Case Number: 1300900/2021

EMPLOYMENT TRIBUNALS

Claimant: **Mr N. Butler**

Respondent: **OCS Group U.K. Limited**

Heard at : Birmingham via CVP **On 24 June 2022**

Before Employment Judge Wedderspoon

Representation :

Claimant: In Person
Respondent : Mr. C. Mislom, Counsel

JUDGMENT

1. The claimant's claim is amended to include a complaint of direct race discrimination.
2. The claim of unfair dismissal is struck out because the tribunal has no jurisdiction to hear it.
3. The claim of discrimination is struck out because the tribunal has no jurisdiction to hear it.

REASONS

Purpose of hearing

1. The preliminary hearing was listed to determine the following matters :-
(a)Whether the claim has been presented within the time limits specified in section 111 of the Employment Rights Act and section 123 of the Equality Act 2010;
(b)Whether it is just and equitable to extend the normal time limit to the claimant's discrimination claim (section 123 (1)(b) of the Equality Act 2010;
(c)whether it was not reasonably practicable for the claimant to have presented his claim for unfair dismissal within the time limit specified in section 111 of the Employment Rights Act 1996 and if so whether he presented it within such further period as was reasonable.

The hearing

2. The Tribunal was provided with a bundle of documents 45 pages. The claimant

gave evidence and was cross examined by the respondent. The Employment Judge requested that the respondent forward the claimant's grievance to the Tribunal. This was provided and added to the bundle. The respondent also provided an opening note to its case.

3. The claimant found difficulty in joining the video link initially. The claimant as a Litigant in Person disclosed that he was dyslexic. In the circumstances the Tribunal drew the respondent to the references to dyslexia in the Equal Treatment Bench Book and that questions should be asked singly. Regular breaks were given to the claimant as a reasonable adjustment in the hearing. The claimant was informed to ask for clarification if he did not understand anything that was said in the hearing. Further he could ask questions to be repeated and a question could be rephrased to ensure he understood the question. Due to the length of the hearing, judgment had to be reserved.

4. Prior to determining the issues set out above, it was necessary to consider the following points :-
(a)Has there been a termination of the claimant's employment;
(b)If so, when ?
(c)What claims were presented in the original ET1 ?

Background Facts

5. The claimant was employed as a zero hours worker, a cleaning operative, of the respondent from 2008. His role involved waste removal whilst events were built within event halls and at the point when events are brought down. The work involved removing and disposing of packaging and sweeping up waste and debris from the floors. He was placed on furlough during the 2020 lockdown from 1 May to 1 October 2020.

6. On 17 November 2020 the claimant emailed the respondent querying the decision to end his furlough leave and whether he could be considered for redundancy. On 18 November 2020 the respondent issued a communication to all zero hours employees and casual worker working on the contract stating that the decision had been made to not utilise the CJRS for employees on zero hour contracts and causal workers.

7. On 4 December 2020 the claimant raised a grievance. He alleged he had been unfairly dismissed. He did not raise race discrimination in this grievance. On 17 December 2020 the respondent rejected the claimant's grievance and stated that there was no evidence to suggest the claimant's employment had been terminated. By 19 December 2020 the claimant secured new employment.

8. On 12 December 2020 the claimant entered early conciliation. He received an EC certificate on 23 January 2021 (page 1).

9. On 21 March 2021 (page 2) he presented an ET1 pursuing complaints of unfair dismissal and redundancy payments. On page he did not tick the box for a claim of race discrimination or any discrimination. In the narrative on the claim form paragraph 8.2 he pleaded *"I been working for this company for over 12 years I was not given any work on from the 1 May 2020 I was place on furlough up till 31 August 2020 then I was taken off furlough because they say they will not top up the 60% because they need to pay for staff redundancy a email was sent out to favouritism staff to apply for statutory redundancy and some members of staff was still in work the night team was brough in on days to work while I was off and I'm a day staff, I felt victimised I was treated unfairly after not receiving*

any work in four consecutive week I wrote to the company asking for my redundancy no one reply. I wrote another email open a grievance that did really make any difference. There are members of staff that as receive these redundancy and been told they can come back to work for the come, I can't understand why I was not treated the same way, I feel like this discrimination against me, it hurt me do bad it feels like a knife in my heart when I think about."

10. In its response the respondent contended that the claimant's employment was continuing. It alleged that the claimant was out of time. The claimant was required to lodge his claim on or before 23 February 2021 but lodged it on 21 March 2021. It submitted that there were no grounds for extending the time limit. Its case is that pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 the claimant transferred to the respondent from the previous service provider ISS. The claimant's period of continuous employment commenced on 26 August 2008.
11. In response to correspondence from the Tribunal dated 14 October 2021 (page 38) the claimant stated in his email 15 October that he was taken off furlough and not offered any work up to this day October 2021. He stated that the respondent "ended my contract because offer I was taken off furlough I was not offered any work up on till this day while other members of staff and I wasn't offered any work, 4 week after I was taken off furlough and was not offer any work." He went ton to say "in my last email I added about racism the reason why it was not in my first one was because I only found out that all the staff was given there redundancy and was reinstated with work by OCS..why am I not treated as equal as these staff."

Evidence of claimant

12. In evidence the claimant was asked on a number of occasions if and when he was dismissed. The claimant stated that he had received prior to lockdown a weekly rota of work. Following coming off furlough he did not receive a weekly rota and he was not offered any work. He believed he was dismissed by the respondent from October 2020 when he was no longer offered any work. He was referred to his claim form and asked what he meant about discrimination at page 8; he stated that not one black person was offered ethnicity and it still hurt him. He said he felt he was not offered voluntary redundancy because he was black.
13. The claimant stated that he completed the claim form on 21 March 2021. He said when everything happened it stressed him out. He had been taking sleeping tablets. He was not the best reader or writer. He said he took new employment on 19 December 2020 because he no longer had employment with the respondent. At the time of writing his claim form, he was unaware that the redundancy letter was sent to special people; white members of staff; this is racism. He ticked the boxes of unfair dismissal and redundancy. He found out later from other members of staff about white members. He said at paragraph 8.2 "discrimination" mentioned is race discrimination. He said he felt victimised as he was separated and white colleagues were treated differently.
14. The claimant stated he checked on the government website and he had been employed for 12 years so was entitled to a redundancy payment. He said it was about treating him fairly.
15. He was referred to his grievance dated 4 December 2020 and he was asked why he had not alleged race discrimination. The claimant stated he was unaware that white people were given redundancy. He was not a good reader

or writer.

16. The claimant was aware of a time limit to bring a claim. He decided to present a claim in March 2021 because he felt he had to do something for himself.

Submissions

17. The respondent submitted first the Tribunal should determine what is contained in the claim form. The claimant had specifically ticked unfair dismissal and redundancy at paragraph 8.1. There was nothing in the claim form to alert the respondent to a claim under the equality act 2010. The assertion of words of "discrimination and victimisation" is insufficient that discrimination was alleged here as a claim. The claimant now seeks to introduce discrimination into his claim. Insofar as there is an implicit application to amend his claim, to add discrimination, it should be declined. It is a hopeless claim either direct or indirect discrimination; a number of zero hour employees have been treated in the same way as the claimant; it is nothing to do with race.

18. There was no suggestion of any medical condition that impeded his ability to lodge his complaint within time. There can be no proper basis for the Tribunal to find that it was not reasonably practicable for the claimant.

19. The Equal Treatment Bench Book (references to difficulties of Litigants in Person in pleading cases) does not oust the statutory test. The claimant contends a direct dismissal by way of removal from furlough and offered no work. The timing of this is at the end of August 2020 or being charitable the latest date 1 October 2020.

20. The claimant submitted that he was dismissed when he was offered no work. He dated this to 31 August 2020. "The respondent did not use me anymore; I was dismissed".

The Law

21. The amendment of a claim is part of the Tribunal's discretionary powers pursuant to Rule 29 of the Employment Tribunal Rules 2013. The Tribunal must take account of the overriding objective and the Presidential Guidance on general case management when considering an amendment application.

22. The principles relevant to the amendment of claims are described in **Selkent Bus Co v Moore (1996) IRLR 661**. The Tribunal should consider :-
(a)the nature of the amendment;
(b)the applicability of statutory time limits; and
(c)the timing and manner of the application.

23. The Tribunal should take into account all the circumstances and balance the hardship and prejudice of allowing the amendment against the injustice and hardship of refusing it (see **Vaughan v Modality Limited UKEAT/0147/20**).

24. The Equal Treatment Bench Book indicates that difficulties faced by Litigants in Person includes an inability to understand the relevance of law to their own problem and describing their case but failing to apply the correct legal label. The ETBB also lists difficulties for litigants with dyslexia includes difficulties

distinguishing important information in a logical sequential way and difficulty in distinguishing important information from unimportant details.

25. In the case of **McLeary v One Housing Group Limited UKEAT/0124/18** HHJ Auerbach stated *"the starting point is a fair reading of the pleadings. It seems to me that in this case on a fair reading the claimant's original particulars of claim and/or her original particulars of claim and her subsequent March pleading, should have been read as sufficient to include a claim of constructive dismissal contrary to section 39; or at the very least their content was such that the matter should have been proactively raised by the Judge at the case management preliminary hearing and clarified, given how the point, it seems to me, jumped out from the claim form and particulars of claim; and/or given that it was not in this case raised at the case management haring, it should have been raised prior to or at the Preliminary hearing at the time."* The judgment was approved in the case of **Mervyn v BW Controls Limited (2020) EWCA Civ 393** at paragraph 41.

26. Pursuant to section 111 of the Employment Rights Act 1996 a complaint for unfair dismissal must be presented to the Tribunal (i)before the end of the period of three months beginning with the effective date of termination or (ii)within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

27. In the case of **Palmer and Saunders v Southend on Sea Borough Council (1984) 1 All ER 945** it was held that the test under this limb is not "whether it was physically possible" but *"was it reasonably feasible to present to the employment tribunal within the relevant three months?"*

28. The burden rests upon the claimant to establish this (see **Consignia plc v Sealy (2002) EWCA Civ 878**).

29. Lord Justice Brandon stated in ***Walls Meat Co Limited v Khan (1979) ICR 52*** *stated "the performance of an act in this case the presentation of a complaint is not reasonably practicable if there is some impediment which reasonably prevents or interferes with or inhibits such performance. The impediment may be physical for instance the illness of the complainant or a postal strike or the impediment may be mental namely the state of mind of the complainant in the form of ignorance of or mistaken belief with regard to essential matters. Such states of mind can however only be regarded as impediments making it not reasonably practicable to present a complaint within time if the ignorance on the one hand or the mistaken belief on the other is itself reasonable. Either state of mind will further not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made.."*

30. In the Employment Tribunal case (which is persuasive only) **Ms. O'Brien v Holes & Hills Solicitors LLP (ET/3219992/20)** the Tribunal determined that it was reasonably practicable for a claimant to submit a claim where she failed to do so in time where she complained that in the weeks before her dismissal her father in law died of COVID; her partner was deeply upset; her daughter reacted very badly to this death and she had caring responsibilities for her grand daughter.

31. Illness may be an impediment to presenting a claim. The Tribunal should take account of (a)the nature of the illness (**Ebay UK Limited v Buzzeo EAT 5.9.2013)** (b)the effect of the illness or injury over the limitation period; **Schultz v Esso Petroleum Company Limited (1999) IRLR 488** and (c)the effect of the illness in the weeks running up to the limitation period.

32. In respect of the second limb of the test **"such as the tribunal considers reasonable"** the EAT in **Cullinane v Balfour Beatty Engineering Services 5 April 2011** held *"it requires an objective consideration of the factors causing delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted having regard certainly to the strong public interest in claims in this field being brought promptly and against a background where the primary time limit is three months.".*

33. A discrimination claim may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable. Where conduct extends over a period, the act is to be treated as done at the end of the period (see section 123 of the EqA).

34. The discretion to extend time is broad. In **Miller v MOJ (UKEAT/0003/15)** it was stated that time limits are to be observed strictly; the EAT can only interfere if the decision is Wednesbury unreasonable/perverse; the prejudice to the respondent is customarily relevant and section 33 of the Limitation Act 1980 contains a useful checklist.

35. Lord Justice Underhill in the case of **Adedeji v University Hospital Birmingham NHS Foundation Trust (2021) EWCA Civ 23** stated that it was a useful exercise to consider the factors in section 33 of the Limitation Act 1980 but that there is no requirement to go through the list. The most relevant factors are likely to be (a)the length of and reasons for the delay and (b)whether the delay has prejudiced the respondent.

<u>Conclusions</u>

36. The claimant is a litigant in person unfamiliar with the tribunal process and has dyslexia. The Tribunal therefore permits the claimant to apply to amend his claim today by way of implication following his description of the claim he believes he brought. The Tribunal accepts the claimant's account that when he wrote "discrimination" and "victimisation" in paragraph 8.2 of his claim form he meant that he believed he had been subject to direct discrimination by reason

of his race as he had not been offered any further work following the ending of furlough and had been directly dismissed by the respondent.

37. In the context of the recognised difficulties faced by a litigant in person in the litigation process who also has dyslexia (see the Equal Treatment Bench Book), the Tribunal determines that paragraph 8.2 “screamed out” that the claimant was expressing he felt he was directly discriminated against by reason of a protected characteristic. The Tribunal accepts the claimant’s evidence when he says that this is what he meant. The addition today is the protected characteristic of “race” which the Tribunal finds as an amendment falls into the category of re-labelling.

38. The amendment application is made some three months following the submission of the claim form. However, the claimant believed he had made such a claim in his claim form. If he is not permitted to amend he will not have the opportunity to pursue a complaint and seek redress for an injustice he believes that he has suffered and that he believed he had included in the claim form.

39. In respect of the respondent, this is the first time it has been fully clarified a direct discrimination complaint has been brought; the grievance dated December 2020 did not mention race discrimination; it has no opportunity to investigate this claim; a similar claim made by a colleague has no prospect of success because both white and black employees on zero contracts were no offered work and not offered redundancy following the end of furlough. A further claim will inevitably mean a longer trial with further witnesses.

40. However, there was no indication from the respondent that it was evidentially prejudiced in the sense it would be unable to defend such a claim. Its case is that it is able to defend the claim because it is unmeritorious as any decision not to offer work or redundancy had nothing whatsoever to do with race. It says it can establish this in another case.

41. Taking into account all the circumstances and balancing the hardship and prejudice of allowing the amendment against the injustice and hardship of refusing it (see **Vaughan v Modality Limited UKEAT/0147/20**), the Tribunal determines that it would be unduly harsh to the claimant not to be allowed to amend his claim today and the amendment by way of re-labelling to a direct race discrimination complaint is permitted.

42. The claimant clarified in his evidence that he considered that he had been directly dismissed by the respondent; this was both unfair and discriminatory. The claimant’s case is that the direct dismissal took place at the end of furlough when he was not offered any further work from the respondent. Prior to furlough he had been provided with a weekly rota of tasks. Following being taken off furlough he did not receive a rota. He timed his direct dismissal as taking place on 31 August 2020 or end October 2020.

43. His grievance dated 4 December 2020 indicates that he believed he had been unfairly dismissed having been taken off the furlough scheme and not been given any work or pay by the respondent. In his grievance the claimant had requested a reply in 7 days or he would take it to the employment tribunal and his solicitor. The claimant is aware of the tribunal process and appears to have the ability to obtain solicitor's advice.

44. On the basis of the way the claimant puts his claim, assuming a direct dismissal of 31 August 2020, he engaged ACAS conciliation outside the time limits on 12 December 2020. There is no explanation by the claimant put forward to explain this delay.

45. Applying a more generous timescale submitted as an alternative by the respondent of a direct dismissal on 31 October 2020, the claimant engaged ACAS conciliation in time but having received a certificate on 23 January 2021, he failed to submit his claim in time; it was submitted on 21 March 2021 (instead of 13 March 2021).

46. The claimant admitted under cross examination he was aware of timescales. The explanation provided by the claimant for this delay is that he was stressed. No medical evidence supporting an inability to submit a claim has been produced by this claimant to establish he was physically or mentally impeded.

47. The fact that he was stressed is mere assertion. Although the Tribunal accepts the claimant is genuine when he asserts he was stressed, many litigants who lose their jobs are stressed. This, in itself, does not prevent a litigant from lodging a claim in good time. Particularly in the context of a litigant who is aware of timescales and has the opportunity to seek advice from a solicitor.

48. For the purposes of the unfair dismissal claim, the burden rests upon the claimant to establish that it was not reasonably feasible to present to the employment tribunal his unfair dismissal claim within the relevant three months. The claimant has not been able to establish that he was impeded in any way in bringing his unfair dismissal claim to the Tribunal within the relevant three months. In the circumstances the unfair dismissal claim has been brought outside of the statutory time limit provided by section 11 of the Employment Rights Act 1996 and Tribunal does not have jurisdiction to hear his unfair dismissal claim. This claim is struck out.

49. In respect of the amended complaint of dismissal as an act of direct race discrimination, the claimant has failed to provide a reason for the lateness of this claim. Although the discretion pursuant to section 123 of the Equality Act 2010 is a wide one; the most relevant factors are length of and reasons for the delay and whether the delay has prejudiced the respondent. For the purposes of the amendment application the Tribunal had already considered prejudice to the respondent and concluded there is no real evidential prejudice.

50. However there has been a delay here which is unexplained by the claimant. He was aware of a discriminatory dismissal complaint; he was aware of time limits but he failed to lodge the complaint in time. There is no real explanation

provided by this claimant for the delay. Discrimination claims are fact sensitive and should be brought in a timely fashion. There is no reason for this delay. In the absence of any credible reason for delay, the tribunal determines that it is not just and equitable to extend time. The Tribunal concludes that the race discrimination complaint has been brought outside the statutory time limit provided by section 123 of the Equality Act 2010 and the Tribunal has no jurisdiction to hear it. The discrimination complaint is struck out.

Employment Judge Wedderspoon
5 July 2022