



EMPLOYMENT TRIBUNALS

Claimant: Mr R Hughes

Respondent: Esure Services Ltd

Heard at: Manchester (by CVP)

On: 3 June 2024

Before: Employment Judge Serr

Representation

Claimant: In person

Respondent: Mr G Murphy (Solicitor)

JUDGMENT having been sent to the parties on 14 June 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. The Claimant brings claims for Unfair Dismissal and Sex Discrimination.
2. The Unfair Dismissal revolves around a purported redundancy dismissal with a consultation exercise beginning in June 2023 and being given notice of redundancy on 5 July 2023 with an Effective Date of Termination on 14 September 2023.
3. The challenge to the dismissal is identified in EJ Aspinall's case management summary at paragraphs 26-28. It is unnecessary for the Tribunal to repeat the grounds set out in the Order but they do not involve any allegations of discrimination.
4. The Claimant also brings claims for direct Sex Discrimination under s.13 Equality Act 2010 (EqA).
5. The claims are identified by Judge Aspinall at paragraphs 22-24 of the previous Order. They are as follows
SXD1: The claimant complains of less favourable treatment by Graham Hughes in January 2020 when he did not allow the claimant to back fill his

RNM role when acting up. He cites Julie Murray as a direct actual comparator whose circumstances were not materially different to the claimant's; she was a D3 stepping up, but she was allowed to back fill and he, as a male, was not.

SXD2: The claimant complains of less favourable treatment by Graham Hughes in January 2020 through to May 2022 during the period when the claimant was both RNM and acting up doing two jobs. He cites Julie Murray as a direct actual comparator whose circumstances were not materially different to the claimant's; she was a D3 stepping up, but she was allowed to back fill so that she did only one job, and he, as a male, was required to do two.

SXD3: the claimant complains of less favourable treatment by Graham Hughes from spring to autumn 2022 through to the appointment of Dawn Marsden on 24 November 2022, in that he says he was excluded from recruitment because he was a man.

The claimant has some difficulty pointing to an actual or hypothetical comparator here as he accepts that the respondent's decision was to recruit externally and this decision would have prejudiced him and Julie Murray equally, so that it was not his sex that prevented him getting the role but the fact that he was already an internal candidate. The claimant is aggrieved that the respondent was allowed to instruct agents (if indeed it did) to seek to engage a woman and to pursue its action of seeking to address its gender pay gap through a strategy of engaging qualified females over qualified males into higher paid roles.

6. The Claimant seeks to add some additional allegations of direct Sex Discrimination by way of amendment. These can be labelled "SXD4" and all relate back to some issues around the time of the secondment in early 2020. The amendment was intimated at the time of the Preliminary Hearing (PH) in front of Judge Aspinall in April 2024 but not actually submitted until May. They are set out in the Claimant's witness statement to the Tribunal at p.151 of the bundle presented today. They are as follows:

- 6.1 CCO leadership team WhatsApp group – Whilst JM was added to the WhatsApp group immediately, I only found out about the WhatsApp group over the coming weeks when I attended one of CCO's direct reports' team meeting and some of the team were talking about sharing information within the WhatsApp group. I didn't pay much attention to this at the time, but it did make me feel excluded, as I was not part of this group. When I discussed this with the CCO, he said that he was surprised that I was not part of the group and said he would correct this. I was then added to the group.

- 6.2 Job titles for interim roles – Julie Murray appeared to have her job title changed with immediate effect, to reflect her new interim role, whilst my job title remained the same and despite raising this with the CCO at the time and on future occasions, it took until 2022 for my job title on esure's HR systems to reflect my secondment position as Head of Repairs & Engineering and this only happened as I insisted for this to happen, prior to me asking to be moved back into my substantive role, to ensure that the job title was recorded on esure's HR

6.3 SLT communications and meetings – In my secondment position of Head of Repairs & Engineering, it was essential for all SLT members to attend monthly SLT meetings (remote or face to face) and to also receive regular communications. As my job title on esure's HR systems did not reflect the seniority of the role that I was seconded to, I was excluded from all such communications and meetings, whilst JM was included in them. This was a direct result on the CCO treating JM's secondment more favourably than my own. As I was not aware of any such communications or meetings, a number of months went by when I would hear colleagues referring to SLT this or SLT that and I initially didn't take much notice of this, until it became clear that I was the only member of the CCO's direct reports that was not involved in any of these discussions. I broached this with the CCO and asked why I had been excluded from the SLT communications and meetings and he said it must have been an administrative oversight. I resolved this matter myself by speaking to my colleague who managed the SLT distribution list and she added me to the list and apologised to me. Being excluded from the SLT meetings and communications had a detrimental impact on my ability to communicate all of the relevant leadership messages to my team of circa 72 employees, who often heard the SLT messages from other colleagues in other departments, which undermined my position as their leader.

Procedure

7. Judge Aspinall listed a public PH to deal with a number of matters.
 - (i) Whether the Claims for SXD were out of time and if time should be extended
 - (ii) Whether the amendments should be permitted
 - (iii) To consider a deposit order in respect of the SXD
 - (iv) Case management orders

8. At the outset it was clear to the Tribunal and agreed by the parties that the key issue was time limits. If the claims for Sex Discrimination were permitted to proceed the amendment would be difficult to resist. Likewise, if the claims were not permitted because they were out of time and it was not just and equitable to extend the time limits, the amendment and the deposit application became otiose. Accordingly, the case proceeded by hearing evidence and submissions on the time limits points and assuming that the amendments were to be included. The Tribunal had a 202 page bundle, but only considered documents it was taken to (which included the Claimant's witness statement and written submissions from both parties). It heard evidence from the Claimant and submissions from both parties.

The Facts

9. The following brief facts are necessary to resolve the time limits issues
10. The Claimant was previously employed as part of RAC's accident management services in the senior leadership team. This was a management level role. The Claimant was a long term member of a Trade Union but was not involved in ET litigation.
11. The Claimant was employed with the Respondent's insurance business from April 2017 as a senior repair network manager. He was on a relatively substantial salary of over £75 000 per annum plus benefits. He had 9 direct reports in this role.
12. On 1 December 2019, the Claimant and the Respondent agreed that the Claimant would act up as Head of motor repairs and Engineering Services on a temporary basis. The Claimant was then formally seconded to this role with effect from 1 January 2020. This involved a 5% pay increase and an expansion of reports to 70 staff.
13. The Claimant was to report to Graham Hughes as part of the secondment/temporary promotion. He would be part of Mr Hughes Senior Leadership Team (SLT).
14. A co-worker Julie Murray was also subject to temporary promotion to head of home claims also reporting to Mr Hughes as part of the SLT.
15. The Claimant alleges that while Julie Murray was allowed to backfill her substantive role he was not and had to essentially juggle two roles- head of motor repairs and senior repair network manager. While the Tribunal cannot make a finding at this stage of the veracity of this allegation it does find that there were no documented complaints by the Claimant to Mr Hughes about the alleged refusal to allow him to backfill his role at the material time. There is no documentary evidence of him being asked to backfill the substantive role that the ET was taken to nor is there any record of any formal or informal complaint about his workload in doing two roles.
16. During the initial temporary promotion there were some issues around being put into an SLT, a WhatsApp group, and having the new title recognised on the IT system. The Tribunal can make no express finding at this stage about whether Julie Murray experienced the same problems, but all of these issues were ultimately addressed to the Claimant's satisfaction and the WhatsApp group did contain a mixture of female and male employees even before the Claimant was added.
17. While he undertook the role of head of motor repairs and engineering he was complimented by his manager and received positive appraisals.
18. The secondment ended in or around May 2022. From this point he returned to his original role as senior repairs network manager.
19. In July 2022 the Respondent instructed external recruitment agents to recruit for amongst other things the role of head of claims supplier manager.

The Tribunal has had sight of an email dated 21 July 2022 from the Respondent to the recruitment agent confirming this instruction. It is unclear to the Tribunal to what extent there was an overlap with this role and the role the Claimant had been acting up into, Motor Repairs and Engineering. The Claimant says that as an internal candidate he had no opportunity to apply for this role. However he was aware of it being externally advertised from Q2 of 2022. Further, the Claimant accepts that both male and female applicants applied for the role and were considered by the Respondent. Ultimately on 22 November 2022 the head of claims supplier manager role was filled by Dawn Marsden who took up the role in February 2023.

20. The Claimant says that Julie Murray was passported in to a leadership role of home business leader without it being externally advertised. He accepts that as an internal candidate she would have been equally disadvantaged from applying for the head of claims supplier manager role.
21. The Claimant says that despite the secondment role ending in May 2022 he had to continue to cover the role of head of motor repairs and engineering until he handed over to Dawn Marsden in 2023 close to his dismissal. In other words he was still juggling two jobs. This is relied on as a continuing act of discrimination. This assertion was made for the first time in his submission to the Tribunal at p.163 para 6.6.2 (following receipt of the Respondent's written submissions). It does not appear in his witness statement or his claim to the Tribunal and is the opposite of what he told EJ Aspinall where he said there were no later acts of discrimination beyond 24 November 2022 being the appointment of Dawn Marsden. There was no documentary evidence the Tribunal was taken to support this assertion. While the Tribunal found the Claimant generally a straightforward witness it did not accept his evidence on this point.
22. The dismissal process started in June and was concluded in September 2023. Early Conciliation commenced 25/9/23 and concluded 27 September 2023. The claim was presented on 3 October 2023.
23. The Claimant gave evidence about why he did not present his claim about sex discrimination sooner and about the timing of his claim. He stated in essence there were two reasons. Firstly he was afraid to raise any issues at all with the Respondent about workload, backfilling or the recruitment process because the Respondent has a culture of hostility towards complaints and has a history of managing complainants out and he was worried about retaliation. As a relatively senior reasonably highly remunerated employee with management responsibility of his own the Tribunal finds this difficult to accept. It is more probable that the Claimant was doing well in the temporary promoted role, had been praised in appraisals and did not want to appear as an employee who could not adequately perform the workload he was being given.
24. The second reason was that the Claimant did not realise it was discrimination until he sought legal advice about his dismissal. Again as an experienced employee relatively senior and well remunerated with a long history of employment including active Trade Union membership the Tribunal does not accept the Claimant was unaware of the possibility that he was being the victim of discrimination as on his own case the unfair

treatment all revolves around the disparate treatment of a single female co-worker with the perpetrator being Mr Huges.

The Law

25. s.123 EqA states

123Time limits

(1) Subject to section 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.

(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.

26. So far as conduct extending over a period is concerned there is a distinction between a one off act such as a failure to promote an employee and the consequences of that act such as an ongoing loss of pay. See for example *Parr v MSR Partners Ltd LLP* [2022] ICR 672.

27. In considering applications for extension, the correct approach for the tribunal to take is to bear in mind that employment tribunal time limits are generally enforced strictly and to ask whether a sufficient case has been made out to exercise its discretion in favour of extension. It is not a question of extending time unless a good reason can be shown for not doing so *Robertson v Bexley Community Centre (t/a Leisure Link* [2003] IRLR 434.

28. In deciding whether or not it is just and equitable to grant an extension of time, the tribunal must take care first to consider the reasons why the claim was brought out of time and why the claim was not presented sooner than it was- *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] I.C.R. 1194. However, the failure to put forward a reason for the delay (whether a good reason or any reason at all) does not necessarily mean time should not be extended. The Tribunal has the widest possible discretion and all relevant factors including the balance of prejudice and the merits of the claim must be considered.

Conclusions

29. The first question for the Tribunal is when does limitation begin. The Tribunal is quite satisfied that SxD1 is a one off act beginning in Jan 2020 with the alleged refusal to backfill the Claimant's substantive post. Accordingly, limitation would expire sometime in April 2020. SxD2 is simply a continuing consequence of the refusal to allow the Claimant to backfill his substantive post.
30. SxD 4 are all one off acts that took place around the time of temporary promotion in January 2020.
31. Likewise SxD3 is a one off act beginning with the appointment of Dawn Marsden into the role the Claimant says he should have been able to compete for on 22 November 2022. Limitation would expire sometime in the end of February 2023.
32. Even assuming that SxD1-4 are a continuing act of discrimination the last act is the appointment of Dawn Marsden into the role of head of claims supplier manager in November 2022. There is no continuing act beyond this point for the reasons given (he was not juggling two roles after the secondment ended in May 2022). In any event the continuing act relied on is in fact on a true analysis, merely the ongoing consequence of the alleged refusal to allow the Claimant to backfill the substantive role in 2020 which is a one off act.
33. The Claimant's claims are accordingly at least 7 months out of time.
34. The Tribunal has considered whether it would be just and equitable to permit the Claims to proceed out of time. The Tribunal finds that it would not be just and equitable to do so and the claims for sex discrimination must accordingly be dismissed.
35. The Tribunal's reasons are as follows:
 - 35.1 For the reasons identified the Claimant does not have a good reason for not presenting his claim in time. He was aware of all the ingredients for his claim at the time the alleged discrimination arose. He is an experienced employee who is a former TU member and holds/held senior management positions with the Respondent and others.
 - 35.2 The Claimant was clearly aware of the right to claim Unfair Dismissal as he sought legal advice around the time of his dismissal. He made no efforts to explore his options at the material time either by seeking legal advice or the Citizens Advice Bureau or going online to the ACAS website etc.
 - 35.3 The suggestion that he was concerned about retaliation by the employer if he raised complaints at the time is not accepted.
 - 35.4 The Claimant suffered short periods of illness from 12/9/22-10/10/22 and 12/8/23 for 17 days but they are not material to the failure to present a claim in time. They do not cover the period from November 2022 when the last possible act of discrimination took place. He was fit and able to work throughout and indeed was, according to his appraisals at the time, working successfully.

- 35.5 There would be significant prejudice to the Respondent if the claim was allowed to proceed. Graham Hughes, the main protagonist, no longer works with the business and so it is reasonable to conclude that the Respondent would likely be in a position of having to defend a claim without its key witness. Further, this is not a well-documented case. There has been no previous grievance investigations and nor is there any documentary evidence relating to previous complaints of any kind by the Claimant. While it is recognised the Claimant would suffer some obvious prejudice by not being able to pursue a claim for sex discrimination, his claim for unfair dismissal remains to be adjudicated upon.
- 35.6 The claims in respect of SXD1-2 and 4 are very stale going back to 2020. Even the Dawn Marsden appointment SXD3, will have occurred over 2 years prior to the date of hearing (listed for November 2024).
- 35.7 The merits of the claim are not irrelevant but the Tribunal is not undertaking a mini trial of the discrimination claims. It would observe at this stage that so far as the role of head of claims supplier manager is concerned, both male and female applicants were considered (undermining the suggestion the entire exercise was orchestrated to recruit a female employee) and that both the Claimant and his comparator were equally disadvantaged by being internal candidates. Further, it is of note that the WhatsApp group of the which the Claimant complained of being excluded from had workers of both sexes and the Claimant made no complaints about discrimination at the material time. Accordingly the claims for discrimination face some serious challenges.
36. The complaint of Sex Discrimination was not presented within the applicable time limit. It is not just and equitable to extend the time limit. The claim is therefore dismissed.

Employment Judge SERR
June 24, 2024

REASONS SENT TO THE PARTIES ON
2 July 2024

FOR THE TRIBUNAL OFFICE