Case number 2303037/2023

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr A Buono	v	**Capital Arches group Limited**

PUBLIC PRELIMINARY HEARING

Heard at: London South by CVP **On: 5 July 2024**

Before: Employment Judge Truscott KC

Appearances:

For the Claimant: **In person**
For the Respondent: **Mr A Leonhardt barrister**

JUDGMENT on PRELIMINARY HEARING

1. The amendment sought by the claimant to add a claim of race discrimination during employment and at the termination is refused.

2. The claim of unfair dismissal has no reasonable prospect of success and is struck out under Rule 37(1) (a).

3. The complaint of race discrimination has no reasonable prospect of success and is struck out under Rule 37(1) (a).

4. The claim for a redundancy payment has no reasonable prospect of success and is struck out under Rule 37(1) (a).

5. The claim for notice pay as deduction from wages or breach of contract has no reasonable prospect of success and is struck out under Rule 37(1) (a).

REASONS

Preliminary

1. This preliminary hearing was fixed on 12 March 2024 by EJ Robinson to address the following issues:

Dismissal

a. Was the claimant dismissed and, if so, what was the date of dismissal?

Time limits

b. Was the discrimination complaint made within the time limit set out in the Equality Act 2010? The Tribunal will decide:

i. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

ii. If not, was there conduct extending over a period?

iii. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

iv. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1. Why were the complaints not made to the Tribunal in time?

2. In any event, is it just and equitable in all the circumstances to extend time?

c. Were the unfair dismissal, redundancy pay, and notice pay claims made within the time limits set out in the Employment Rights Act 1996? The Tribunal will decide:

i. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination / date of payment from which the deduction was made?

ii. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

iii. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

Strike out / Deposit Order applications.

d. To consider any application for strike out / deposit order that the Respondent wishes to make.

2. The Tribunal heard evidence from the claimant and Ms C Costa, Head of People of the respondent, which was represented by Mr A Leonhardt, barrister.

3. There was a bundle of documents to which reference will be made where necessary.

4. At the previous case management hearing, EJ Robinson narrated as follows [48]:

13. **By 4pm on 2 April 2024**, the Claimant must make any amendment application he wishes to make to the Tribunal (copied to the Respondent) in relation to:

a. Converting his unfair dismissal claim to one of automatic unfair dismissal. and explaining which automatically unfair reason he relies upon.

b. The specific alleged discriminatory treatment he relies upon which was not. set out in his claim form as part of his race discrimination claim.

6. The claimant made no such application. He provided a witness statement for this hearing which addressed his dismissal but did not provide any reasons for extending time. The evidence on extending time was taken orally by the Tribunal as was additional evidence on the allegations of race discrimination.

Findings

1. The claimant was employed as a Crew Member by the respondent from 18 November 2022 to 31 December 2022 at the respondent's McDonalds Wandsworth Road restaurant. The respondent is a company operating 31 McDonald's restaurants via a franchise arrangement.

2. He worked a total of four shifts, the first being on 1 December 2022 and on two occasions was late for work due to travel difficulties. He was late on 16 December [153] and 17 December 2022 [139]. He indicated to the respondent's Business Manager, Rana Ahmad, that he was struggling to travel to work due to public transport issues and the length of time it took him to travel from his home to the restaurant. The claimant told Mr Ahmad that he thought it was better for him to transfer [183] to a different McDonald's restaurant, nearer his house. Mr Ahmad informed the claimant that if he wanted to do that, he was happy to support him.

3. The claimant emailed the respondent on 27 and 28 December 2022, indicating that he had visited other McDonalds restaurants (not operated by the respondent) in order to enquire about working at those sites [174].

4. On 31 December 2022, the claimant attended the respondent's Wandsworth Road restaurant having had further travel difficulties [157] and had a conversation with the respondent's Business Manager, Rana Ahmad. During this conversation, the claimant informed Mr Ahmad that, as they had previously discussed, it was not feasible for him to work for the respondent's restaurant and as such he would be transferring to another restaurant nearer his home.

5. The claimant did not report for work again following his conversation with Mr Ahmad and in the months following the conversation on 31 December 2022, the respondent received no further communication from the claimant suggesting that he believed that his employment was continuing or that he had any issues to raise.

6. Mr Ahmad did not process the claimant's resignation on the system, or take the usual steps required, which would involve asking the claimant to confirm his resignation in writing, and then processing the resignation on the MyStuff HR system.

7. The restaurant emailed the claimant on 20 February 2023 regarding his return to work [192]. This email was not from the People Team but was from the restaurant's manager. The claimant did not respond.

8. As Mr Ahmad had not properly processed the claimant's resignation, he remained 'live' on the system. On 8 May 2023, the Wandsworth Road restaurant was closed for refurbishments, and all staff there were temporarily redeployed. Once the staff redeployments were processed, a review was carried out of all staff associated with that restaurant who were not currently working. The respondent has many casual and zero-hours workers on its system, some of whom work infrequently and never formally confirm that they no longer wish to work for the company. The respondent carries out regular reviews to ensure that its systems are up-to-date and anyone who has not worked a shift for 4-6 weeks is contacted to confirm whether they wish to continue working for the respondent. The respondent wrote to all staff for this

restaurant who were not currently working but who remained on its systems, including the claimant [193].

9. The claimant responded to confirm that his employment had terminated on 31 December [193], although he stated he believed he had been "laid off". The claimant's grievance was investigated, as part of investigation into the grievance, Ms Costa spoke to Mr Ahmad. The outcome of the claimant's grievance was sent to him on 26 August 2023 [210 213], it did not uphold his allegation that Mr Ahmad had dismissed him in December 2022, but that his employment had terminated by way of resignation. The claimant's P45 was issued; accordingly, this showed a termination date of August 2023, as it could not be backdated to the correct termination date.

10. The ET1 was lodged on 27 June 2023.

Law

Amendment

11. In the case of **Selkent Bus Company Limited v Moore** [1996] ICR 836 the Employment Appeal Tribunal ("EAT") set out the test to be applied by a Tribunal in deciding whether to exercise its discretion to grant an amendment. It said the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The EAT in **Selkent** also set out a list of factors which are certainly relevant, which are usually referred to as the "**Selkent** factors". In brief they are:

(1) The nature of the amendment i.e. whether the amendment sought is one of the minor matters or is a substantive alteration pleading a new cause of action;
(2) The applicability of time limits. If a new complaint of cause of action is proposed to be added by way of amendment it is essential for the Tribunal to consider whether that complaint is out of time and if so whether the time limit should be extended; and
(3) The timing and manner of the application. An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the rules for making amendments, but delay is 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).

12. In the case of **Vaughan v Modality Partnership UKEAT/0147/20/BA** the EAT reminded parties and Tribunals that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. The exercise starts with the parties' making submissions on the specific practical consequences of allowing or refusing the amendment. That balancing exercise is fundamental. The **Selkent** factors should not be treated as if they are a list to be checked off.

13. Although **Selkent** says it is essential for the Tribunal to consider whether a complaint is made out of time and if so whether the time limit should be extended, in **Galilee v Commission of Police of the Metropolis [2018] ICR 634** the EAT held it

is not always necessary to determine time points as part of an amendment application. A Tribunal can decide to allow an amendment subject to limitation points being determined at a later stage in the proceedings, usually at the final hearing. That might be the most appropriate route in cases where there is alleged to be a continuing act and the Tribunal needs to make findings of fact on this issue.

14. The assessment of the balance of injustice and hardship may include an examination of the merits but there is no point in allowing an amendment if it will subsequently be struck out. That extends to cases not only which are utterly hopeless but also to ones where the proposed claim has no reasonable prospect of success. The authority for that is **Gillett v Bridge 86 Limited [2017] 6 WL UK 46**.

Reasonably practicable

15. The Employment Rights Act 1996 provides, in relation to wages and dismissal:

> "An [employment tribunal] shall not consider a complaint under this section unless it is presented—
> (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

16. A Tribunal may only extend time for presenting a claim where it is satisfied of the following:

> "It was "not reasonably practicable" for the complaint to be presented in time. The claim was nevertheless presented "within such further period as the Tribunal considers reasonable".

Just and equitable extension

17. Section 123(1)(b) of the 2010 Equality Act permits the Tribunal to grant an extension of time for such other period as the employment tribunal thinks just and equitable. Section 140B of the Equality Act 2010 serves to extend the time limit under section 123 to facilitate conciliation before institution of proceedings.

18. The Tribunal has reminded itself of the developed case-law in relation to what is now section 123 of the Equality Act 2010. That has included a group of well-known judgments setting out the underlying principles to be applied in this area, together with recent occasions on which those principles have been applied and approved by later courts and tribunals. Particular attention has been paid to the historical line of cases emerging in the wake of the case of **Hutchinson v. Westwood Television** [1977] ICR 279, the comments in **Robinson v. The Post Office** [2000] IRLR 804, the detailed consideration of the Employment Appeal Tribunal in **Virdi v. Commissioner of Police of the Metropolis et al** [2007] IRLR 24, and, in particular, the observations of Elias J. in that case, as well as the decision of the same body in **Chikwe v. Mouchel Group plc** [2012] All ER (D) 1.

19. The Tribunal also notes the guidance offered by the Court of Appeal in the case of **Apelogun-Gabriels v. London Borough of Lambeth & Anr** [2002] ICR 713 at 719 D that the pursuit by a claimant of an internal grievance or appeal procedure will not

normally constitute sufficient ground for delaying the presentation of a claim: and observations made by Mummery LJ in the case of **Ma v. Merck Sharp and Dohme** [2008] All ER (D) 158.

20. The Tribunal noted in particular that it has been held that 'the time limits are exercised strictly in employment … cases', and that there is no presumption that a tribunal should exercise its discretion to extend time on the 'just and equitable' ground unless it can justify failure to exercise the discretion; as the onus is always on the claimant to convince the tribunal that it is just and equitable to extend time, 'the exercise of discretion is the exception rather than the rule' (**Robertson v. Bexley Community Centre** [2003] IRLR 434, at para 25, per Auld LJ); **Department of Constitutional Affairs v. Jones** [2008] IRLR 128, at paras 14–15, per Pill LJ) but LJ Sedley in **Chief Constable of Lincolnshire Police v. Caston** said in relation to what LJ Auld said "there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised." See also the comments of Judge Tayler in **Jones v. Secretary of State for Health** 2024/EAT/2

21. The Tribunal's discretion is as wide as that of the civil courts under section 33 of the Limitation Act 1980; **British Coal Corporation v. Keeble** [1997] IRLR 336; **DPP v. Marshall** [1998] IRLR 494. Section 33 of the Limitation Act 1980 requires courts to consider factors relevant to the prejudice that each party would suffer if an extension was refused, including:

the length 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 had co-operated with any requests for information.
the promptness with which the claimant acted once he knew of the possibility of taking action; and
the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

Although these are relevant factors to be considered, there is no legal obligation on the Tribunal to go through the list, providing that no significant factor is left out; **London Borough of Southwark v. Afolabi** [2003] IRLR 220.

22. The Tribunal has additionally taken note of the fact that what is now the modern section 123 provision contains some linguistic differences from its predecessors – which were to be found in various earlier statutes and regulations – concerning the presentation of claims alleging discrimination in the employment field. However, the case law which has developed in relation to what is now described as "the just and equitable power" has been consistent and remains valid. The Tribunal has therefore taken those authorities directly into account in its consideration.

23. It is also a generally received starting proposition that it is for the claimant who has presented his or her claims out of time to establish to the satisfaction of the Tribunal that the "just and equitable" discretion should be exercised in the particular case.

Striking out

24. An employment judge has power under Rule 37(1)(a), at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on the ground that it has no reasonable prospect of success. In **Hack v. St Christopher's Fellowship** [2016] ICR 411 EAT, the then President of the Employment Appeal Tribunal said, at paragraph 54:

> Rule 37 of the Employment Tribunal Rules 2013 provides materially: -
>
> "(i) At any stage in the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds – (a) Where it is scandalous or vexatious or has no reasonable prospect of success…"
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> 55. The words are "no reasonable prospect". Some prospect may exist but be insufficient. The standard is a high one. As Lady Smith explained in Balls v Downham Market High School and College [2011] IRLR 217, EAT (paragraph 6):
>
> "The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the words "no" because it shows the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects…"
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> 56. In **Romanowska v. Aspirations Care Limited** [2014] (UKEAT/015/14) the Appeal Tribunal expressed the view that where the reason for dismissal was the central dispute between the parties, it would be very rare indeed for such a dispute to be resolved without hearing from the parties who actually made the decision. It did not however exclude the possibility entirely.

25. The EAT has held that the striking out process requires a two-stage test in **HM Prison Service v. Dolby** [2003] IRLR 694 EAT, at para 15. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid. See also **Hassan v. Tesco Stores** UKEAT/0098/19/BA at paragraph 17 the EAT observed:

> "There is absolutely nothing in the Judgment to indicate that the Employment Judge paused, having reached the conclusion that these claims had no reasonable prospect of success, to consider how to exercise his discretion. The way in which r 37 is framed is permissive. It allows an Employment Judge to strike out a claim where one of the five grounds are established, but it does not require him or her to do so. That is why in the case of *Dolby* the test for striking out under the *Employment Appeal Tribunal Rules 1993* was interpreted as requiring a two-stage approach."

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26. It has been held that the power to strike out a claim on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances

(**Tayside Public Transport Co Ltd (t/a Travel Dundee) v. Reilly** [2012] IRLR 755, at para 30). More specifically, cases should not, as a general principle, be struck out on this ground when the central facts are in dispute.

27. In **Mechkarov v. Citibank N A** UKEAT/0041/16, the EAT set out the approach to be followed including: -

(i) Ordinarily, the claimant's case should be taken at its highest.

(ii) Strike out is available in the clearest cases – where it is plain and obvious.

(iii) Strike out is available if the claimant's case is conclusively disproved or is totally and inexplicably inconsistent with undisputed contemporaneous documents.

28. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances, **Anyanwu v. South Bank Students' Union** [2001] IRLR 305 HL. Similar views were expressed in **Chandhok v. Tirkey** [2015] IRLR 195, EAT, where Langstaff J reiterated (at paras 19–20) that the cases in which a discrimination claim could be struck out before the full facts had been established are rare; for example, where there is a time bar to jurisdiction, where there is no more than an assertion of a difference of treatment and a difference of protected characteristic, or where claims had been brought so repetitively concerning the same essential circumstances that a further claim would be an abuse. Such examples are the exception, however, and the general rule remains that the exercise of the discretion to strike out a claim should be 'sparing and cautious.

29. In **Ahir v. British Airways plc** [2017] EWCA Civ 1392 CA, Lord Justice Underhill reviewed the authorities in discrimination and similar cases and held at paragraph 18, that:

> "Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context."

DISCUSSION and DECISION

30. The ET1 makes no meaningful allegations of race discrimination, nor does it set out the claimant's allegations about dismissal. The claimant provided no additional evidence that he was automatically unfairly dismissed.

31. Dismissal

The evidence of the claimant in his witness statement of 21 June 2024 is:

" On 31 December 2022, I attend Mr Rana's Wandsworth Road restaurant, under Mr Rana's pretense of a new shift, per what he told me at the end of my previous shift, and, after being made to wait outside the office for minutes, I finally had a conversation with Mr Rana. During this conversation, Mr Rana tells me the Restaurant was not making as much money as they used to, and that for said reason, he had to dismiss me. Unfair, as no ACAS Code of Practice was followed (nor steps at page 65, 85, 89, 90, 91 and previously discussed

> 104 either). Following the dismissal (unfair at that too), demoralised (understandably so too), I then thank Mr Rana, and leave his office and store following this conversation. Respondents obviously deny Mr Rana telling me the restaurant no longer had need for me.

32. In oral evidence to the Tribunal, he said the manager dismissed him for being late. The Tribunal did not accept the claimant's evidence that he was dismissed on 31 December 2022 or that he was told that it was because of a downturn in business or because he was late. He said he was aggrieved but did nothing.

33. In relation to race discrimination claim, the claimant did not particularise this claim whatsoever, simply ticking the 'race discrimination' box at section 8.1 of his ET1 Form and then making no reference to his race in his written particulars.

34. The evidence provided by the claimant in relation to race discrimination in employment was that on his first and second shifts:

> "Previously didn't trust leaving my phone, small black purse and black wallet with credit card in a stranger's locker. For that reason, I wore my black purse with my wallet and credit card and phone in it. My Assistant Manager then mentioned that employees needed to bring their own padlocks (which I did but obviously couldn't use, as, again, some lockers were full and others were padlocked, so I obviously didn't trust leaving my phone, small black purse and black wallet with credit card in a stranger's locker). My Assistant Manager then mentioned I was offered the option of leaving your belongings at the manager's office, which I did, as the office had CCTV, unlike with lockers area. Per CCTV evidence, in December 2022 other employees worked wearing jeans, not following McDonald's uniform guidelines, whilst I was prevented to do so on my first day of work, instead, per CCTV evidence. When I worked at the restaurant last December I saw a Mrs, Shift Manager (definitely blonde, definitely Easter European), wearing jeans and carrying her phone at work, per CCTV evidence. Another crew member was wearing jeans, instead, when I was told, I was not allowed to do so, on the day my Company Outfit was being cleaned, per CCTV evidence, which I know is unfair (page 104)."

35. The oral evidence provided by the claimant was that:

> "There was an employee, Algerian or Turkish who was allowed to wear jeans."

36. The claimant sought to add by amendment discriminatory action as above in his employment and a discriminatory dismissal because he was not given a reason for his dismissal. The claimant did not establish any race discrimination during work or at the end. Both claims were made out of time. He had worked for Wenzel's the Bakers between March and April 2023 but was dismissed and claimed "I am a victim of discrimination" [191]. He did not research his rights on this occasion. The claimant explained that he became aware of his rights after he was upset at being dismissed from a 3rd job in May 2023. Once he discovered his rights, he also made a claim against the respondent. He said he was upset when he was dismissed by the respondent, if he had been he could have looked into his rights then.

29. The bare facts of a difference in status and a difference in treatment only

indicate a possibility of discrimination. They are not, without more, sufficient to shift the burden of proof: **Madarassy v. Nomura International plc** [2007] ICR 867 CA at para 56 per Mummery LJ.

30. The Tribunal accepted the claimant's evidence as to what took place during the shifts but did not accept that it was an act of race discrimination. The failure to provide a reason for dismissal was because he was not dismissed.

31. In relation to prejudice generally, the respondent will have the prejudice of having to defend claims which do not amount to discrimination, and which are well out of time. The claimant's claims are out of time, on the basis that all allegations date from no later than 31 December 2022, the date the claimant's employment terminated with the exception of the redundancy payment claim.

32. The claimant provided no basis for why it would not have been reasonably practicable for him to issue any such claims within the relevant time limit. Neither did he provide any reason to extend the time limit on a just and equitable basis.

33. On the basis of the guidance set out earlier and weighing all the relevant factors, the Tribunal considers that it is not proportionate to resolve that issue when it is out of time, accordingly it is not just and equitable to extend the time for lodging the claim.

34. In relation to strike out, the Tribunal took the claim at its highest which means that contrary to the finding of fact, the claimant is taken as dismissed. The claimant does not have sufficient length of service to pursue a claim of unfair dismissal, having been employed by the respondent for 6 weeks between 18 November 2022 and 31 December 2022. Accordingly, even taking account of the proposed amendment, it stands no prospects of success.

35. The claimant did not have sufficient length of service to qualify for a statutory redundancy payment even if he was dismissed as redundant.

37. If there was no dismissal, the claimant might be entitled to notice pay but the Tribunal has already decided that he was not dismissed so this claim has no prospects of success.

36. The claimant did not particularise this claim of race discrimination. Even taking into account the material proposed as an amendment, the claims of race discrimination during and at the end of employment stand no prospect of success.

37. In the light of the foregoing, the Tribunal exercised its discretion to strike out all the claims.

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Employment Judge Truscott KC

Date 9 July 2024

Sent to the parties on:

11th July 2024

For the Tribunal:

P Wing