EMPLOYMENT TRIBUNALS

Claimant	Mr Godfrey Bwire		
Respondent	West Sussex County Council		
Heard at	Croydon (by video)	**On**	25 July 2023
Before	Employment Judge Fowell		
Representation			
Claimant	In Person		
Respondent	Peter Doughty of counsel		

JUDGMENT

1. The claim is struck out under rule 37(1)(a) Employment Tribunal Rules of Procedure, on the basis that there is no reasonable prospect of success given that all of the complaints were presented out of time.

REASONS

1. This hearing was arranged at the last preliminary hearing on 17 May 2023 to consider whether to strike out any of the claims on the basis that they were presented out of time. That exercise involves being very clear about what the actual complaints are and when the allegations in question are said to have occurred.

2. No directions were given for evidence to be exchanged and although it was not specifically stated in the previous case management order, I approach this on the basis that my task is to consider whether to strike out the claims. Tribunals have power to strike out claims under rule 37(1)(a) where they have "no reasonable prospect of success". That might be the case where the claimant has no reasonable prospect of satisfying the tribunal in due course that any of the claims are in time. That is a high test to meet, and the time limit issues would need to be particularly clear-cut, but I have found that to be the case here. I have done so on the basis of submissions from each side rather than by weighing the evidence presented, and taking the claimant's case at its highest.

3. Inevitably, in the course of explaining his position Mr Bwire has given some further information. He has also provided written further and better particulars of his claim. In fact, at the last hearing he was ordered to provide those further particulars. To some extent these go beyond the scope of the original claim. There is a distinction to be drawn between further particulars or further information about an existing complaint, and a new complaint altogether. To add a new complaint the permission of the tribunal is required. He is therefore also making an application to amend his claim, but I will deal the time limit issues first. That involves considering the further particulars which have been provided, together with additional information provided today.

4. Mr Bwire presented his claim form on 12 April 2022. In it he set out his description of the events in question in some detail. There are three pages of particulars and two subheadings – First Issue and Issue Two.

5. The first issue concerns an investigation in 2017. A colleague of Mr Bwire's, a colleague of colour, was being disciplined for an offence at work, details of which I do not have, and in the course of that investigation he raised a grievance about race discrimination at Orchard House. That led to an investigation into race discrimination. Mr Bwire was interviewed. He agreed that there was race discrimination there. However, when he had a further interview on 29 December he was presented with the statement that had been taken from him, and it said the opposite, that he did not believe there was any such discrimination. He was very concerned about this, not just because he had been misrepresented but because his colleague's grievance had been dismissed, the disciplinary proceedings had resumed and the colleague had been dismissed. He complained about this in the meeting as soon as he saw the statement.

6. According to his claim form, after that,

> "whenever I had the opportunity to ask what was happening with regards to the investigation, I was told that the investigation was taking place that I will be informed of the outcome. I trusted the system and waited for the answers"

7. The second issue is said to have occurred in the summer of 2019. The date is not given in the claim but it is now agreed that he first raised this issue in an email on 21 July 2019, so the events in question happened shortly beforehand. As he explained at this hearing, he came into work one evening and found a piece of paper on the floor with his picture on it. He picked it up. It also had his name and address, his phone number and his next of kin. He asked a colleague about it, and was told that it had been printed by a manager, Mr Williams. Mr Williams had been telling them that Mr Bwire was not going to be coming in that evening, that he was away from work, and he had been sharing personal information about him with others. It is not clear why, but that is the allegation. (It was originally raised as a data protection issue, rather than an allegation of discrimination.)

8. Having complained about it by email, he waiting for the outcome of an investigation. The respondent says that it concluded in February 2020. No formal disciplinary action was taken about Mr Williams and Mr Bwire was not told of the outcome because it was confidential. Consequently, Mr Bwire raised a grievance about this whole episode on 28 August 2021, over two years later.

9. I was able to see the grievance letter which was very generic. It just stated that he was raising a grievance about discrimination, harassment and victimisation. There were no further details. However, I also had the notes of the first grievance meeting, from which it is clear that the issues raised were these two major events - tampering with his witness statement in 2017 and the sharing of his personal data in 2019. These are obviously the same two issues raised in the claim form and relied on as the basis for the claims of harassment and direct discrimination. (The complaints of victimisation and detrimental treatment only relate to the second issue since there had been no disclosure or protected act in 2017.)

10. Claims of harassment, discrimination and victimisation are claims under the Equality Act 1010, whereas the claim to have suffered a detriment for having made a protected disclosure is a claim under The Employment Rights Act 1996. For the Equality Act claims, time begins to run from the last act of discrimination, or failure to act, as set out in s.123 EA:

> "(1) …. proceedings … may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (2) …
>
> (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 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.

11. Summarising these provisions therefore, there is a general three month rule with two exceptions. One is where it is just and equitable to extend time, and the other is where there is "conduct extending over a period." If so, it is treated as done at the end of that period. In other words, the employee has three months from the end of a series of acts of harassment or other mistreatment to bring a claim.

12. That three month period is now extended to allow for time spent in early conciliation before the claim is presented. In this case early conciliation began on 1 March 2022. Going back three months from that date, anything which took place on or before 1 December 2021 is out of time. (To be within three months it has to be after 1 December).

13. I will deal first with the test under the Equality Act. Starting with the events of 2017, this came to Mr Bwire's attention on 29 December that year. So, he had all the information he needed at that point to bring a claim, and should at least have started early conciliation by 28 March 2018, three months later. It seems that the respondent did nothing about the fact that his witness statement was wrong or had been misrepresented and he simply waited.

14. At no point, it seems, did the respondent make clear that they were not going to do anything about this. In those circumstances the position is governed by section 123(4)(b) of the Act, quoted above. This determines *when* the respondent is taken to have failed to do anything about it. It is at the end of the period in which they might reasonably have been expected to do something. The purpose of this provision is to draw a line somewhere. Inactivity is not simply treated as an ongoing failure, so that as long as nothing is being done Mr Bwire has the option of complaining to a tribunal about it.

15. It is difficult to judge to a nicety but in my view a reasonable period has to be measured in months not years. No reasonable employee would wait 12 months for any action to be taken in respect of a concern of this nature. Even if 12 months was allowed, the claim would still be over three years out of time, and I can see no reaso prospect that a full tribunal, having heard all the evidence, would regard it as just and equitable to allow this further delay. A reasonable period in the circumstances has to take into consideration the three-month period permitted for claims to be brought.

16. The same considerations apply with almost equal force to the second episode involving Mr Williams. The features are very similar. This time the events in question occurred in or around July 2019. Again, the question has to be asked what is a reasonable further period. And again, that has to be answered in months rather than years. So, taking his claim at the highest, and on the basis that he heard nothing further about this data protection issue after his original email complaint, he should within a few months of that email have been in a position to commence early conciliation, from perhaps October 2019. But early conciliation was not begun until March 2022, nearly 2 ½ years later. As before, there is no real explanation for the delay except that he was waiting for a response. Hence, I come to the same conclusion that there is no reasonable prospect of a tribunal concluding that it would be just and equitable to extend time so far.

17. Claims under the Employment Rights Act however have a more stringent test. A Tribunal can only consider the claim if it is satisfied that it was "not reasonably practicable" for it to be presented in that time. Even then, it can only do so if that it was presented within a further reasonable period (s.111(2) Employment Rights Act 1996 (the ERA)).

18. In **Palmer and anor v Southend-on-Sea Borough Council** 1984 ICR 372, the Court of Appeal held that "reasonably practicable" does not mean "reasonable", which would be too favourable to employees, and does not mean "physically possible", which would be too favourable to employers, but means something like "reasonably feasible". That is not a test that makes any allowance for delay on the part of the employer and it would have been reasonably feasible for Mr Bwire to have brought these proceedings within three months of the events in question. Again, I can see no reasonable prospect of a different outcome.

19. Accordingly, all of the complaints set out in the claim form are substantially out of time and have to be dismissed.

Application to amend

20. There was also an application to amend the claim to add further complaints at this late stage, or at least I have treated it as such. As already noted, Mr Bwire was ordered to provide further information and it was expected at the last hearing that there would be an application to amend. There has been no such written application but the further information goes beyond the existing claim form in some respects. It is however very broad in its scope and lacking in detail. The main points are summarised in a table. This provides, for example that on various occasions Mr Bwire was told that there were duties for black colleagues not white colleagues. The only detail provided is that this occurred in practically every year of his employment from 2014 to 2022. The next allegation is that he was told to "man up" and "work as a black person" and again this is said to have occurred every year.

21. There is some more specific detail but this is mainly an elaboration of the two main complaints set out in the claim form. One point made relates to the proceedings involving Mr Williams. He says that he found out that there was an apology from Mr Williams on his file and that he was recorded as having accepted it. He says that this is completely untrue.

22. This detail is also mentioned in the minutes of the grievance investigation meeting when he is recorded as saying that he found this out about two weeks earlier, which would have been in early September 2021. That was not however stated, even in the further information, to be an act of discrimination. Instead it was referred to as a criminal act.

23. In considering applications to amend, the key test, applying the principles in the case of **Selkent Bus Company v Moore** 1996 ICR 836, is the balance of

prejudice between the parties. The Tribunal has to carry out a careful balancing exercise of all the relevant factors, in particular:

a) The nature of the proposed amendment. Applications to amend range, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, and on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action;

b) The applicability of time limits - if a new claim or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that claim or cause of action is out of time and, if so, whether the time limit should be extended; and

c) The timing and manner of the application - an application should not be refused solely because there has been a delay in making it as amendments may be made at any stage of the proceedings. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery.

24. Taking these in turn, firstly the bulk of the further information provided is in the form of rather sweeping background statements about the prevalence of race discrimination at work. They are not in a form which could be addressed by the respondent, let alone by a tribunal, in due course. The disputed apology is certainly specific enough, but has not been described as an act of discrimination.

25. Secondly, there are the time limits. The disputed apology is the most recent point mentioned and there is no reason why that could not have been included in the original claim form. Although not so glaringly out of time, the relevant cut-off date is 1 December 2021 and so early conciliation did not occur until about six months after Mr Bwire found out about this incident. Even if this were regarded as an act of discrimination it would have been out of time from the outset and we are now over a further year on.

26. Thirdly, there is the timing and manner of the application. There has been no written application to amend and no clear particulars have been provided. This is not the first preliminary hearing and there is no real explanation for the delay.

27. In those circumstances, particularly given the time limit issue, there is no basis now to allow an amendment, even if the allegations could be identified with any clarity. If it were allowed it would mean introducing new factual allegations, all of which could have been made in the original claim form but were not, while all of the allegations in the claim form have been struck out as out of time.

28. Accordingly, the balance of prejudice is against allowing any amendment, and so there are no remaining live complaints in these proceedings.

Employment Judge Fowell

Date 25 July 2023