distinction between the 2 companies was not well founded. No duty of care had been exercised.

51. The inference which should be drawn was that the reason for the unfavourable treatment was his race.

For the Respondent

52. The background to this matter was a company seeking to remain afloat and the uncertainties at the time of closure in March 2020.

53. There was no request made in March 2020 by the claimant for furlough. That came some time later.

54. The previous Judgment essentially provided an answer to the claim. That Judgment identified that the claimant was in a unique position within the company as a "worker" which crystallised the point.

55. The email to all staff on 26 March 2020 advised that the company would be considering what could be done but asked those who might be in financial difficulty to contact the company.

56. There was no contact from the claimant but on 30 March the respondent contacted him. He was asked if he had another job and that was confirmed. The claimant sought sick pay but he was not ill and that was not a possibility.

57. There was then a gap in contact between 30 March and 23 July 2020 and the claimant clearly worked extensive hours elsewhere in the period through to end July 2020.

58. The claimant maintained that he was awaiting a reply to his request in March but that did not hold water given that he waited almost 4 months before contacting the respondent. There was no urgency on the claimant's part as he was hard at work in his security assignments.

59. Once he saw work was dropping off after July and the respondent had re-opened he made contact which sparked the meeting of 25 July 2020 when he made his first reference to furlough. However he required to be furloughed already before being able to take advantage of furlough after end June 2020.

60. Reference was made to written statements of terms being provided to "workers" only after 6th April 2020. By that time the respondent's premises had been closed. There was no requirement prior to that time for a written statement to be supplied. That was the reason why he was not provided with a statement and not because he was being treated less favourably than Caucasian/European employees.

61. The claimant was a worker at the relevant time and there was no mutuality of obligation for the provision of work. That was very relevant to the respondent's decision making. It was on that basis that they made a decision allied to the claimant having another job.

62. While the claimant had made various assertions that the respondent failed in their duty of care to him it was not identified just what duty of care it was they had breached. There was no entitlement to furlough. An employer could make application for furlough but there was no obligation on an employer for

that be done. The obligation of mutual trust and confidence existed in the employment relationship but not for a "worker". Clearly while the respondent should not discriminate there was no obligation on them to act reasonably and it did seem to be the case that the claimant was seeking to rely on some obligation of duty of care or to act reasonably with him. In this case there was no evidence of overt act, no subtext of unspoken hostility but apparent reliance on general duties of care and none of it relating to race. A discrimination case needs something more than mere difference in treatment and here there was no extra ingredient which might require an explanation from the respondent.

63. Given the claimant's worker status he was unable to rely on actual comparators because none of the other staff at Cask Smugglers were in that legal category. He could only rely on a hypothetical comparator. A hypothetical comparator would require to be a worker and to have been sent the same text message as the claimant and responded asking for sick pay for there to be no material difference in the circumstances

64. In any event an explanation was provided by the respondent as to the reason why they had acted in the way that they did namely that the claimant had another job and was not in the position of an employee.

65. It did not matter that the regulations allowed furlough for a worker. The respondent's belief at the relevant time was that was not possible. Even though mistaken that was still the reason.

66. So far as the issue of time limits was concerned the Tribunal were invited to see each interaction between the claimant and the company as separate events and the claim out of time. The claim was that the claimant was not put on furlough in March 2020 and his claim clearly not presented within the 3 month period thereafter. No account had been given as to why it would be just and equitable to extend time.

Conclusions

Relevant Law

67. Section 13(1) of the Equality Act 2010 (EqA) provides that direct discrimination occurs where "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others". Therefore section 13(1) bites if:-

- It treats that person less favourably than it treats or would treat others and

- The difference in treatment is because of a protected characteristic

68. It is not always possible to separate the two issues and in some cases "the less favourable treatment issue cannot be resolved without at the same time deciding the reason why issue. The two issues are intertwined" (***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337).

69. Direct discrimination is rarely blatant. Such claims present special problems of proof. For that reason the burden of proof rules applied to claims of unlawful discrimination in employment are more favourable to the claimant than those that apply to claims brought under most other employment rights and protections. Once a claimant shows *prima facie* evidence from which the Tribunal could conclude, in the absence of any other explanation, that an employer has committed an act of discrimination, the Tribunal is obliged to uphold the claim unless the employer can show that it did not discriminate – s136 EqA.

70. Where an employer behaves unreasonably that does not mean that there has been discrimination but it may be evidence supporting that inference if there is nothing else to explain the behaviour (***Anya v University of Oxford*** [2001] ICR 847).

71. In order to claim direct discrimination under section 13 a claimant must have been treated less favourably than a comparator who was in the same or not materially different circumstances as the claimant. A successful direct discrimination claim depends on a Tribunal being satisfied that the claimant was treated less favourably than a comparator because of a protected characteristic. It is for the Tribunal to decide as a matter of fact what is less favourable. The fact that a claimant believes that he or she has been treated less favourably does not of itself establish that there has been less favourable treatment.

72. A claimant who simply shows that he was treated differently than others in a comparable situation will not, without more, succeed with a complaint of unlawful direct discrimination. The EqA outlaws less favourable not different treatment and the two are not synonymous.

73. A complaint of direct discrimination will only succeed where the Tribunal finds that their protected characteristic was a reason for the claimant's less favourable treatment. In that connection a discriminator's motive and intentions are irrelevant when determining whether the elements of a direct discrimination claim have been made out.

74. The Tribunal considered the best approach to deciding whether allegedly discriminatory treatment was "because of" a protected characteristic was to focus on the reason why, in factual terms, the employer acted as it did.

Jurisdiction

75. With regard to discrimination claims (other than equal pay claims) the Equality Act 2010 provides that the relevant time limit for starting Employment Tribunal proceedings runs from the "date of the act to which the complaint relates" – section 123(1)(a).

76. In terms of section 123(3) for the purposes of this section –

> "(a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) in the absence of evidence to the contrary a person (P) is to be taken to decide on a failure to do something –
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

77. In this case given the date of approach to ACAS for early conciliation and the presentation of the claim the "cut off" point in assessing the date of the act to which the complaint relates would be 24 September 2020. If the act to which the complaint relates (or failure to act) was prior to 24 September 2020 then the complaint is out of time.

78. Tribunals have a discretion to hear out of time discrimination claims where they consider it "just and equitable" to do so – s123(1)(b) Equality Act 2010. That allows Employment Tribunals a wide discretion to have an extension of time but it does not follow that the exercise of that discretion is a foregone conclusion. It has been said that a claimant requires to "convince the Tribunal that it is just and equitable to extend time limits" (***Robertson v Bexley Community Centre t/a Leisure Link*** [2003] IRLR 434).

79. In exercising that discretion factors which it may be relevant to consider are the extent to which the cogency of the evidence is likely to be affected by delay; whether the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she

knew of the facts giving rise to the cause of action; and the steps taken to obtain appropriate advice. However the essential ingredients have been stressed as being the length of and reasons for the delay and whether the delay has prejudiced the respondent, for example by preventing or inhibiting it from investigating the claim while matters were fresh (***Adedji v University Hospital Birmingham NHS Trust*** [2021] ECWA Civ 23).

Discussion and Decision

Jurisdiction

80. The complaint by the claimant is that he should have been placed on furlough along with other members of the respondent's staff at end March 2020 and thereafter. His discrimination complaint stretches back to end of March 2020. However the facts show as matters unfolded he made a specific application in a meeting with Mr Keane on 25 July 2020; again on 24 September 2020 (J82); and again on 12 November 2020 (J84). The requests of 24 September 2020 and 16 November 2020 were on or after the cut off date.

81. As indicated the general rule is that a complaint of work related discrimination must be presented within the period of 3 months beginning with the date of the act complained of. Conduct extending over a period is to be treated as done at the end of that period.

82. Much of the case law on time limits in discrimination cases centres on whether there is continuing discrimination extending over a period of time or a series of distinct acts. Where there is a series of distinct acts the time limit begins to run when each act is completed whereas if there is continuing discrimination time only begins to run when the last act is completed. This can sometimes be a difficult distinction to make in practice. It was submitted in this case that each act be treated as a distinct act given the varying changes in the Coronavirus Regulations on job support from time to time.

83. In this case if the acts complained of are prior to 24 September 2020 then it would be necessary to rely on either a continuing act of discrimination taking place beyond that date or that it was just and equitable to extend time.

84. It is clear that a Tribunal should consider whether the substance of a claimant's application is an ongoing situation or a continuing state of affairs as distinct from a succession of unconnected or isolated specific acts. A Tribunal should look at the substance of the complaints in question as opposed to an existence of a policy or regime and determine whether they can be said to be part of one continuing act by the employer.

85. It has also been held (***Rovenska v General Medical Council*** [1998] ICR 85) that where a discrimination complaint is based on the denial of a particular benefit an employee can reactivate the time limit for presenting a Tribunal claim by making another request for the benefit in question. The time limit will then begin to run from the date on which the later request is refused.

86. The Tribunal considered in this case that there was a continuing act of alleged discrimination. The substance of the complaint in question was the failure to put the claimant on furlough as distinct from other staff. The last two requests for that to be done were as indicated on or after the cut off date. The Tribunal considered that these were not part of a series of unconnected acts and related to an ongoing state of affairs namely not being furloughed whereas other staff were. Additionally the Tribunal considered that the making of the further requests for the benefit of furlough on 24 September and 12 November 2020 reactivated the time limit. The Tribunal found that the claim of direct discrimination on the issue of furlough was not time barred and it had jurisdiction.

Failure to supply a Written Statement

87. The failure to supply a written statement was an issue raised by the claimant in his claim form as being a further act of discrimination. Leaving aside whether there was any obligation on the respondent to issue any statement of

terms, on the issue of time limit this was not a continuing act but a continuing omission. The failure to do something is to be "treated as occurring when the person in question decided upon it". There was no evidence as to when it was that the respondent made any decision on not issuing a written statement of terms to the claimant.

88. The Act provides that in the absence of evidence to the contrary a person shall be taken to have decided upon a failure to do something when he or she does an act inconsistent with doing it (such as conferring the benefit on another employee) or if he or she does no inconsistent act when the period expires within which he or she might reasonably have been expected to have done that act.

89. The supply of written terms could have been made if the respondent was so inclined up until the claimant intimated he was "resigning". The Tribunal considered that failure to act in this respect could last until 16th December 2020 when the claimant "resigned" and so this claim could also be regarded as being within time.

Alleged Discriminatory Matters

90. On the alleged discrimination of failure to supply a written statement the Tribunal considered that there was no unfavourable treatment of the claimant because of a protected characteristic. He was in a unique position within the staff of either Malones or Cask Smugglers as the only "worker" as distinct from an "employee" of the respondent or sister company.

91. The matter was clarified, as submitted, under reference to the Employment Rights (Miscellaneous Amendments) Regulations 2019 which indicates that the right to a statement of initial employment particulars for a "worker" came into effect from 6 April 2020. The particular right then became in terms of section 1 of the Employment Rights Act 1996:-

(1) Where a worker begins employment with an employer the employer shall give to the worker a written statement of particulars of employment ….”

92. In this case the claimant commenced work in early August 2019. Entitlement to be provided with a statement arises where the worker “begins employment with an employer ….” and given that the claimant’s work predated 6th April 2020 the entitlement did not arise.

93. Given that there was no entitlement to a written statement of particulars for the claimant then there could be no unfavourable treatment or detriment when others of employment status and who had that legal entitlement were provided with that statement.

94. The Tribunal did not consider that there was any discrimination of the claimant in this respect. The reason why he was not provided with a written statement of particulars was because he was a “worker” and there was no obligation on the respondent to provide that Statement at the relevant time. Given he was in a unique position of a “worker” in the respondent staffing arrangements (as found in the previous Judgment) there was no actual comparator who could be relied upon and there was no evidence or inference to suggest that the hypothetical comparator, namely a “worker “ who did not share the same protected characteristic as the claimant and had no legal entitlement to a written statement, would have been given such a statement.

Coronavirus Job Retention Scheme

95. The Coronavirus Job Retention Scheme (“the Scheme) contained no obligation on employers to place individuals on furlough meaning they were placed on “leave of absence”. Neither was there any obligation on an employee/worker to accept furlough if the employer indicated that he wished to place an employee/worker on furlough. Employees/workers would require to agree to a variation of their contract.

96. Neither was there any guidance in the Scheme regarding the selection of those who would be placed on furlough by an employer. While one of the policy reasons behind the Scheme was to avoid redundancies that did not mean that an employer must use the same selection criteria that it would for a redundancy exercise in order to select those placed on furlough leave. That said clearly an employer should not select on criteria that could potentially give rise to discrimination claims.

97. The Tribunal considered that a claimant could establish less favourable treatment than a comparator if that comparator in the same or not materially different circumstance was offered furlough and the claimant was not. The furlough scheme was of benefit to employees/ workers in receiving pay for no work. The issue would then be whether that treatment was because of a protected characteristic.

98. In this case the respondent sought to identify criteria in their consideration of selection for offer of furlough.

99. There was no suggestion that list of criteria drawn up was inherently discriminatory. Two of the criteria were important as regards the claimant namely (as put by the respondent):-

> "(a) Whether the member of staff was an employee or a worker. The reason for that was there was no obligation for us to provide work to the workers, there was an obligation for us to provide work to employees.
>
> (b) Did they have any other work, if they were working elsewhere they still had income and at the time, we understood that they would not qualify for furlough".

100. On those matters (1) The claimant was a "worker" as that has been determined and the respondent was correct in their assessment of the status of the claimant. They did not have an obligation to provide him with hours of

work. At the relevant time there were no employees of the respondent on zero hours contracts. That came later around 18 July 2020 when hospitality premises were allowed to reopen and fresh contracts issued by the respondent. In March 2020 employees had contract which contained provision on set working hours; and (2) after enquiry they were advised that the claimant did have other work.

101. The evidence showed that the claimant was not in fact seeking furlough at that point. The Tribunal did not accept that his enquiry about whether he could benefit from "sick pay" was an enquiry to be furloughed at that time being a very distinct concept. He accepted that he was not entitled to sick pay at that time.

102. The evidence also was that over April, May, June and into July 2020 the claimant worked quite considerable hours in security assignments. He indicated that there was no financial loss to him over that period. It was then unsurprising that the claimant did not make any further contact with the respondent until he saw that the security work from Allander Security was likely to diminish.

103. The Tribunal in those circumstances were of the view that the reason why in factual terms the claimant was not selected to be placed on furlough in March 2020 was because he was a "worker" and so there was no obligation to provide him with hours and also that he had another job. Those were the relevant factors rather than any issue of colour or nationality which affected the selection at that time.

104. While a Tribunal always requires to be alert to evidence which might lead to an inference of discrimination there was nothing here which would upset those reasons for not seeking to place the claimant on furlough. There was no evidence of any extraneous factors coming to play. Mr Keane was clear in his evidence as regards the difference between an employee and a "worker" as regards the obligation to provide hours. The claimant was the only individual whose hours were expressed as "*ad hoc"* and that marked a

differentiation. The Tribunal did not consider that was a rationalisation after the event. It was also clear that the claimant had been specifically asked if he had other employment which was a factor in the selection.

105. As indicated the Tribunal considered that it was only when the claimant saw hours for security work diminishing that he returned to the respondent in July 2020 seeking information on furlough.

106. By that time the rules of the Scheme meant that the respondent could not place the claimant on furlough. As at 25 July 2020 the claimant could not be placed on furlough because he had not been on furlough to end June 2020. In those circumstances there was no discretion being applied by the respondent on furlough. It simply was not available. There was no evidence that any discriminatory factors overrode the Scheme rules in place at that time. The evidence indicated that enquiry was made by Mr Keane as to the availability of furlough and his suspicions regarding the "cut off date" confirmed. Those circumstances indicated for the Tribunal that the reason for non-furlough was based on the rules of the Scheme in place at that time not because of a protected characteristic.

107. The position regarding the inability to furlough individuals if they had not previously been furloughed existed up to 31 October 2020. The claimant returned to the respondent to seek information on furlough on 24 September 2020. As the position had not changed at that time no furlough could be effected. Despite enquiry there was no additional work available for the claimant at that time. Again given the strictures of the Scheme the Tribunal were unable to find that there was any discriminatory issue involved in not providing furlough arrangement at that time. Additionally in August 2020 while 80% of wages were paid employers were required to pay employer NICs and pension contributions (if any). In September the government were to pay 70% of wages (up to a certain cap) and employers required to pay 10% of wages to make up the 80% total. Furlough was no longer free from cost to the respondent and provided further reason in not making an offer.

108. The next approach from the claimant was made on 16 November 2020 and after clarifying his last payments Mr Keane responded on 30 November 2020 indicating that the respondent was engaged in redundancy process as again trading had ceased and furlough in terms of the Scheme at that time was costing a significant amount to the respondent. That had led to discussions on redundancy.

109. The Tribunal accepted the evidence that redundancies were effected in December 2020 and that the business was under extreme strain at the time the claimant made his approach in mid November 2020 given the lack of trading and necessary contribution to furlough payments for those who had been furloughed to that point. Again the Tribunal were not of the view that there was any discriminatory issue at play in the response to the claimant at that time.

110. The claimant introduced in his evidence certain individuals as comparators. The difficulty with the stated comparators was that none of them were "workers" but employees of either the respondent or its sister company.

111. As was outlined in the decision on the Preliminary Hearing the claimant was in a unique position as a "worker" of the respondent. That meant that there required to be envisaged the hypothetical comparator who resembled the claimant in all material respects. That would be a person who was not Black/East African and whose circumstances resembled the claimant in all material respects. There was no evidence to suggest such a "worker" would have been treated any differently. The fact that a particular comparator cannot because of material difference qualify as the "statutory comparator" does not disqualify him or her from an evidential role. Such comparators could be used as evidential tools that may or may not justify a Tribunal in drawing an inference of discrimination. However their usefulness will in any particular case depend on the extent to which their circumstances are the same or as those relating to the claimant. Given the different status of the comparators in this case the Tribunal was of the view that that difference

deprived them of any significant evidential value in assessing whether a hypothetical comparator would have been treated any differently.

112. There was no other material identified which was capable of supporting the requisite inference of discrimination. In some cases discriminatory comments about the claimant might suffice. So might unconvincing denials of discriminatory intent given by the alleged discriminator coupled with unconvincing assertions of other reasons for the allegedly discriminatory treatment. However in this case there was no such evidence. Mr Keane did describe at some length the relationship between him and the claimant in work and social terms to indicate that the relationship was devoid of any discriminatory intent. While it is common enough for Tribunals to hear denials of discriminatory intent they did not consider that to be unconvincing in this case.

113. In those circumstances the Tribunal considered that the reason why, in factual terms, the respondent acted as it did was not because of the claimant's colour or nationality and so the claim of discrimination on the ground of the protected characteristic of race fails.

Employment Judge: **J Young**
Date of Judgment: **21 February 2022**
Entered in register: **23 February 2022**
and copied to parties