



EMPLOYMENT TRIBUNALS

Claimant: Mr Michael Cotteral

Respondents: Currys Group Limited

Record of an Open Preliminary Hearing at the Employment Tribunal

Heard at: Nottingham

Heard on: 25 July 2023

Before: Employment Judge Hutchinson (sitting alone)

Representation

Claimant: In person

Respondent: Miss Ferrario, Counsel

JUDGMENT

The Employment Judge gave Judgment as follows:

1. The Tribunal does not have jurisdiction to hear the claim of racial harassment. It is dismissed.
2. The other claims proceed to hearing.

REASONS

BACKGROUND TO THIS HEARING

1. The Claimant presented his claim to the Tribunal on 10 January 2023. He had notified ACAS under the Early Conciliation procedure on 7 November 2022 and a certificate had been issued on 19 December 2022.
2. As a result, any incident that occurred prior to 8 August 2022 is outside the primary time limits.
3. The Claimant has been employed by the Respondent as a Notebook Engineer since 10 December 2007.
4. His claims are of:
 - 4.1. Harassment related to his race.
 - 4.2. Disability discrimination, namely failure to make reasonable adjustments.
5. The case is listed for final hearing commencing on 10 June 2024.
6. The incidents of racial harassment are alleged to have occurred between June and October 2019.
7. At a Preliminary Hearing conducted by my colleague Employment Judge Ayre on 31 March 2023 she ordered that there should be a Preliminary Hearing to consider:
 - 7.1. Whether the Claimant is disabled by reason of Lateral Epicondylitis and/or depression.
 - 7.2. Whether the Tribunal has jurisdiction to hear the claim of harassment related to race as it was presented more than 3 months after the last act complained of. I would have to consider whether it would be just and equitable to extend time.
 - 7.3. Consider the length of the final hearing and the dates of it.
 - 7.4. Discuss the possibility of Judicial Mediation.
 - 7.5. Make Case Management Orders to prepare the case for the final hearing.

THE DISABILITY ISSUES

8. The Respondent have accepted that the Claimant at the relevant time suffered from a disability mainly Lateral Epicondylitis and depression.

THE RACIAL HARASSMENT CLAIM

9. The Claimant brings a claim of harassment related to race.
10. I had an agreed bundle of documents and a witness statement of the Claimant's Union Representative. I also heard evidence from the Claimant. Where I refer to page number it is from the agreed bundle.

THE FACTS

11. The Claimant alleges that his Line Manager, Ian Henderson made racist remarks to him after he purchased a BMW motor vehicle in June 2019. He says that Mr Henderson made a comment to him that "*he looked like a drug dealer in his car*". He says that another colleague who was white had bought the same car but did not suffer such a comment. He says that the comment was made on more than one occasion but the last time it occurred was in October 2019 when he challenged Mr Henderson and he stopped using the comment in the future.
12. Mr Cotteral has an ongoing issue with his left arm called Lateral Epicondylitis. He has been prescribed pain killers, but the condition has not improved.
13. In 2020 he was off for 4 months between March and July 2020 and again for a further 4 months between August and December 2020.
14. There were numerous Occupational Health reports, and the Claimant raised a grievance about his treatment and Respondent's failure to make reasonable adjustments.
15. I have seen the letter of grievance dated 3 August 2021 at pages 96-98. He made no mention in that written grievance about any issue with Mr Henderson relating to racial harassment.
16. His grievance was discussed with the Senior Operations Manager, Christopher Sadler at the grievance meeting on 12 October 2021.
17. At the end of the grievance meeting, he raised the issue of Mr Henderson's comment, and it was agreed that there should be a separate grievance hearing in respect of that.
18. On 14 October 2021, Jules Kandola, Operations Manager investigated his allegation of racial harassment.
19. The notes of that meeting are at pages 117-123.

20. Mr Kandola then conducted interviews with the witnesses and this is confirmed in his email to Mr Cotteral dated 1 November 2021 at page 127.
21. On the Claimant's return from his sickness absence in December 2021 discussions took place about how to resolve his issues with Mr Henderson. He was offered mediation but declined this. No further action though was taken in respect of his grievance with Mr Henderson.
22. On 25 February 2022, Mr Sadler wrote to him with the outcome of their grievance meeting that had been held on 12 October 2021. That outcome only related to his health issues.
23. Mr Cotteral decided to appeal against that outcome on 11 March 2022 (page 156-157).
24. There was then a further delay in dealing with that grievance and the grievance meeting did not take place until 5 May 2022.
25. At that grievance appeal hearing he again raised the issue of Mr Henderson's behaviour. At the hearing Mr O'Donnell expressed a view that Mr Henderson's comment had not been racial harassment and it can be seen by the Claimant's email of 5 August 2022 (pages 178-179) that he saw the outcome as a racist slur being called banter.
26. Mr Cotteral did nothing further.
27. On 11 August 2022 Mr O'Donnell wrote with the outcome of the grievance. The letter is at pages 174-177. In that letter Mr O'Donnell commented:

"In your grievance meeting I asked you, could this have been taken in the wrong context by yourself, to which you replied, *"To be fair yes"*. *"That being said this needs to be addressed separately and my recommendations will be passed to Damian Rodgers to follow up."*
28. The Respondent took no further steps, and the Claimant did not receive this letter which was sent by email and had to ask for the outcome letter to be resent which he finally received on 18 October 2022.
29. He took no further steps in the meantime.
30. He then contacted ACAS about his claim under the Early Conciliation Procedure and the notification is date 7 November 2022. The certificate was issued on 19 December 2022 and his claim which included the claim of racial harassment was presented on 10 January 2023.

THE LAW

31. Section 123 Equality Act 2010 provides:

“(1) Subject to 140B proceedings on a complaint within section 120 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”

32. The ACAS Early Conciliation extends the time for presenting a claim form as set out in section 140B Equality Act 2010.

33. I have a wide discretion in determining whether or not it is just and equitable to extend time, but I have to consider everything that I believe to be relevant.

34. It should be remembered that time limits in the Tribunal are strictly applied and that the exercise of the discretion should be the exception rather than the rule.

35. Miss Ferrario has referred me to the cases of:

- ***British Coal Corporation v Keeble & Others [1997] IRLR336***
- ***Secretary of State for Justice v Johnson [2022] EAT1***
- ***Bexley Community Centre v Robertson [2003] IRLR434***

36. It is important for me to consider the whole picture when considering whether to exercise my discretion including the Claimant’s knowledge of the facts giving rise to his claim, his knowledge of his right to claim and the enforcement of those rights. If he was ignorant of the time limit was this reasonable. This is because there is an obligation on the Claimant to seek information or advice about enforcement of their rights.

37. When considering whether to exercise my discretion I should consider the length and reason for the delay and the extent to which the cogency of the evidence is likely to be affected by the delay.

MY CONCLUSION

38. The allegations in this case relate to a period between June and October 2019. It is now 4 years since the alleged incidents happened.

39. It is not a continuing act. According to the Claimant the last act of discrimination occurred in October 2019 when he says he challenged Mr Henderson about his

behaviour and says that there was no repetition in that behaviour subsequently.

40. The Claimant says that he complained at the time, but he made no mention of it in his written grievance that he made on 3 August 2021 some 2 years later.
41. He only mentioned it in the grievance meeting covering other matters on 12 October 2021 and then had a further meeting with a different colleague on 14 October 2021.
42. Even if he had done something at that time, he would be well outside the time limit for making a complaint.
43. The Respondent tried to deal with the matter by the way of mediation, but the Claimant wouldn't agree to it and then he did nothing further about the matter until he raised it again at his grievance appeal meeting in May 2022. Even after that meeting, he still did nothing about it even though he knew at that time that his complaint about Mr Henderson was not upheld.
44. Mr Cotteral did not contact ACAS until November 2022 by which time 3 years had elapsed since the incident occurred.
45. I am satisfied that there is no good reason for the Claimant's delay in issuing his proceedings. Certainly, after the meeting in May 2022 he knew what the position was as described in his email of 5 August 2022 yet he still did nothing.
46. Time limits in the Tribunal are strictly applied and the burden of proof is on the Claimant to establish that it would be just and equitable to extend time.
47. In this case the events occurred so long ago it would be extremely difficult for people to remember what was said and the context of anything that was said. This would cause great prejudice to the Respondent in trying to defend the allegation.
48. There is no good reason why the Claimant could not have presented his claim in time, and I am therefore not satisfied that it would be just and equitable to extend time in the circumstances of this case.

LISTING A FURTHER HEARING

49. The remainder of the Claimant's claims of disability discrimination are already listed for a full hearing. I have decided that the hearing should take place over 4 days. The claim will now be heard by an Employment Judge sitting with members at the **Tribunal Hearing Centre, 50 Carrington Street, Nottingham NG1 7FG on 10 June 2024, 11 June 2024, 12 June 2024 and 13 June 2024**. The hearing will start each day at 10.00am and the parties should arrive 30 minutes before the start time. The first morning though will be a reading morning and on the first day the parties should not arrive before 1.30pm so the hearing can start promptly at 2.00pm. 4 days have been allocated to hear all the evidence, to determine the issues and deal with any remedy.

JUDICIAL MEDIATION

50. I raised the question of Judicial Mediation and said that in my view this case was suitable. The Claimant is interested in Judicial Mediation and the Respondent will write to me within 14 days to let me know if they are interested. If so, a further Telephone Case Management Discussion will take place at which a Judicial Mediation will be listed for a private hearing and Case Management Orders made in respect of that.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

DOCUMENTS

1. The Claimant and Respondent must send each other a list of all documents they have relevant to the issues. This includes documents relevant to financial losses and injury to feelings **by 31 October 2023**.
2. If the Claimant or the Respondent want copies of any documents, they must ask for them and copies must be sent to them **by 14 November 2023**.
3. Documents includes recordings, emails, text messages, social media and other electronic information. The parties must list all relevant documents they have in their possession or control even if they do not support their case.

FILE OF DOCUMENTS

4. The Claimant and Respondent must agree which documents are going to be used at the hearing. The Respondent must prepare a file of those documents with an index and page numbers and send an electronic version and a hard copy to the Claimant **by 28 November 2023**.
5. The file should contain:
 - 5.1. The claim and response forms, any change or additions to them and any relevant Tribunal Orders in the front of the file.
 - 5.2. Other documents or parts of documents that are going to be used at the hearing in date order.
 - 5.3. The Claimant and the Respondent must both bring a copy of the file to the hearing for their own use.
 - 5.4. The Respondent must deliver **4 copies** of the file for the hearing for the Tribunal to use **by 4.00pm on 7 June 2024**. The Respondent must also provide to the Tribunal an electronic version of the same.

WITNESS STATEMENTS

- 6. The Claimant and the Respondent must prepare witness statements for use at the hearing. Everybody who is going to be a witness at the hearing including the Claimant needs a witness statement.
- 7. A witness statement is a document containing everything relevant the witness can tell the Tribunal. Witnesses will not be allowed to add to their statements unless the Tribunal agrees.
- 8. Witness statements should be typed if possible. They must have paragraph numbers and pages numbers. They must set out events, usually in the order they happen. They must also include any evidence about financial losses and any other remedy the Claimant is asking for. If a witness statement refers to a document in the file it should give the page number.
- 9. At the hearing the Tribunal will read the witness statements. Witnesses may be asked questions about their statements by the other side and the Tribunal.
- 10. The Claimant and the Respondent must send each other copies of all their witness statements **by 30 January 2024**.
- 11. The Claimant and the Respondent must both bring copies of all the witness statements to the hearing for their own use.
- 12. The Respondent must deliver **4 more copies** of the witness statements to the Tribunal for the hearing to use **by 4.00pm on 7 June 2024**. They must also deliver an electronic version of the same.

Employment Judge Hutchinson

Date: 3 August 2023

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

CASE NO: 600058/2023

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