



# EMPLOYMENT TRIBUNALS

**Claimant:**  
Mr E Itua

v

**Respondent:**  
Dematic Ltd

**Heard at:** Reading (by CVP)      **On:** 1 April 2022

**Before:** Employment Judge Anstis (sitting alone)

**Appearances:**

**For the Claimant:** In person

**For the Respondent:** Mr P Starcevic (counsel)

## REASONS

### INTRODUCTION

1. These are the reasons for my judgment of 1 April 2022, prepared at the request of the claimant. The claimant made his request by email on 1 April 2022.
2. The claimant worked for Cordant Security at the GXO warehouse in Barnsley. The current respondent, Dematic, are also a sub-contractor of GXO and carry out work at the warehouse.
3. The claimant brought a race discrimination claim against Cordant. It is not clear when this was done or precisely what it comprised, but it was underway by 2019 and I was told by the claimant that it was eventually settled by Cordant. This was the claimant's first employment tribunal claim.
4. The claimant wanted to move on from his work for Cordant. He applied for a role working directly with GXO in December 2018. He was told by his Cordant manager that there was a "no poaching" agreement preventing people moving between employers at the warehouse. Nevertheless, he was interviewed (unsuccessfully) for the role. This resulted in a second employment tribunal claim, this time against GXO. This proceeded to a hearing at which the tribunal found that the reason why he was not appointed was that he did not have the relevant qualifications and experience, although in later correspondence GXO confirmed the existence of the non-poaching agreement and said he could not work for them.
5. In September 2020 the claimant sought to apply for a job with the current respondent but was told (he says) by Andy Turner that he could not be appointed because of the non-poaching agreement. In mid-November 2020 the claimant complained to GXO about this. This was because he had identified a colleague as moving on to GXO. The claimant wrote to Mr Turner on 16

November 2020 saying he was taking this up with GXO. In December 2020 GXO told him there was no such agreement.

6. In December 2020 the claimant had an interview for another position with the current respondent. The employment tribunal's reasons in his second claim record that "*The claimant was not successful in his application because the other candidates had scored higher and had more skills and experience.*" He was notified that he had been unsuccessful on 18 January 2021.
7. On 13 February 2021 the claimant commenced early conciliation against GXO, and his second tribunal claim alleging direct race discrimination in respect of his non-appointment to the role he applied for with them and in the application of the non-poaching agreement followed. Both claims failed on their merits and because of time issues, and were dismissed by the tribunal.

#### THE CURRENT CLAIM

8. On 27 February 2021 the claimant commenced early conciliation against the current respondent, and lodged his claim against them on 11 April 2021. This was his third employment tribunal claim. As originally submitted, the claim was a claim of direct race discrimination in respect of being told that he could not apply for roles in September 2020. During the course of a case management hearing on 7 February 2022 the claimant made an application to amend his claim to include claims of victimisation and direct race discrimination in respect of the failure to appoint him to the second job he applied for with the current respondent.
9. His original claim was over three months out of time, and his application to amend was nearly a year out of time.
10. As the claimant explained matters to me today, both claims are perhaps more to do with victimisation than direct race discrimination. His case was that the respondent had been influenced by his line manager and GXO to refuse to appoint him to these role (or to permit him to apply) because of his previous complaints, and particularly his complaints against Cordant. He says that Andy Turner knew there was no such policy in existence but had been put up to say that there was such a policy by a combination of Cordant and GXO.

#### THE APPLICATION TO AMEND

11. The first question is whether the claimant should be permitted to amend his claim. This requires consideration of all relevant circumstances, but above all the prejudice caused to either party by the amendment or refusal of the amendment.
12. I will look first at why there was a delay. The claimant has produced a witness statement saying that he had always intended to include this in the claim but had not done so for the reasons set out in his claim form (lack of time and space). He also says he was ill at the time and that his claim should be heard.

13. In the course of his evidence it was his case that he had first come to suspect that the actions of the respondent had been motivated by discrimination around mid-November 2020.
14. He has provided redacted medical records. These show that in late 2019 he was suffering from stress. The next relevant entry is in 4 March 2021 when he is recorded as saying that he is "*stressed, depressed and anxious*". He also says it was difficult to manage two claims at the same time. I do not accept these as good reasons for the late submission of his claim. He was well aware of his rights at this time, as he had already been through much if not all of his claim against Cordant. His suggestion that he did not have either space or time to complete the form fully cannot be accepted. All that was necessary was the addition of one paragraph complaining about the refusal of the second job. While this may have been a difficult time for him, his health was not so bad at the turn of 2020/21 that he needed to consult a doctor about it.
15. Of course, the most important point is the question of the prejudice to each party. The respondents correctly identify that to address this will require them to call an additional witness or witnesses, and open up lines of enquiry and evidence which would not be addressed in the claim in its current form. That will no doubt add to costs and the length of the hearing. While it appears that necessary documentation has been preserved, memories will have faded. Against that, the claimant will be deprived of a claim that he wanted to bring – but that is, of course, always a possibility where a claim is omitted from the original claim form and only raised many months later. I bear in mind in considering this that the merits of the claim do not look good. It is not clear why the earlier tribunal felt it necessary to express a view on the failure to appoint him to the second job, but they have done so, having apparently heard evidence on the point, and have concluded that there was a non-discriminatory reason for it. A subsequent tribunal will not be bound by this finding, but it is not a promising start for the claimant. For him to prove his case on victimisation requires him to prove the link between his previous complaints and the failure to appoint him. This involved Dematic being subject to influence by GXO and or Cordant in their failure to appoint him. There is nothing in the evidence I have seen (which includes what I understand to be the claimant's intended witness statement for the final hearing) that would suggest that. In those circumstances I refuse the application to amend.

#### STRIKE OUT OR A DEPOSIT ORDER

16. There is then the question of whether the original claim should be struck out as having no reasonable prospects of success (or be the subject of a deposit order as having little reasonable prospects of success). That claim was out of time, and as with the application to amend the reasons for it being out of time are not good ones. There is less prejudice to the respondent in replying to this out of time claim – indeed, it appears that preparations for a hearing to address this are all but complete.
17. However, as with the application to amend, the merits of this claim do not look good. The way in which the claimant described it to me was more akin to a victimisation claim than the current claim of direct race discrimination. It was not at all clear to me from the claimant's description of matters how he would

persuade the tribunal even that the burden of proof had shifted. The claimant seemed to find the respondent's later acceptance of his job applications suspicious, but in reality it is equally consistent with the respondent's position that they initially thought there was a no-poaching agreement but later found there was not. He would also (on his account of events) have to demonstrate that Andy Turner said what he did under the influence of Cordant and XPO, and I do not see how he can do that on the current evidence.

18. While I should be careful about striking out discrimination claims, I consider this should be done to this claim. The combination of time issues and weak merits mean it has no reasonable prospect of success and should be struck out.

**Employment Judge Anstis  
11 April 2022**

Sent to the parties on: .....

.....  
For the Tribunal Office

**Public access to employment tribunal decisions:**

All judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.