EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Genus	**v**	Amey Services Ltd

Heard at: Bury St Edmunds **On:** 30, 31 July, and 1, 2 August 2024

Before: Employment Judge K J Palmer

Members: Mr A Fryer and Mr A Chinn-Shaw

Appearances
For the Claimants: In person
For the Respondent: Mr K Harris (counsel)

JUDGMENT having been given extemporaneously on 2 August 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claimant presented a claim to this Tribunal on 19 July 2023, pursuant to early conciliation which commenced on 15 June 2023 and ended on 19 June 2023. In it, the Claimant ticked the box in the ET1 for race discrimination. There is no other claim. The Claimant is unrepresented and the ET1 is home made. In the short narrative attached to the ET1 the Claimant raised a number of issues. These were then clarified and recorded before Employment Judge Michael Ord at a Preliminary Hearing that took place by telephone on 18 January 2024. Employment Judge Ord clarified the claims as being solely claims under section 13 of the Equality Act 2010, that is claims in direct discrimination because of race.

2. The Claimant's claim is principally set out as being that he was paid less than others doing the same job and carrying out the same work who were white. The Claimant identifies as a non-white or black male. He identified four specific comparators and these were recorded by Judge Ord. They are:

   Emerson Loveday, Paul Collingwood, Victor Bryant and an unnamed comparator who we now know as Steven Bass.

3. The Claimant argues, essentially, that he was paid less than others because of his race. EJ Ord sets out the issues at paragraph 8 of his summary as follows:

3.1. Was the Claimant paid less than the comparators relied upon or any of them?, if so

3.1.1. Was that difference because of race?

3.2 If the Claimant establishes facts from which the Tribunal could conclude that any differential in pay was because of race, does the Respondent have a non-discriminatory reason for that differential?

3.3 Did Mark Billington ask Mr Bishop to manage the Claimant out of the business? If so,

3.3.1 Was that because of the Claimant's race or race generally?

3.4 Did the Respondent handle the Claimant's grievances fairly. Mr Billington was one of the managers about whom the Claimant complained and he was appointed to determine the grievance. (I should say that there is a typo in there and that it should say Mr Collington and not Mr Billington). If the grievances were not handled fairly, was the reason for that unfairness of the Claimant's race or race generally?

4. Those were the issues that were identified as being the issues about which this tribunal, which was listed for four days, would determine.

5. The summary sent out by Judge Ord contained the standard paragraph asking for the parties to consider the contents of the Case Management section of the summary and requesting them to inform the Tribunal if any part of that summary was in any way inaccurate or incomplete, they should do so within 14 days.

6. Neither party wrote to the Tribunal indicating that there was a problem with the Case Management Summary.

7. We have before us a bundle running to some 108 pages. We had various witness statements from a variety of people, the Respondent had intended to call four witnesses and applied for a postponement as two of those witnesses were unable to attend, Adam Collington and Nick Best. That application was refused. The Respondents therefore called Ophelia Geal from HR and Billy Taylor, who was senior operations manager who conducted the Claimant's grievance. For the Claimant we heard evidence only from the Claimant.

8. At the outset of the hearing the Claimant applied to amend the list of issues in the Case Management Summary. This was essentially to add two further issues of fact to paragraph 8.6 of the Case Management Summary which was the Claimant's complaint about the fairness of the grievance process. These two additional points were that the Respondents failed to follow its own policy in that despite being entitled to copies of notes of the grievance hearings and despite specifically asking for them, they were never provided to the Claimant. Secondly, that in taking just over three months to hear and determine and deliberate on the grievance, the Respondents took too long to reach a conclusion.

9. The Respondents, in the shape of Mr Harris of counsel, opposed that

application. We considered the application and upon the basis of the authorities in particular, the principles set out in the case of Selken Bus Company v Moore and Vaughan v Modality Partnership [2021] ICR335, we determined that the balance of hardship lay in favour of the Claimant and we allowed those amendments to add those two further aspects of detail to the issue already set out by Judge Ord at 8.6 of his summary.

10. In light of that we were also in receipt of further documents at the beginning of the second day of the hearing, these consisted of extracts from the relevant grievance procedure showing that indeed, notes were to be available to someone pursuing a grievance when requested. There were also emails from the Claimant evidencing that he had asked for those notes and he would chase the grievance outcome.

11. The Respondents also helpfully produced a much more comprehensive salary comparison schedule, detailing salaries for all comparators from 2018 to 2023 including details of their length of service and their ethnicity. This was more comprehensive than anything we already had before us in the bundle and it was agreed that this was the definitive schedule upon which we would rely.

FINDINGS OF FACT

12. The Claimant started working for the Respondent in November 2017 as a building engineer. The role was later renamed fabric engineer. The Respondents are a company that supply maintenance service to schools through contracts.

13. It emerged, during the giving of evidence in the hearing that the Claimant's complaints also included a complaint that he was interviewed for the job by Mr Andrew Tyler and was promised that he would then start on the same salary as all others doing the same job as him. He says that he subsequently discovered that he was not on the same salary as Emerson Loveday and Paul Collingwood and that they were paid more. He also says that Mr Tyler tried to vito a 2% pay rise in the April pay review for him in 2018 and that he only received this rise when he lodged a complaint with HR. This is in the shape of a particular complaint, therefore, about acts perpetrated by Mr Tyler which the Claimant says was because of is race. There are some difficulties with this as this issue is not one of the complaints listed in the agreed list of issues (now amended) in Judge Ord's Case Management Summary. There has been no application to add it as an amendment. It also occurred in October 2017/2018, some 5-6 years before the Claimant presented his claim to this tribunal. Mr Tyler left the Respondents in 2018 and could not be contacted. The Claimant didn't raise a formal complaint at the time and further, no documentary evidence exists to support any aspects of the Claimant's evidence including no documentary evidence of the emails between him and HR which ultimately led to him receiving his 2% pay rise in April 2018.

14. The fact remains that the Claimant did receive the 2% pay rise at that time and there is nothing in his contract to suggest that all building engineers were to be paid identically. The only evidence that we have on this that the Respondents could give, was that the Claimant did indeed receive his 2% pay rise in 2018.

15. We heard from Miss Geal that a middle manager could not, under any circumstances, prevent an across the board pay rise by blocking such pay rise

to one person. Pay rises were agreed at Board level and a middle manager could make a business case for one individual to receive an enhanced out of cycle pay rise but could not block the standard annual pay rise which was paid equally to all. We accept her evidence on this.

16. The nub of the Claimant's case, however, is as set out in the agreed list of issues is that he was paid less than fellow building engineers/fabric engineers in the form of the specific complaints and that this was because of his race. It is not clearly defined when he says this happened and the time line before the Tribunal covered a considerable period between 2018 and 2023. We examined that time line extensively during the course of these proceedings although absolute clarity of information was only introduced by the Respondents on day 2 when they produced the XL spreadsheet. It is notable that the Claimant was basing his beliefs, upon which he is pursuing his claim, on discussions he had informally with other colleagues and he would not have been privy to the definitive information which we all then saw in the XL spreadsheet. We accept that the spreadsheet is a true reflection of the pay of those with whom the Claimant seeks to compare himself throughout the period of 2018 to 2023. Examining that spreadsheet and hearing evidence from Miss Geal, we can make findings of fact.

17. In 2018 the Claimant was paid less than Emerson Loveday and Paul Collingwood. Mr Loveday, however, had 12 years of service to the Claimant's five months and Mr Collingwood had six years of service to the Claimant's five months. Mr Loveday and Mr Collingwood are white. The Claimant was paid more than Mr Scott Hazeledene, who had three years service in 2018 and is white.

18. In 2019, three others were employed as multi-trade persons and were all paid less than the Claimant. Mr Stephen Bass was also employed on a marginally higher salary than the Claimant – he is white. Mr Collingwood and Mr Loveday continue to earn more than the Claimant throughout 2019, although we note that the disparity narrowed. In 2020 the picture remained much the same.

19. In 2021 Mr Collingwood left and the disparity between the Claimant and Mr Loveday and Mr Bass is just over £500 per year.

20. In 2022, the two remaining general building operatives had become fabric operatives and Mr Loveday has changed job roles and has become a carpenter. The Claimant is paid more than Victor Bryant, a white comparator and more than another fabric operative who is black, but less than Stephen Bass, who is white. We heard evidence from the Respondents that the reason for this was that he required a slightly higher salary to secure him because he was an agency worker and had been working at a higher salary as an agency worker. We accept that as a reason.

21. In 2023 Mr Bryant received an out of cycle pay award. The reason given is his exceptional work and that he was valuable and a potential flight risk. We saw evidence to support this in the bundle where three individuals had separately considered this additional payment. We accept that this was entirely genuine.

22. The Claimant then lodged a grievance for the first time, formerly claiming that he considered he had been discriminated against in terms of pay on grounds

of race and in respect of other treatment that he complained of. The grievance was lodged in March 2023 and the first grievance hearing took place on 29 March 2023. The grievance was presided over by Billy Taylor and Miss Geal was present as a note taker.

23. There were two hearings and we heard from Mr Taylor that he worked on the outcome but sadly, before he could send it, he suffered a heart attack in early May 2023. As a result, Mr Adam Collington, who was himself a subject of the grievance, signed it off on behalf of Mr Taylor. This was done, slightly oddly, by Mr Collington in that it appears, on the letter before us, that the letter was written by him. He didn't pp Mr Taylor's signature as would have perhaps been more usual. However, we accept that the decision is genuinely Mr Taylor's and not Mr Collington's and he had no part in it. The letter before us is oddly dated 20 May but we understand that the actual grievance outcome letter in identical terms, was dated 23 June and sent to the Claimant on that date. In that outcome Mr Taylor found no discrimination but partially upheld the grievance. The grievance included other complaints which do not form part of this claim before this tribunal, including the fact that Mr Loveday was given a new role as a carpenter without other individuals being invited to apply. It also included a complaint about Mr Mark Billington who, in July 2022, was then employed by the Respondent, raised the Claimant's performance with the Claimant's then line manager, Mr Bishop, and suggested that the Claimant could be managed out due to performance. That does, of course, form part of the Claimant's claim before this tribunal.

24. As a result of the partial upholding of the grievance, the Claimant's salary was raised up to the same level as Mr Bryant who had enjoyed and received the out of cycle uplift. It was also backdated to April 2023. The Claimant remains employed and is now the equal highest earning fabric operative with Mr Bryant.

25. The Claimant's claim includes a complaint about the comments made by Mark Billington to Mr Bishop in July 2022 that the Claimant's performance was such that Mr Bishop should manage him out. It must be remembered, however, that no such process occurred or was even commenced. This was in July 2022. Mr Billington was not here as he left in May/June 2023. No witness statement was taken from Mr Billington as part of the grievance process.

26. We accept the Respondent's assertions in evidence that it was a matter of fact that Mr Billington did raise performance issues about the Claimant with Mr Bishop and that no action was taken pursuant to it. The grievance process was far from perfect and the Respondents have admitted this.

27. Despite requesting notes of the meetings, none were sent to the Claimant. This is breach of the grievance policy. Mr Taylor admits that this was his fault. Also, the process was elongated due to Mr Taylor's heart attack which the Tribunal does not find at all unsurprising.

28. Mr Collington was not the ideal person to sign off the grievance and it wasn't done properly. However, it is very clear that despite being listed as issues that amount to direct discrimination in the list of issues as amended by us, the Claimant does not consider that these failings were discriminatory because of his race. He was asked this in cross examination on a number of occasions and he confirmed that. So certainly, there were failings in the process but we

consider these unfortunate but not, in any way detrimental to the Claimant as the ultimate outcome that the Claimant was largely positive and that his salary was increased.

THE LAW

29. This is a claim under section 13 of the Equality Act 2010.

> Section 13 tells us :
>
> Direct discrimination
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

The burden of proving that discrimination is on the Claimant and that is on the balance of probabilities, which is the civil burden of proof.

The burden of proof is set out in section 136 of the Equality Act 2010 and states as follows:

> 136 Burden of proof
>
> (1)This section applies to any proceedings relating to a contravention of this Act.
>
> (2)If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3)But subsection (2) does not apply if A shows that A did not contravene the provision.

30. Key authorities that assist us in determining whether a claimant has shown a prima facie case under 136(2) are Igden Ltd v Wong [2005] ICR931, Maderassay v Nomura [2007] ICR867. At the first stage of the burden of proof test the Tribunal must decide if there are facts from which a tribunal could decide that an act of unlawful discrimination had taken place. If a tribunal does not decide that at that first stage, then a claim fails. Maderassay tells us that different race and different treatment are not, of themselves, evidence of discrimination. There has to be a connection, there has to be something else.

31. These principles are supported in the more recent case of Efobi v Royal Mail Group Ltd [2002] ICR 1263.

Time limits

32. There are strict time limits for when a tribunal can consider complaints of discrimination. These are set out section 123 of the Equality Act 2010. Essentially, 123(1) says:

> (1) Proceedings on a complaint must 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.

33. Sub-section 3 tells us:

(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;

34. We agree with Mr Harris that the Claimant's principal claims set out in the list of issues is that he has a general complaint about being paid less than the named comparators. This is not specified in time and seems to be a somewhat uninformed belief based on discussion with fellow workers. His complaint ranges across nearly six years from 2017 to 2023. We conclude that the reality was that he was paid less than some and more than some others. As far back as 2018 he was paid more than one white employee, Scott Hazeldene, who did the same job. More latterly he was paid more than Mr Bryant until Mr Bryant (fight risk uplift) and then when he complained the Claimant's salary was lifted to be equal with Mr Bryant's. He was paid less than Loveday and Collingwood in the early days albeit the differential was less than the Claimant believed but we find that this was because they had considerably more service than the Claimant. He was also paid marginally less than Mr Bass at one point but this was because Mr Bass came from an agency and the slightly larger salary was necessary to secure him.

35. We can conclude that there are no facts from which it can reasonably be inferred that race played any part in the salary differential between the employee, who performed the same role, and the Claimant between 2018 and 2023. Whether this part of the Claimant's claim is in or out of time is therefore not something that has exercised us.

36. The Claimant's remaining claims are three fold. First, the Claimant's claims regarding Mr Tyler. This is hugely problematic for the Claimant as it concerns discussions with an individual who left the Respondent some five years ago. They do not form part of the list of issues. We consider it a distinct and separate claim in respect of allegations made against Mr Tyler. We accept the Respondent's position that he had no authority to make determinations about salary uplift or blocking. We have limited evidence to support the Claimant's claims as to what happened. It is not in the list of issues. The Claimant is clearly distinct and a stand alone event and is therefore clearly manifestly out of time. The time limit is three months. We have no evidence before us to suggest that we should contemplate extending the time limit to validate it under section 123. To do so would clearly be hugely prejudicial to the Respondents. We also cannot see that the Claimant suffered any less favourable treatment that he was given the then standard pay rise in any event in April 2018. The claim fails for the fact that it was out of time by virtue of the fact that it was five years ago but we would add that if we found it in time or we had extended time, we should have concluded that there was simply insufficient evidence before us that there had been less favourable treatment or that it was because of race.

37. The part of the Claimant's claims which concerned Mr Billington's comments to Mr Bishop about managing the Claimant out, certainly happened. That is admitted. But it happened in July 2022, the year before the Claimant presented his claim. It too is a stand alone claim and is manifestly out of time. We see no evidence before us to persuade us to extend that time. However, even if we had done so, we do not consider that the statement amounted to less favourable treatment as it was never acted upon. Moreover, we have no facts from which it can be inferred reasonably that race played any part in it. As the complaints about the failures or unfairness of the grievance, the Claimant himself effectively withdrew this part of his claim during the giving of his evidence when he confirmed, on more than one occasion that he accepted that the failures in the grievance process, namely the fact that it took three months, the failure to hand over the notes and Mr Collington stepping in at the end, were not in any way, tainted by race. Had the Claimant not done so, however, we confirm that we would have concluded, with no hesitation, that there were no facts before us from which it could reasonably be inferred that race played any part in the decisions concerning the grievance and the conduct of the grievance procedure, even those that clearly did not demonstrate best practice.

38. For the above reasons the Claimant's claims fail and are dismissed.

_____
Employment Judge K J Palmer

Date: 9 September 2024

Judgment sent to the parties on

.....

.....
For the Tribunal office

Public access to Employment Tribunal decisions

Judgments and reasons for the Judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal Hearing has been recorded you may request a transcript of the recording, for which a charge is likely to be payable in most but not all circumstances. If a transcript is produced it will not include any oral Judgment or Reasons given at the Hearing. The transcript will not be checked, approved or verified by a Judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/