



EMPLOYMENT TRIBUNALS

Claimant: Mr M Y Toure

Respondent: The Hut.com Limited

Heard at: Manchester (remotely, by CVP)

On: 27 June 2022

Before: Employment Judge KM Ross

REPRESENTATION:

Claimant: In person

Respondent: Mr Kelly, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claims for race discrimination were presented outside the time limit permitted in section 123 Equality Act 2010 and were not presented within such further period as the Employment Tribunal considers just and equitable.
2. Accordingly, the Tribunal does not have jurisdiction to hear the claimant's claims.

REASONS

The Facts

1. The claimant is employed by the respondent as a Warehouse Operative. On 15 August 2021 he presented a claim to the Employment Tribunal. At page 8 he ticked the box which states "I was discriminated against on the grounds of race".
2. At a case management hearing before Employment Judge Shotter the claimant confirmed his complaints were about:

- (1) The refusal of the respondent to allow the claimant to work overtime. The person who refused to allow him to work overtime was Anna Menzoreva, a shift manager. The relevant period was August 2019.
- (2) A manager, Ivan Manik, denied the claimant's training needs and support. The relevant period was November 2019 to February 2020.
- (3) The reduction of a one month extension to the claimant's probation period to 13 days. This was done by Alex from HR and Janice. The relevant period was mid-April to mid May 2020.
- (4) The suspension of the claimant. The claimant alleged he was unfairly suspended by Ivan Manik for two weeks from 28 February 2020 to mid-March 2020. (There is a typographical error in Judge Shotter's case management note which incorrectly states mid May.)
- (5) The delay in transferring the claimant to another site. In July 2020 the claimant asked to be transferred to another site and whilst hundreds/thousands of other employees were transferred, the claimant did not transfer until 12 months later in September 2021. The claimant said the relevant period was July/August 2020.

3. The final issue, which was unclear at the time of the case management hearing, was an allegation relating to intimidation in August 2020 when managers sent a "hitman" to "harass" the claimant. The claimant did not initially clarify that claim but following Employment Judge Shotter's case management hearing he stated (page 81) that this related to Mehmet (shift manager) and Samantha (HR) calling him into the HR offices without warning to make him withdraw his grievances or even give up his job. The claimant confirmed at the outset of the hearing today that that took place in August 2020.

4. Prior to commencing his Employment Tribunal claim the claimant contacted ACAS on 6 July 2021 and a certificate was issued on 12 August 2021 (see page 3).

5. I had a small file of documents comprising the claim, the response, Employment Judge Shotter's note of the case management hearing on 28 March 2022, the claimant's further and better particulars document dated 16 March 2022 (pages 43-46) and the claimant's letter of clarification after case management hearing dated 13 April 2022. There was also a document (page 92) which I treated as the claimant's statement and a statement from Mr Alex Stevens(p87-9) from the respondent's HR department in relation to the issue of prejudice as required by Employment Judge Shotter. The claimant and Mr Stevens gave evidence.

6. The claimant's claims are for direct discrimination pursuant to s13 Equality Act 2010 and/or. for harassment pursuant to s26 Equality Act 2010.

7. The claimant agreed when questioned that the acts of which he complained ended at the very latest in August 2020. The time limit therefore expired at the latest on 30 November 2020. His claim was not presented until almost 9 months later on 15 August 2021. The claim was therefore presented outside the time limits. The

issue for me was whether to exercise discretion to permit the claim to proceed outside the time limit.

The Law

8. I had regard to section 123 Equality Act 2010, the well-known case of **British Coal Corporation v Keeble & others [1997] IRLR 336, EAT** and **Southwark London Borough Council v Afolabi [2003] ICR 800 CA**.

9. Mr Kelly directed me to **Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576**. In relation to the delay in commencing tribunal proceedings and the fact there was an internal appeal, I considered **Apelogun-Gabriels v Lambeth London Borough Council & another [2002] ICR 713 CA** and **Robinson v Post Office [2000] IRLR 804**.

Applying the law to the facts.

10. The claimant agreed that the acts of which he complained ended at the very latest in August 2020. The time limit therefore expired on 30 November 2020. His claim was not presented until almost 9 months later on 15 August 2021.

11. Section 123 Equality Act 2010 provides that a complaint 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.

12. As this complaint was brought many months after the last act, it was presented out of time. I therefore must go on and consider section 123(1)(b). I must consider whether a claim which is out of time has been presented within "such other period as the Employment Tribunal thinks just and equitable".

13. I reminded myself when exercising my discretion that it is for the claimant to convince me that it is just and equitable to extend the time limit (see **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434 CA**).

14. I therefore turn to the relevant factors I must consider. I reminded myself of **British Coal Corporation v Keeble & others [1997] IRLR 336 EAT**. That case deals with the exercise of discretion in Civil Courts and requires the court to consider the prejudice which each party would suffer as a result of the decision reached, to have regard to all the circumstances of the case and in particular the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party sued has cooperated with any requests for information, the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action and of the steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action. I remind myself that this is not a list to be adhered to slavishly but that I must consider all relevant factors when exercising my discretion.

15. I turn to consider first of all the length of and reasons for the delay. The claimant told me that the reason for the delay, which was very lengthy being the period of almost 9 months, was because he was pursuing the respondent's internal appeal procedure and it was only when that was exhausted that he decided to bring a claim to the Employment Tribunal.

16. I turn to consider the allegations. So far as allegation (1) is concerned, which is the refusal for the claimant to work overtime, there was a factual dispute between the parties whether the claimant was given an oral decision about the grievance he presented in relation to that issue. The respondent says he was, the claimant says he was not. What is undisputed is that the claimant later asked his trade union representative to seek a written outcome which he received in February 2021 and that he received a final appeal outcome on 3 June 2021.

17. So far as allegation (2) is concerned, which is about training needs and support, there was a dispute about any grievance in relation to that matter. The respondent says that was part of a grievance hearing where the claimant was given an outcome on 16 April 2020 and was informed his appeal was unsuccessful on 16 May 2020. The claimant disagrees and says the grievance with those dates of outcome was about another matter. However the claimant did not suggest any other dates when this allegation formed part of a grievance hearing or appeal.

18. So far as allegation (3) the reduction of one month's probation is concerned, the claimant agreed that his grievance in relation to that matter was rejected in August 2020 and the appeal was unsuccessful in November 2020.

19. So far as allegation (4) in relation to the claimant's suspension on 28 February 2020 is concerned, the claimant agrees that he was informed his grievance was unsuccessful on 16 April 2020 and his appeal was unsuccessful on 16 May 2020.

20. So far as allegation 5 is concerned, the claimant agreed that he did not present a grievance in relation to the issue of his move which he says should have taken place in July 2020.

21. So far as allegation 6 is concerned the claimant stated did not raise a grievance in relation to the actions of Mehmet and Samantha of HR in August 2020.

22. Stepping back at this point it is clear that the grievances presented by the claimant had failed at appeal level in April 2020, May 2020 and November 2020. The only grievance appeal which had reported in 2021 was the grievance in relation to the oldest allegation, namely the failure to pay overtime in 2019. There was no dispute that the claimant knew of the final appeal outcome on 3 June 2021.

23. The claimant informed me that he had been a trade union member and had been represented by his union at some of his grievance hearings. He also told me that he had access to the internet and had some awareness of time limits. Although the claimant said the reason he had not put in his claim until 15 August 2021 was because he was pursuing his grievances internally, he did not explain why once each particular one of his grievances had reached the final stage (i.e. appeal outcome) he did not present a Tribunal claim at that point. Neither did he explain

why, once he had exhausted the final grievance (of which he knew the outcome on 3 June 2021) he did not contact ACAS until a month later on 6 July 2021 and did not present his claim until 15 August 2021.

24. Although pursuing an internal appeal is a factor I must take into account when considering the reason for the delay, as I have outlined above it does not explain why the claimant did not present the claim once he had exhausted the appeal procedure in relation to each allegation, nor why he delayed from 3 June 2021 until 15 August 2021.

25. I turn to consider any other reasons for delay. When I asked him about any absence from work, the claimant told me he had been absent from work in July 2020 for five days when he was undergoing surgery and then had a two week period of recuperation. He said he had a fit note at that time covering his absence from work. He did not clarify the nature of the surgery or suggest that there was any reason he could not have commenced his claim before he had surgery or that he was too unwell to complete a Tribunal application because he was recuperating.

26. I turn to consider whether the delay has prejudiced the respondent. I find that it has to some extent. I rely on the evidence of Mr Stevens that a number of witnesses have left the respondent's business since the time of the claimant's allegations. In particular Glen Herring has left the Respondent's employment. He was the Senior Operations Manager who heard the claimant's original concerns in 2019 about the overtime ban (for which there are no written notes), and who says he gave the claimant a verbal outcome of that grievance. He was also relevant to the claimant's allegation that the claimant was not moved in July 2020. Samantha Timmins, People Adviser, is also relevant in respect of the claimant's request to transfer to the new Manchester site in 2020 and she is no longer employed by the respondent either. Although it may not be impossible for the respondent to secure the attendance of these witnesses, it is likely to be more difficult if they have left the business. These are 2 key witnesses in relation to 2 of the claimant's allegations and their lack of attendance will be prejudicial to the respondent's case.

27. Regarding the delay in bringing the claim, I reminded myself that the claimant's allegations are about the specific facts he has relied upon as described in each allegation (not the conduct of the grievance or appeals), and the witnesses are going to be required to remember in October 2022 events which happened 3 years earlier in August 2019.

28. I turn to consider the factor of the extent to which the parties cooperated with any requests for information.

29. Unfortunately, although the claimant has supplied some information, he was reluctant to supply information particularly in relation to the reason why he considered his allegations were matters of race discrimination and answered them "no comment" (see pages 44-46). I am mindful that the claimant is a litigant in person and I do not criticise him for failing to respond to the question "which type of race discrimination are you bringing in respect of this allegation e.g. direct, indirect, harassment or victimisation?", but it is surprising that when the claimant was asked

in relation to each allegation at item (d) “the basis upon which you claim the reason for the treatment was race” he replied “no comment”.

30. So far as the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action, I find there was significant delay here. The claimant had the benefit of trade union membership and trade union representation. He was sufficiently informed to present a grievance in relation to a number of his concerns. He had access to the internet. However, it is unclear why the claimant did not present a claim once the appeal had concluded in relation to his various matters.

31. I step back to balance all of the factors in this case.

32. The allegations relied upon by the claimant all relate to matters which occurred either in 2019 or in 2020. The claimant delayed for almost 9 months before bringing his claim. The claimant says the reason for delay was he was still pursuing internal appeals. I find that all the claimant's appeals were exhausted by November 2020 save for one. The only appeal heard in 2021 was in relation to the oldest matter, the refusal to award overtime for 1 month in August 2019. That appeal concluded on 3 June 2021. I remind myself that there is no general principle that it will be just and equitable to extend the time limit where the claimant was seeking redress through the grievance procedure before embarking on legal proceedings, rather it is one factor to take into account. When weighing up this factor I have taken into account that this grievance concluded on 3 June 2021 but the claimant did not present his claim for a further period of 10 weeks. I have taken into account that although the claimant was absent from work in July 2021 due to an operation, he did not suggest this was the reason for further delay. I am not satisfied that the fact the claimant was pursuing an internal appeal which concluded on 3 June 2021 is a sufficiently strong factor to outweigh the fact that his claim is very late, particularly as the claimant has not given a clear explanation as to why the allegation in relation to that grievance was also presented outside the time limit.

33. There is a public policy in having time limits for bringing claims.

34. I am mindful that the claimant is a litigant in person but he does have the benefit of trade union membership, or he certainly did during the time he brought the grievances. I am aware that there is considerable prejudice to the claimant by failing to exercise my discretion, but I am also mindful that to allow the exercise of discretion will cause prejudice to the respondent in defending the claim but also if they can not secure the attendance of key witnesses who have left the respondent's employment.

35. Therefore taking all of these circumstances into account for the reasons outlined above I do not exercise my discretion in accordance with section 123(1)(b).

36. That therefore concludes the matter and the claim can not proceed further.

37. However for the sake of completeness, in case my decision above is wrong, I have gone on to consider the respondent's alternative application for a deposit order

on the basis that the claimant's claims had little reasonable prospect of success pursuant to section 39(1) Employment Tribunals Rules of Procedure, which states:

“Where at a preliminary hearing the Tribunal considers any specific allegation or argument in a claim or response has little reasonable prospect of success it may order the paying party to pay a deposit of an amount not exceeding £1,000 as a condition of continuing to advance the allegation or argument.”

38. Rule 39(2) states:

“Before making such an order the Tribunal must make reasonable enquiries into the ability of the party to pay the deposit and have regard to any information when deciding the amount of the deposit.”

39. I reminded myself of the public policy behind deposit orders. In **Hemdan v Ishmail [2017] IRLR 228** Simler J pointed out that the purpose of a deposit order is:

“To identify at an early stage claims with little reasonable prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails. That, in our judgment, is legitimate because claims or defences with little prospect cause costs to be incurred and time to be spent by the opposing party which is unlikely to be necessary. They are likely to cause both wasted time and resource and unnecessary anxiety. They also occupy the limited time and resource of Courts and Tribunals that would otherwise be available to other litigants and do so for a limited purpose or benefit.”

40. I am mindful of the guidance in this case that even where a party's means may be limited, it is still appropriate to make a deposit.

41. I am satisfied the allegations in this case have little reasonable prospect of success. The claimant has not referred to any evidence which could shift the burden of proof from himself to the respondent. He has not given any information other than the fact that he describes his protected characteristic as race (namely, black African) and unfavourable treatment. I remind myself that in Equality Act cases there is a shifting burden of proof. However, for the burden of proof to shift it is not enough for the claimant to show a difference in treatment and a difference in protected characteristic. Something more is required (see **Madarassy v Nomura International PLC [2007] ICR 867**).

42. The claimant has been ambiguous and rather confusing when attempts have been made to clarify the nature of his claim. In his claim form he ticked the box which says “discrimination” on the Employment Tribunal claim form and in the narrative of his claim form he stated that he had been discriminated against (see page 10). However, at the end of page 10 the claimant stated:

“I won't say that was about my race, but for sure I have been discriminated against, harassed and segregated for personal reasons, totally unfair.”

43. This ambiguity continued in the claimant's clarification of his claim in his further and better particulars document. On 16 March he stated:

“You insist a lot the race discrimination. I guess easily that it’s not accidental. Your purpose is to trap me and make it difficult to support my allegations. I never said that the discrimination was related to my race. It’s not very relevant. I stopped on facts that prove that I was subject to discrimination, harassment and segregation for any honest people. Nowadays you won’t find someone foolish enough to claim his racism openly.”p43

44. It is unclear whether the claimant is relying on his race as the reason for the discriminatory treatment. The reference to segregation suggests that he is as does the reference to “you won’t find someone foolish enough to claim his racism openly.” However suggesting that the purpose of the respondent’s solicitors is to “trap me” when they “insist a lot the race discrimination” and the remark “I never said that the discrimination was related to my race. It’s not very relevant” seems to suggest the claimant does not consider his treatment was race discrimination.

45. In any event, even if the claimant does consider that the real reason for his treatment was his race, he has not provided any information to shift the burden of proof to the respondent. There is no evidence suggested other than a difference in treatment and a difference in race.

46. I am mindful that to succeed in a claim for direct discrimination and/or harassment the claimant must adduce facts which could suggest the reason for his treatment was his race. From the claimant's information in his claim form, his further and better particulars document and his witness statement document, the claimant has not adduced such facts and his claim appears to have very poor prospects of success. However, I remind myself that in **Nagarajan v London Regional Transport [1999] IRLR 572** is authority that discrimination by an alleged discriminator may be subconscious. Tribunals have been reminded they must not overlook this possibility -see **Geller v Yeshrun Hebrew Congregation [2016] UKEAT 0190/15**).

47. Only the Employment Tribunal hearing from the alleged discriminator can the claimant determine the reason for the treatment.

48. However, for the reasons I have set out above, I consider that in the absence of any information to shift the burden the claimant's claims have little reasonable prospect of success.

49. I have taken into account the claimant's means. He confirmed that he continues to earn the sum stated in his claim form each month, which is a relatively low wage. His wife works part-time and he has four dependent children, one of whom is at university. He was unable to give me a figure as to the amount of money he has left at the end of each month but he said it was a struggle.

50. Having regard to all the usual outgoings which the claimant says he has and the present situation in terms of the cost of living crisis and inflation, if I had not struck out the claimant's claims for being out time I would have ordered him to pay a deposit of £50 for each of the six allegations he wished to pursue.

51. For the avoidance, at the outset of this hearing the claimant said he did want to pursue the allegation described in relation to allegation 6 in this document which occurred in August 2020.

Employment Judge KM Ross
Date: 4 July 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
7 July 2022

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