Case Number:1805829 /2021

1805830 /2021

1805831 /2021

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr JA Blanco Cabrera	v	**SPL Powerlines UK Ltd**
Mr J Ramirez Fernandez		
Mr VJ Rodriguez Mallada		

PRELIMINARY HEARING

Heard at: Leeds by CVP **On: 31 March 2022**

Before: Employment Judge O'Neill

Appearance:

For the Claimant: In person

For the Respondent: Mr N McDougal of Counsel

Interpreter Ms F Semprere

JUDGMENT

The claims of unfair dismissal, breach of contract, discrimination and harassment because of nationality are struck out because they have no reasonable prospect of success.

a) Each claim for unfair dismissal and breach of contract has been lodged out of time and each claimant has failed to show that it was not reasonably practicable to submit their claims within the statutory time limit.

b) Each claim under the Equality Act (discrimination and harassment) has been lodged out of time and it would not be just and equitable to extend time.

REASONS

Purpose of the Hearing

1. The purpose of the hearing was set out in the letter of employment Judge Cox dated 6 January 2022 to

a) clarify the nature of the allegations

b) decide whether the tribunal has power to hear the claims given the statutory time limits

c) decide whether any aspect of the claims or response should be the subject of a deposit order on the ground that it has little reasonable prospect of success will be struck out because it has no reasonable prospect of success.

Allegations

2. The claimants identified their allegations as follows

   a) unfair constructive dismissal

   b) breach of contract

   c) discrimination (nationality)

   d) harassment (nationality)

3. The claimants described three heads of discrimination
   a) direct discrimination - less favourable treatment than the British workers during furlough from April 2020 to their effective date of termination (EDT) in the allocation of working hours and therefore pay.
   b) Indirect discrimination, the unilateral imposition of new terms and conditions with which the Spanish team could not comply because they were Spanish workers, and the withdrawal of former terms and conditions which were offered to the Spanish team as an inducement to take up work in the UK and included a lodging allowance, the cost of 10 flights to Spain and time off without pay each month to return home.
   c) Direct discrimination - the unilateral imposition of new terms and conditions on the Spanish team as above.

4. The claimants rely on the respondent's decision to recall the £1200 loan and make unilateral deductions from wages in respect of its recovery and the manner in which this was carried out as harassment by reason of their nationality. The decision regarding the loan and its implementation took place in July 2020.

Time Limits

5. The relevant time limits by which the claimant should have been lodged are as follows
   a) constructive dismissal 29 December 2020 (VJM and JRF) and 10 January 2021 (JAC)
   b) breach of contract - as above
   c) harassment 30 October 2021

d) direct discrimination - new terms - 13 October 2020
e) indirect discrimination new terms - 13 October 2020
f) direct discrimination treatment during furlough - 29 December 2020 (VJM and JRF) and 10 January 2021 (JAC)

6. The Claimants initiated Acas early conciliation on 3 November 2021, the certificate was issued on 5 November 2021 and the ET1 submitted on 15 November 2021.

Law

7. The relevant statutory provisions are as follows

- section 111 Employment Rights Act 1996
- section 123 Equality Act 2010
- rule 37 Employment Tribunal rules and constitution 2013
- Sections 13,19 and 26 Equality Act 2010

Evidence

8. the claimant has produced statements explaining why their claims have been submitted out of time. These were taken as read. The claimants have provided additional oral evidence, were cross-examined by counsel for the respondent and answered questions from me. They gave their evidence in Spanish through the interpreter.

9. Aside from the pleadings there were no documents before the tribunal apart from the decision of employment Judge Davis in the case of Fernandez number 180 5817/2020.

Findings

10. the three claimants are all Spanish and were recruited along with others in Spain by a headhunting firm to work for the respondent in the UK. The terms upon which they were induced to take up employment in the UK included a number of allowances such as a substantial lodging allowance, 10 flights a year to Spain, monthly time off without pay to visit family.

11. They took up employment in 2014, and together with other Spanish workers, and one English man made up what became known as the Spanish team. They formed a close working relationship over the six years that they worked together, and the claimants attributed this to being foreigners in a strange land, and therefore kept together in and out of work. They maintained in contact after their employment ended.

12. On 1 July 2020 the respondent issued the claimants and everyone in their team with a letter unilaterally removing the allowances set out above. All in the team, including the Englishman received such a letter. The English man enjoyed the same allowances as the Spaniards save for the 10 flights home to Spain.

13. The loss that these allowances caused the claimant's considerable financial hardship on top of the reduction in pay as a consequence of furlough. This situation was made even worse when the company informed them that the loan of £1200 which they had been given in 2014 , to enable them to set up home in the UK and pay the landlord deposits, was also to be recovered in its entirety without notice. The loss of these allowances made their continuing employment in the UK untenable.

14. The Spanish team was understandably very upset about this. In the period from 1 July 2020, when they were issued with the letter, they were in discussion with each other about the next steps. They submitted grievances, but by letter of 14 July 2020, the company indicated that the matter was not negotiable. As a consequence, the Spanish team decided that they had no option but to resign and return to Spain because they could not afford to remain on the new terms.

15. One of their number Mr A R Fernandez consulted Acas and had commenced ACAS early conciliation on 23 July 2020, he resigned from the company on 31 August 2020 and submitted an employment tribunal claim which was heard on 11 October 2021. Mr Fernandez succeeded in his claim for unfair dismissal and breach of contract and was awarded a substantial sum in compensation.

16. During the discussions within the Spanish team the claimants acknowledge that ACAS was mentioned and although they did not fully understand the function of ACAS, or how to access it, they were aware of his existence and that it acted as a mediator in industrial relations matters. The claimants regarded Mr Fernandez as more knowledgeable and as having a better facility in English. It would appear that he led the team to lodge grievances. Given the supportive relationship of the people within the Spanish team and the confidence and competence of Mr Fernandez, who had initiated ACAS early conciliation by 23 July 2020 I find the claimants evidence incredible to the effect that they did not know how to access ACAS for advice when they were able to find out about it from Mr Fernandez.

17. In addition, although the claimants accept that they knew that Mr Fernandez was taking some steps to pursue his rights under the contract they say that they did not know what he was doing. Given that in November 2021,Mr Fernandez informed them of the outcome of his case, helped them access a copy of his judgement, explained how to make a tribunal application online from Spain and assisted them in completing the form I infer that he would have taken similar steps in or about July 2020 to assist the claimants in making a claim then had they wish to do so.

18. Mr Fernandez kept in touch with his old colleagues after they left the respondent business and I simply do not believe that they were unaware that he had lodged a claim and it was going through the tribunal system.

19. None of the claimant gave a cogent explanation as to why they did not take advice at the time. Mr Cabrera said in cross examination ' we took no steps … two colleagues individually took steps in starting claims… The rest of us thought

the case was too big for us and we decided to go home to avoid losing more money.' He went on to explain that everything happened too quickly and he was rather overwhelmed by the demands of leaving his job with the respondent, packing up his flat, selling off some furniture, shipping other belongings to Spain and looking for other work in Spain.

20. Mr Cabrera agreed with counsel for the respondent that he could have sought legal advice and went on to say ' I made it clear that I didn't agree… But I didn't know if I had to go to court … I didn't want to invest in that but I could have done so.'

21. Mr Cabrera explained that he looked for advice on returning to Spain but was told to consult an English lawyer which he thought would be too complicated.

22. Mr Mallado accepts that by the end of 2020, or by January 2021. He knew that Mr Fernandez had made a claim.

23. In each of their late claims statements which werein common terms, but adopted by each separately as their own evidence, the claimants said ' I thought that maybe they have the right to remove these conditions without consultation, and that I had low chances to succeed in court'. I accept the proposition of Mr McDougall that this indicates that the claimants knew there was a legal route but felt their chances were not good enough to invest in.

24. I do not find the claimants credible when they say in terms that they only became aware of their right to bring a claim when they were made aware of the judgement in the case of Mr AR Fernandez in November 2021 after he had won.

25. It appears to me that the claimants knowing Mr Fernandez to have made a claim waited until the outcome was known and lodged their own tribunal application because his was successful.

Conclusions

Breach of Contract and Unfair dismissal

26. Notwithstanding the claimants' facility in English-language, Computer literacy, knowledge of English law and procedure it was clearly possible for them to have submitted claim forms within the time limit because Mr Fernandez did so, and in the circumstances of this case it was reasonable to expect the claimants to have done so as well.

27. As set out above, the Spanish team were a very tight group of men and I infer Mr AR Fernandez was available and willing to assist the claimants to access ACAS and submit their tribunal claim forms in time as he did in November 2021, by which time the claims had become out of time.

28. I do not accept the claimant's statements that they were in ignorance of what Mr Fernandez was doing or what they would be required to do to lodge a claim or where advice and assistance might be found. There is no good reason as to

why they did not take advice and lodge their claims at the same time as he did.At the very least they could have consulted Acas.

29. I find that the claimants were not confident in the prospects of success and I infer that they decided to await the outcome of Mr Fernandez case before lodging their own claims, and that this had everything to do with prospects of success and not the realisation for the first time of the right to make a claim.

30. In the circumstances, the claimants have failed to show that it was not reasonably practicable to submit their claims for unfair dismissal and breach of contract within the time limit.

31. Further, and in the and in the alternative, if it was not reasonably practicable to lodge the claim within the time limits then to wait until 15 November 2021, was too long a delay and they did not lodge their claims as soon as was reasonable. Mr Mallada accepts that by January 2021, he was aware of Mr Fernandez, having made a tribunal claim. If Mr Mallada was so aware I find it implausible that the other claimants did not also know and that should have put them on notice that a Tribunal claim could and should be made.

32. In the circumstances I strike these claims out as having no reasonable prospect of success in the Employment Tribunal.

Discrimination

33. The discrimination claims are also out of time and it will be for me to decide whether if such a claim has been made it has been submitted within such a period as I think just and equitable. At today's hearing the claimants were not asked to give evidence relating to discrimination but they were asked to clarify their allegations

34. The claimants rely on the decision to recall the £1200 loan and make a unilateral deduction from wages in respect of its recovery and the manner in which this was carried out as harassment by reason of their nationality. The decision regarding the loan and its implementation took place in July 2020.

35. Insofar as this is pleaded at all the ET1 says' Judge Davis also found that the loan repayment was not rightfully recovered by the company and because it was done at the same time as the salary reduction I am asking for harassment.' When I asked them to explain their allegations and how they related to nationality the claimant could not say how this treatment related to nationality and the withdrawl of the loan does not appear to have been conducted in a manner which rendered it degrading or hostile to them as spaniards. In the circumstances this does not appear to be an obvious case of harassment because of nationality.

36. The ET1 and the claimant's clarification points to possible Indirect discrimination, through the unilateral imposition of new terms and conditions with which the Spanish team could not comply, and the withdrawal of former terms and conditions which were offered to the Spanish team as an inducement to take up work in the UK and included a lodging allowance, the cost of 10 flights to Spain and time off without pay each month to return home because

the new terms were untenable for them as expatriate workers who relied on these allowance

37. The claimants were asked to clarify their allegations.Under the heading, direct discrimination, the claimants asserted that in the period from April 2020 to the date of their resignations, they were treated less favourably than British workers during the furlough period in the allocation of working hours and therefore pay. This appears not to have been pleaded at all in the ET1 and the particulars of claim would require amendment.

38. Direct discrimination - the unilateral imposition of new terms and conditions on the Spanish team as above. This is briefly set out the ET1. No claimant alleged that they were singled out for less favourable treatment because they were Spanish. They had these additional allowances because they were recruited from Spain and now they were being taken away. The English man on their team also had the same letter removing the allowances he had been given. Allowances were being cut across the Team irrespective of nationality.

39. If the claim were to be amended to include direct discrimination in relation to furlough, the claim would be out of time as the time limit would be 29 December 2020 (RF and VJM) and 10 January 2021 (JAC). The time limit for the alleged harassment 30 October 2021. The time limit for direct discrimination imposition of new terms 13 October 2020, indirect discrimination new terms 13 October 2020. The ET1 was lodged on 15 November 2021.

40. Looking generally at the merits of these claims, the harassment claim does not appear to be obvious.

    In respect of the direct discrimination allegation arising from the unilateral imposition of a new terms and conditions that allegation appears to be undermined if the company sent to the English member of the team, a letter in the same terms as was sent to the Spanish members on 1 July 2020 as the claimants accept.

    The direct discrimination claim about the claimants treatment during furlough was only articulated today, and which has not been pleaded so far and requires amendment.

41. The claimants argue that they were ignorant of their rights to bring claims until they saw the judgement in the Mr AR Fernandez case. That judgement makes no reference whatsoever to discrimination and therefore it is illogical to say that that judgement decision had alerted the claimants to their right to bring a discrimination claim.

42. However, I am told by Mr McDougall and the claimants that Mr Fernandez did in fact make a discrimination claim , but it failed and was disposed of before the final hearing. That being the case I infer that he would have taken similar steps in or about July 2020 to assist the claimant in making a discrimination claim then had they wished to do so.

43. In short, the discrimination claims are over a year out of time (save for the case of direct discrimination during furlough which is 11 or 10 months past the deadline). They are not claims with obvious merit. There was no obvious reason preventing the claimants from taking advice from Acas and making a discrimination claim, given the steps taken by Mr Fernandes and their relationship to him.

44. In all the circumstances I do not consider it to be just or equitable to extend time to admit the claims of discrimination and I strike them out as having no reasonable prospect of success.

31 March 2022

Employment Judge O'Neill

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d) direct discrimination - new terms - 13 October 2020
e) indirect discrimination new terms - 13 October 2020
f) direct discrimination treatment during furlough - 29 December 2020 (VJM and JRF) and 10 January 2021 (JAC)

6. The Claimants initiated Acas early conciliation on 3 November 2021, the certificate was issued on 5 November 2021 and the ET1 submitted on 15 November 2021.

Law

7. The relevant statutory provisions are as follows

- section 111 Employment Rights Act 1996
- section 123 Equality Act 2010
- rule 37 Employment Tribunal rules and constitution 2013
- Sections 13,19 and 26 Equality Act 2010

Evidence

8. the claimant has produced statements explaining why their claims have been submitted out of time. These were taken as read. The claimants have provided additional oral evidence, were cross-examined by counsel for the respondent and answered questions from me. They gave their evidence in Spanish through the interpreter.

9. Aside from the pleadings there were no documents before the tribunal apart from the decision of employment Judge Davis in the case of Fernandez number 180 5817/2020.

Findings

10. the three claimants are all Spanish and were recruited along with others in Spain by a headhunting firm to work for the respondent in the UK. The terms upon which they were induced to take up employment in the UK included a number of allowances such as a substantial lodging allowance, 10 flights a year to Spain, monthly time off without pay to visit family.

11. They took up employment in 2014, and together with other Spanish workers, and one English man made up what became known as the Spanish team. They formed a close working relationship over the six years that they worked together, and the claimants attributed this to being foreigners in a strange land, and therefore kept together in and out of work. They maintained in contact after their employment ended.

12. On 1 July 2020 the respondent issued the claimants and everyone in their team with a letter unilaterally removing the allowances set out above. All in the team, including the Englishman received such a letter. The English man enjoyed the same allowances as the Spaniards save for the 10 flights home to Spain.

13. The loss that these allowances caused the claimant's considerable financial hardship on top of the reduction in pay as a consequence of furlough. This situation was made even worse when the company informed them that the loan of £1200 which they had been given in 2014 , to enable them to set up home in the UK and pay the landlord deposits, was also to be recovered in its entirety without notice. The loss of these allowances made their continuing employment in the UK untenable.

14. The Spanish team was understandably very upset about this. In the period from 1 July 2020, when they were issued with the letter, they were in discussion with each other about the next steps. They submitted grievances, but by letter of 14 July 2020, the company indicated that the matter was not negotiable. As a consequence, the Spanish team decided that they had no option but to resign and return to Spain because they could not afford to remain on the new terms.

15. One of their number Mr A R Fernandez consulted Acas and had commenced ACAS early conciliation on 23 July 2020, he resigned from the company on 31 August 2020 and submitted an employment tribunal claim which was heard on 11 October 2021. Mr Fernandez succeeded in his claim for unfair dismissal and breach of contract and was awarded a substantial sum in compensation.

16. During the discussions within the Spanish team the claimants acknowledge that ACAS was mentioned and although they did not fully understand the function of ACAS, or how to access it, they were aware of his existence and that it acted as a mediator in industrial relations matters. The claimants regarded Mr Fernandez as more knowledgeable and as having a better facility in English. It would appear that he led the team to lodge grievances. Given the supportive relationship of the people within the Spanish team and the confidence and competence of Mr Fernandez, who had initiated ACAS early conciliation by 23 July 2020 I find the claimants evidence incredible to the effect that they did not know how to access ACAS for advice when they were able to find out about it from Mr Fernandez.

17. In addition, although the claimants accept that they knew that Mr Fernandez was taking some steps to pursue his rights under the contract they say that they did not know what he was doing. Given that in November 2021,Mr Fernandez informed them of the outcome of his case, helped them access a copy of his judgement, explained how to make a tribunal application online from Spain and assisted them in completing the form I infer that he would have taken similar steps in or about July 2020 to assist the claimants in making a claim then had they wish to do so.

18. Mr Fernandez kept in touch with his old colleagues after they left the respondent business and I simply do not believe that they were unaware that he had lodged a claim and it was going through the tribunal system.

19. None of the claimant gave a cogent explanation as to why they did not take advice at the time. Mr Cabrera said in cross examination ' we took no steps … two colleagues individually took steps in starting claims… The rest of us thought

the case was too big for us and we decided to go home to avoid losing more money.' He went on to explain that everything happened too quickly and he was rather overwhelmed by the demands of leaving his job with the respondent, packing up his flat, selling off some furniture, shipping other belongings to Spain and looking for other work in Spain.

20. Mr Cabrera agreed with counsel for the respondent that he could have sought legal advice and went on to say ' I made it clear that I didn't agree… But I didn't know if I had to go to court … I didn't want to invest in that but I could have done so.'

21. Mr Cabrera explained that he looked for advice on returning to Spain but was told to consult an English lawyer which he thought would be too complicated.

22. Mr Mallado accepts that by the end of 2020, or by January 2021. He knew that Mr Fernandez had made a claim.

23. In each of their late claims statements which werein common terms, but adopted by each separately as their own evidence, the claimants said ' I thought that maybe they have the right to remove these conditions without consultation, and that I had low chances to succeed in court'. I accept the proposition of Mr McDougall that this indicates that the claimants knew there was a legal route but felt their chances were not good enough to invest in.

24. I do not find the claimants credible when they say in terms that they only became aware of their right to bring a claim when they were made aware of the judgement in the case of Mr AR Fernandez in November 2021 after he had won.

25. It appears to me that the claimants knowing Mr Fernandez to have made a claim waited until the outcome was known and lodged their own tribunal application because his was successful.

Conclusions

Breach of Contract and Unfair dismissal

26. Notwithstanding the claimants' facility in English-language, Computer literacy, knowledge of English law and procedure it was clearly possible for them to have submitted claim forms within the time limit because Mr Fernandez did so, and in the circumstances of this case it was reasonable to expect the claimants to have done so as well.

27. As set out above, the Spanish team were a very tight group of men and I infer Mr AR Fernandez was available and willing to assist the claimants to access ACAS and submit their tribunal claim forms in time as he did in November 2021, by which time the claims had become out of time.

28. I do not accept the claimant's statements that they were in ignorance of what Mr Fernandez was doing or what they would be required to do to lodge a claim or where advice and assistance might be found. There is no good reason as to

why they did not take advice and lodge their claims at the same time as he did.At the very least they could have consulted Acas.

29. I find that the claimants were not confident in the prospects of success and I infer that they decided to await the outcome of Mr Fernandez case before lodging their own claims, and that this had everything to do with prospects of success and not the realisation for the first time of the right to make a claim.

30. In the circumstances, the claimants have failed to show that it was not reasonably practicable to submit their claims for unfair dismissal and breach of contract within the time limit.

31. Further, and in the and in the alternative, if it was not reasonably practicable to lodge the claim within the time limits then to wait until 15 November 2021, was too long a delay and they did not lodge their claims as soon as was reasonable. Mr Mallada accepts that by January 2021, he was aware of Mr Fernandez, having made a tribunal claim. If Mr Mallada was so aware I find it implausible that the other claimants did not also know and that should have put them on notice that a Tribunal claim could and should be made.

32. In the circumstances I strike these claims out as having no reasonable prospect of success in the Employment Tribunal.

Discrimination

33. The discrimination claims are also out of time and it will be for me to decide whether if such a claim has been made it has been submitted within such a period as I think just and equitable. At today's hearing the claimants were not asked to give evidence relating to discrimination but they were asked to clarify their allegations

34. The claimants rely on the decision to recall the £1200 loan and make a unilateral deduction from wages in respect of its recovery and the manner in which this was carried out as harassment by reason of their nationality. The decision regarding the loan and its implementation took place in July 2020.

35. Insofar as this is pleaded at all the ET1 says' Judge Davis also found that the loan repayment was not rightfully recovered by the company and because it was done at the same time as the salary reduction I am asking for harassment.' When I asked them to explain their allegations and how they related to nationality the claimant could not say how this treatment related to nationality and the withdrawl of the loan does not appear to have been conducted in a manner which rendered it degrading or hostile to them as spaniards. In the circumstances this does not appear to be an obvious case of harassment because of nationality.

36. The ET1 and the claimant's clarification points to possible Indirect discrimination, through the unilateral imposition of new terms and conditions with which the Spanish team could not comply, and the withdrawal of former terms and conditions which were offered to the Spanish team as an inducement to take up work in the UK and included a lodging allowance, the cost of 10 flights to Spain and time off without pay each month to return home because

the new terms were untenable for them as expatriate workers who relied on these allowance

37. The claimants were asked to clarify their allegations.Under the heading, direct discrimination, the claimants asserted that in the period from April 2020 to the date of their resignations, they were treated less favourably than British workers during the furlough period in the allocation of working hours and therefore pay. This appears not to have been pleaded at all in the ET1 and the particulars of claim would require amendment.

38. Direct discrimination - the unilateral imposition of new terms and conditions on the Spanish team as above. This is briefly set out the ET1. No claimant alleged that they were singled out for less favourable treatment because they were Spanish. They had these additional allowances because they were recruited from Spain and now they were being taken away. The English man on their team also had the same letter removing the allowances he had been given. Allowances were being cut across the Team irrespective of nationality.

39. If the claim were to be amended to include direct discrimination in relation to furlough, the claim would be out of time as the time limit would be 29 December 2020 (RF and VJM) and 10 January 2021 (JAC). The time limit for the alleged harassment 30 October 2021. The time limit for direct discrimination imposition of new terms 13 October 2020, indirect discrimination new terms 13 October 2020. The ET1 was lodged on 15 November 2021.

40. Looking generally at the merits of these claims, the harassment claim does not appear to be obvious.

    In respect of the direct discrimination allegation arising from the unilateral imposition of a new terms and conditions that allegation appears to be undermined if the company sent to the English member of the team, a letter in the same terms as was sent to the Spanish members on 1 July 2020 as the claimants accept.

    The direct discrimination claim about the claimants treatment during furlough was only articulated today, and which has not been pleaded so far and requires amendment.

41. The claimants argue that they were ignorant of their rights to bring claims until they saw the judgement in the Mr AR Fernandez case. That judgement makes no reference whatsoever to discrimination and therefore it is illogical to say that that judgement decision had alerted the claimants to their right to bring a discrimination claim.

42. However, I am told by Mr McDougall and the claimants that Mr Fernandez did in fact make a discrimination claim , but it failed and was disposed of before the final hearing. That being the case I infer that he would have taken similar steps in or about July 2020 to assist the claimant in making a discrimination claim then had they wished to do so.

43. In short, the discrimination claims are over a year out of time (save for the case of direct discrimination during furlough which is 11 or 10 months past the deadline). They are not claims with obvious merit. There was no obvious reason preventing the claimants from taking advice from Acas and making a discrimination claim, given the steps taken by Mr Fernandes and their relationship to him.

44. In all the circumstances I do not consider it to be just or equitable to extend time to admit the claims of discrimination and I strike them out as having no reasonable prospect of success.

31 March 2022

Employment Judge O'Neill