Case Number: 3322402/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Musa	**v**	**Bakkavor Food Ltd**

Heard at: Watford Hearing Centre **On**: 13 February 2023

Before: Employment Judge Tobin

Appearances
For the Claimant: In person
For the Respondent: Mr S Healey, solicitor

JUDGMENT

1. **The Judgment of the Employment Tribunal that that the claimant's claims made on 21 October 2021 was presented outside the statutory time limit contained in s123 Equality Act 2010. The Tribunal declined to exercise its discretion to allow this out of time claim to proceed.**

2. **The proceedings are accordingly dismissed.**

3. **As proceedings were dismissed the application to amend is refused.**

REASONS

The hearing

1. The case management hearing was ordered by Employment Judge Shastri-Hurst following the Private Preliminary Hearing of 30 November 2022. The issues to be dealt with were to determine the claimant's application to amend his claim and to determine whether the claims were presented within the appropriate time limits. As there was a jurisdictional point to determine, I took the time limit point first.

The law

2. Claims of discrimination in the Employment Tribunal must be presented *within 3 months* (i.e. 3 months less a day) of the act complained of, pursuant to s123(1) EqA. Acts of discrimination often extend over a period of time, so s123(3)(a) EqA goes on to say that "conduct extending over a period is to be treated as done at the end of the period". In addition, Employment Tribunals have a discretion to extend the 3-month time limit period if they think it *just and equitable* to do so, under s123(1)(b) EqA.

3. For a discrimination complaint, *continuing acts* under s123(3)(a) EqA are distinguishable from one-off acts or discrete acts that have continuing consequences; in such circumstances, time runs from the date of the discrete complaint of; see *Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96, Aziz v FDA [2010] EWCA Civ 304* and *Okoro and another v Taylor Woodrow Construction Limited and others [2012] EWCA Civ 1590*.

4. The ACAS Early Conciliation period will extend time limits for the parties to attempt to resolve their differences without the need for Employment Tribunal proceedings: see s18A and s18B Employment Tribunals Act 1996 and the Employment Tribunals (Early Conciliation: Exemption and Rules of Procedure) Regulations 2014.

5. There is no presumption that Employment Tribunal's should extend time, the onus is on the claimant to persuade the Tribunal that it is just an equitable to do so: *Robertson v Bexley Community Centre CA [2003] IRLR 434*.

6. In exercising any discretion, the Tribunal should consider the prejudice that each party would suffer as a result of granting or refusing the extension of time and should have regard to all of the other relevant circumstances. *British Coal Corporation v Keeble [1997] IRLR 336* said that the Tribunal should adopt the factors set out in s33 Limitation Act 1980 as useful checklist:
   - The length of and reason for the delay
   - The extent to which the cogency of evidence is likely to be affected by the delay
   - The extent to which the party sued had cooperated with any requests for information
   - The promptness with which the claimant acted once he knew the possibility of taking action
   - The steps taken by the claimant to obtain appropriate professional advice once he knew of the possibilities of taking action.

7. A key issue to be addressed, according to *ABM University Local Health Board v Morgan UK EAT/0305/2013* is as follows:
   a. Why was it that the primary time limit had been missed?
   b. Why, after expiry of the primary time limit, was claim not brought sooner than it was?

8. The Court of Appeal said in *London Borough of Southwark v Afolabi [2003] IRLR 220* that a Tribunal is not required to go through all of the above checklist in considering whether it is just and equitable to extend time, provided no significant factor had been left out in the exercise of the Tribunal's discretion.

The claim

9. The claimant presented a claim on 21 October 2021 which claimed age discrimination, race discrimination and victimisation. In the Claim Form he said that his employment was continuing, and he started work for the respondent on 4 March 2019 as a Process Controller.

10. The claimant's employment ended on 14 March 2022, and he sought to make amendments to add further claims in respect of: (1) the continuation of the disciplinary process; and (2) his dismissal on 14 March 2022. So far as I can tell from the join bundle of documents, the amendments were first raised on 22 November 2022, shortly before Judge Shastri-Hurst's hearing, so they are, on the face of it, significantly out-of-time.

11. In respect of the claims made and accepted, the claimant's details of compliant were difficult to discern but a broad summary of the claim was that the claimant made complaints against his team leader for denying him training and experience in various jobs. The claimant contended that matters got worse, and he absented himself from work. The respondent then embarked upon disciplinary procedures. Judge Shastri-Hurst drafted a list of issues, which the respondent took issue with. Mr Healey provided a helpful schedule of claim from the draft list of issues.

12. We went through the schedule of claim, and I confirmed with the claimant the appropriate dates the cause of action arose and whom the complaints were directed against so I could address whether or not these amounted to ongoing contended discriminatory conduct and the start and end dates of the acts ongoing discriminatory conduct in question.

13. Allegation 1 to 8 on the schedule of claims were directed against the claimant's supervisors who were Vinod and/or Kunar. These are the claims identified at Issues 1.2.1, 1.2.2, 1.2.3, 1.2.5 and 1.2.6. The claimant said these claims were said to range from end of 2019 until the end of his employment.

14. So far as the allegations at 1.2.4 of not been allowed to work the CQC machine independently, and at other locations, the claimant said that these allegations were made against his manager, Harban, and the section manager, Harde. The claimant said those allegations ran from the start to the end of his employment.

15. The claimant said claim at 1.2.6 was made against Vinod and Kunar and also a colleague at the same level as the claimant, Ashvin. This relates to various dates between 29 January 2021 to 8 February 2021.

16. In respect of claim 1.3, the claimant said he did not know who was responsible for telling him of the vacancy for the team leader in January 2021. He said that this is a claim of direct race discrimination but when I

asked him why he thought he ought to be told, the claimant could not provide details.

17. So far as the detriments for victimisation, the allegations in respect of the disciplinary processes were not recorded accurately by Judge Shastri-Hurst as proceeding were issued on 21 October 2021 (with the ACAS Certificate 1 month earlier) so it did not include any allegations about recommencing the disciplinary process. I changed this with the parties on the list of issues at the hearing to reflect the details of complaint more accurately. At paragraph 22 of the details of complaint the claimant said on 22 February 2021 he was invited to a disciplinary meeting. He said that he was invited to this disciplinary meeting by Tia McKenzie who was the temporary HR associate. He said that this was at the instigation of Mirka Thomsen. This is an allegation of direct race discrimination.

18. Mr Healey contended that this was the last of the allegations that the claimant had made , and arose on 22 February 2021.

19. The claimant contended that there were further claims made on the face of this claim form. The claimant said at paragraph 23 identified a complaint of direct race discrimination. The allegation is made against Leisha Wheeldon who was the HR apprentice. Ms Wheeldon had made or communicated a decision on 26 February 2021 to put the disciplinary meeting scheduled on hold until the claimant returned to work. The allegations centres on the temporary pause of the disciplinary procedures once the claimant was sick. On behalf of the respondent, Mr Healey said that this could not possibly be an allegation of discrimination because it involved no detriment to the claimant. Whilst I agree with Mr Healey that this allegation sounds very weak, the claimant seemed to be saying at the hearing that the detriment was, in effect, that disciplinary matters hung over his head, so presumably the claimant's case on this point is that he was fit enough to proceed with the disciplinary matter whilst signed off sick.

20. The claimant said that any date referred to in his details of complaint related to a detriment; but this cannot be right.

    20.1 Paragraph 24 refers to a welfare meeting, which does not identify any detriment.

    20.2 Paragraph 24 also refers to a grievance meeting but there is no discernible complaint of discrimination made in respect of this grievance meeting.

    20.3 Paragraph 25 the claimant refers to a grievance meeting outcome. The claimant said that he did not agree with the finding of wrongdoing, and he said he was going to appeal. He did not contend that the outcome was discriminatory in any discernible way, merely that he disagreed with it. He said that he was overlooked in recruitment and the grievance failed to answer this question which he said he would take up later in the process if he was not satisfied with the employer's answer. This reference would explain an ongoing chronology with is employers, it does not, in my determination, reveal (or can be read as) a complaint of some form of discrimination.

21. The claimant had previously withdrawn his complaints of age discrimination, and this was identified by Judge Shastri-Hurst.

22. The claimant provided a witness statement by email on the Sunday night just before the hearing at 23.57. This was a short statement. Mr Healey did not object to the claimant giving evidence in breach of Judge Shastri-Hurst's order and I thank him for his constructive attitude in this regard. Consequently, I allowed the claimant to give evidence notwithstanding his non-compliance with Employment Tribunal orders.

My findings of fact

23. I then identified that these claims were out of time. The claimant issued proceedings on 21 October 2021. The ACAS Early Conciliation process lasted from 10 August 2021 until 21 Septemebr 2021. The respondents contended that that proceedings ought to have been commenced by 11 May 2021. If I allow, which I do, 26 February 2021 as the last discriminatory act contended, then the claimant needed to issue proceedings (or apply for an ACAS Early Conciliation Certificate) by 25 May 2021. Consequently, he is almost 5 months out of time.

24. I have seen correspondence form the respondent requesting this hearing to be postponed because the claimant had not complied with case management orders. Shortly before the hearing I directed that the hearing would continue as scheduled and that the parties should prepare accordingly.

25. The claimant contended that his claims were brought in time.

26. The claimant contended that his complaints were ongoing act, such that, effectively, either they did not have a limitation date or that the limitation occurred at his dismissal.

27. The claimant's complaints in respect of training and experiencing different jobs in different locations might represented linked or continuous claims because of the individual connected and the issues about training first (with Vinod, Kunar and then possibly Ashvin) and then with the job relocation (involving Harben and Harde). The first tranche arose from August 2019 to mid-2020 and the second tranche arose around the same time span. The claimant said that he raised these matters at the time quoted above, but I am not convinced because he did not put any request in writing, there is no evidence of the claimant raising concerns when this training etc did not happen and there is no contemporaneous documentation to corroborate anything similar. The claimant is not a reliable historian and I do not accept his evidence without documentary corroboration. There is a similarity between the 1.2 allegations and 1.3 where he thinks something should have been say or done, albeit for that allegation the claimant again did nothing. These are discreet allegation in respect of either a decision taken being taken or, more likely not being taken such as to arise when it reasonably ought to have been done and that was on or around the first date that the claimant ascribes to the detriment. The decisions may have had ongoing consequences, but they were not ongoing acts because the claimant did not repeat any requests. Even if he did raise these claims in the first place (which I am not persuaded he did), he is still significantly out of time.

28. So far as the victimisation claims, the last is 26 February 2021 and that is out of time also.

My determination

29. The claimant said that he was in physical and mental pain and that even thinking about going to court would have made matters worse. He provided no further details. The claimant did not provide any medical evidence in this regard. The claimant did not contend that he had a disability in respect of the matters raised in his email. At the previous hearing I read that the claimant said that he had a hearing impairment, which he repeated to me, and he asked me to speak loudly. On his Claim Form he identified that he needed a room with suitable acoustics. No other suggestion for adjustments or contentions of possible impairment were made. I accepted that the claimant might have difficulties in hearing, but I do not accept that he has any other disability or impairment because he has not argued this up until this date nor has been provided any relevant medical evidence to make any sound determination.

30. The claimant said that he did not know anything about such limitations until he started to have contact with ACAS. This is, I think, the real reason for his delay, see *ABM University Local Health Board* above. He thought that the limitation period did not apply to him.

31. The claimant said that he was able to contact ACAS on 2 or 3 occasions in total, i.e. once or twice before he obtained an Early Conciliation Certificate. The claimant was very vague in his evidence in this regard. I make my findings in respect of the claimant's evidence below. It is surprising that in a claim where the importance of complying with time limits has been stressed that the claimant was not able to provide any specifics and he seemed to be evasive in answering any questions. In one of his answers the claimant said that he had obtained independent legal advice; when he was pressed in respect of this by Mr Healey, he said that that he had been to see a number of solicitors. The claimant could not remember how many solicitors he had been to see or talked to but there had been at least one solicitor who had provided him with ongoing advice. The claimant had confirmed that on 25 July 2021, at least, he had obtained legal advice. This was about 3 weeks before he contacted ACAS for an Early Conciliation Certificate. The claimant said that he was advised by his solicitors that because he was still in employment at that time the complaint was ongoing and time limits did not come into issue.

32. Overall, I find that the claimant was not a reliable witness. I did not think he told me a true story. The claimant could not explain why he chose not to lodge his claim initially but then why he changed his mind and applied for an early conciliation certificate in August 2021 and then subsequently issued proceedings in October 2021.

33. The claimant was surprisingly unreliable about obtaining legal advice and about speaking to ACAS. If he was not sure on the relevant dates that he spoke to various individuals then he ought to have ben able to remember approximately when this occurred, i.e., whether it was in the beginning of July 2021 or whether it was before the limitation time expired or whether it

was in mid-July 2021, late July 2021 or early September 2021. He should have been able to remember roughly how many solicitors he went to and roughly how many times he spoke to ACAS.

34. The claimant denied that he was advised in respect of any of these conversations about appropriate time limits, save as the last solicitor, which I find inconceivable.

35. Generally, I found the claimant unwilling to answer straightforward questions. He was vague and inconsistent in his response about, in particular, why he chose not to lodge his complaints about the lack of training around July 2019 and December 2019 and May and June 2020. I believe he was not truthful in respect of his purported stress and anxiety, he produced no medical evidence despite being prompted to do so by the Tribunal and the respondent.

36. I considered the issue of prejudice closely. Mr Healey said that the respondents would be prejudice in responding to various out of time claims. He said that the respondents were entitled to look to certainty in the Tribunal process which would encompass some degree of finality. He said that there must be respect for the employment Tribunal's limitation process and it would generally be detrimental for the respondents to have to respond to proceedings which are, at best, 4 months out of time without an adequate explanation.

37. The prejudice to the claimant is not being able to pursue this complaint, for which no adequate explanation has been given for non-compliance with time limits other than a misinterpretation of the law.

38. For completeness, the respondent has not argued that the cogency of evidence is likely to be affected by the delay, but that is only one factor of many. There is no contention from the claimant that the respondent has not cooperated with any requests for information. Indeed, the reverse is the case, as the respondent have engaged with the tribunal process in order to find out more in respect of the claimant's claims.

39. So far as the claimant's conduct, Mr Healey made the observation that the claimant had declined to particularise his claim. I note the claimant did not comply with the order for further particulars of Judge Manley dated 19 July 2022 nor did he comply with the order of Judge Shastri-Hurst of 3 November 20223 which was very clear in setting out the requirements for witness evidence at this hearing. The claimant could not provide an adequate explanation why he did not comply with these orders.

40. I allowed the claimant to produce evidence notwithstanding the lack of adequate explanation for his non-compliance with the order of Judge Shastri-Hurst because the claimant was facing a strike out and I wanted to afford him the opportunity of haring all possible matters. However, the claimant has demonstrated in the short currency of this claim, a history of ignoring any orders, without any adequate explanation, which he doesn't want to do. So, when I assess the balance of prejudice, I am mindful that although the claimant will not be able to pursue a remedy against the respondent, this is recalcitrant claimant who has little regard to the orders of the tribunal.

Conclusion

41. In summary, the claimant's complaints are out of time and for the reasons stated above, it is not just and equitable to extend time in respect of the claimant's direct race discrimination complaint and victimization complaints, pursuant to s123(3) EqA.

Disability

42. As I determine the Employment Tribunal does not have jurisdiction to hear this complaint, such a decision to amend the claim is otiose. There is no basis upon which to allow the amendment.

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Employment Judge Tobin

Date: 11 September 2023

JUDGMENT SENT TO THE PARTIES ON

12 September 2023

FOR THE TRIBUNAL OFFICE