



EMPLOYMENT TRIBUNALS

Claimant: G

Respondent: Tesco Stores Ltd

Heard at: Watford by telephone **On:** **26 March 2020**
2 April 2020

Before: Employment Judge R Lewis

Appearances

For the claimant: Mr L Bronze, counsel

For the respondent: Mr J Green, counsel

RESERVED JUDGMENT

1. The claim of unfair dismissal is struck out. It was presented out of time in circumstances when it was reasonably practicable to present in time.
2. The tribunal has jurisdiction to hear the claim of disability discrimination. It was presented out of time in circumstances in which it is just and equitable to extend time.

REASONS

Procedural matters

1. This claim was presented by the legal department of USDAW on 15 January 2019. The claim was for unfair dismissal and disability discrimination. The claim was conceded to be out of time.
2. By notice of 21 November 2019 the tribunal listed a preliminary hearing in public on 26 March 2020 to determine if the tribunal accepted jurisdiction under either of the extension provisions.

3. The tribunal closed on the night of 23/24 March 2020, and I proceeded by telephone on 26 March. The hearing could not be concluded then, as I did not have access to the parties' bundle. I adjourned for 7 days, to read the bundle and then hear submissions. In light of my concerns about a public hearing, it was agreed that the hearing on 2 April would in form be an application under rule 37 for the claimant to show cause why the claim should not be struck out. Mr Green agreed to proceed by taking the claimant's case at its highest, so that no oral evidence would be needed.
4. I reserved judgment. As a reserved judgment must be given in writing, and is therefore posted online, I proposed anonymisation. That point, and case management, are dealt with in a separate Order.
5. I record my gratitude for the high degree of professionalism shown by all representatives on both sides in the current very difficult circumstances.

Documents

6. I had available: the ET1 and ET3; written submissions from both counsel; the agreed bundle; and two undisputed witness statements (subject to removal of short passages from each). The first was from Mrs Nunes Vaz, the claimant's sister, attaching two significant items. They were a letter of 7 June 2018 from Dr G Garioli, consultant psychiatrist; and a report of 30 April 2018 by Dr C Yassin, clinical psychologist. The other statement was from Mr C Waterton, of USDAW's legal department, describing the errors which had led to this claim being presented late.

The factual background

7. I heard no evidence, and made no findings of fact. I record my understanding of the factual background. I understand this to be materially undisputed.
8. The claimant was born in 1968. He has worked in retail for most of his life. He was employed by the respondent from early 2004 until 20 July 2018. He had been the subject of a final written warning on 28 July 2017. He was dismissed following an incident on 5 July 2018 when in conversation with a gay colleague he used the word 'poof' or the words 'fucking poof.' The claimant's appeal against dismissal was unsuccessful.
9. On about 5 September USDAW accepted the claimant's case. On his behalf it entered early conciliation. Day A was 19 October. On 6 November (Day B) ACAS emailed the EC certificate to Mr Waterton at USDAW. Allowing for 'stop the clock' the last day to present this claim was 6 December 2018.
10. Mr Waterton candidly explained that he had been off sick on Day B. He returned to work shortly afterwards, but when he caught up with his emails he missed the one from ACAS. He therefore did not know that the certificate had been issued. He did not chase the point further, as a mistake on the file indicated (wrongly) that the previous case handler had presented the claim.

USDAW checked with ACAS on 8 January 2019. The mistake was discovered then. The claim was presented on 15 January.

11. Dr Yassin assessed the claimant on 30 April 2018. (I understand that both these examinations were for purposes not immediately related to this case). Her report is lengthy, and has been redacted (Mr Bronze did not know, broadly, the nature of the redactions). While I hesitate to paraphrase, I noted the following. The claimant described a history of anger in inter personal relationships, his tendency to get into disagreements or trouble at work, and acknowledged his heavy degree of reliance on his sister. Dr Yassin assessed that the claimant registered as 'Extremely low' on four out of five IQ scores. She assessed him as 'Extremely low' on all four scores for adaptive functioning. She assessed him as within the 'mild' learning disability range. Dr Garioli saw the claimant on 5 June 2018, and diagnosed ADHD (and rejected a diagnosis of anxiety / depression).

The main issues

12. The issues in the claim are unfair dismissal and disability discrimination. The former is a 'Burchell' case of dismissal for a conduct related reason. The disability discrimination claim is advanced only under s.15 Equality Act 2010. The claimant's case is that he used offensive language because of something arising in consequence of his disability, broadly a lack of awareness of social boundaries. (That phrase is intended as a working summary and no more). He suffered the unfavourable treatment of dismissal. Although the burden of proving the defence rests on the respondent, the claimant's case is that summary dismissal was not proportionate in all the circumstances.

Submissions

13. I do little justice to either representative by seeking to summarise thoughtful submissions in a few lines. Mr Bronze submitted that the tribunal has wide discretion, and that its approach must be multi factorial. It should avoid the trap of concluding that as professional advisers were involved it must follow that it was reasonably practicable to submit the claim in time. He pointed out, and I fully accept, that neither the claimant nor his sister were to be faulted in the slightest for not chasing USDAW to progress the matter.
14. On the 'just and equitable' extension Mr Bronze again emphasised the breadth of discretion. He approached the matter on a number of headings: the claimant had shown the reasons for delay; the cogency of evidence was not affected by the delay in the short period 6 December to 15 January; USDAW had acted promptly once the error came to light; and most important the balance of prejudice favoured the claimant. Finally he stressed that this is potentially a good claim.
15. Mr Green in reply made two short points on the unfair dismissal extension. The first was that USDAW had been at fault, and, as he wrote, "the adviser's fault must defeat any argument that it was not reasonably practicable to bring the

claim in time.” He also submitted that the period of delay between discovery of the mistake and presenting the claim was not reasonable.

16. On the discrimination extension, Mr Green submitted that the balance of prejudice was in favour of the respondent. He submitted that the delay was 40 days, nearly half the statutory limitation period, which must affect the cogency of the evidence. He submitted that there was no evidence that the claimant’s disability was in any way a cause of the delay, as the line of instruction came through his sister to USDAW; and he submitted that the discrimination claim was weak, and that the claimant had a strong claim against USDAW. (Those last two assertions do not sit happily together, unless one reads them together as asserting that there is a strong claim that USDAW was in breach of duty, but a weak claim for consequential loss).

Discussion

17. I start by noting that Dr Yassin’s report is indicative of a claimant who is committed to his work and employer; and who, despite his intellectual impairment, shows some insight into the difficulties which his emotions may cause himself and others at work. I accept that 14 completed years service shows commitment on the claimant’s side, and, at the very least, understanding management by the respondent. I accept that the report also shows that the claimant has been, and remains, highly dependent on others. The claimant is vulnerable, whether seen as employee, union member or client.
18. Once USDAW accepted the case, responsibility lay with it, and it alone, to progress the matter. It alone was at fault for failing to do so. That Mr Waterton missed an email was a mistake, but one that may be easy to understand; less easy to understand is the apparent absence of a diary system for monitoring deadlines and recording the progress of claims. The deadline was missed in this case through a combination of human error on the part of Mr Waterton and his predecessor; with what presents as systemic error within their department and therefore within the service given to members by USDAW.
19. In that setting, I find that it has not been shown that it was not reasonably practicable for the claim of unfair dismissal to have been presented in time. I accept in principle that a representative’s mistake is one factor, and not determinative. This was however a group of mistakes, individual and organisational, over a period of time.
20. I agree with Mr Green that in these circumstances, the delay between 8 and 15 January was unreasonable. In the usual case, a delay of seven days between discovery of the mistake and presenting the claim might be relatively minor. Mr Waterton has however written that there was in November a draft ET1 on file. That being so, there was no evidence to address the question of why the ET1 was not presented at once, or in any event within 24 hours of the mistake coming to light.
21. When I come to the discrimination claim, I deal with the material points in the exercise of my discretion. I accept that the reason for delay has been shown;

that the claimant and his sister are both individually free of fault or responsibility; and that USDAW has been candid in admissions of fault. I do not accept the proposition that the claimant can make good any financial loss against USDAW's insurers. That requires him to leave the informality and accessibility of the tribunal in favour of the jungle of the CPR and the County Court. More importantly, it deprives him of the opportunity to test the real point of principle in these events against his employer of 14 years.

22. Both sides asked me to take account of the merits of the case. I do so with caution. I have been given limited information. The discrimination claim is less straightforward than the binary responses of both sides suggests. Having found what language the claimant did in fact use, the tribunal must find as fact that his language was something arising from disability; and must then consider whether summary dismissal was a proportionate means of setting management standards and protecting the rights of the gay colleague. The claimant, and his gay colleague, both had rights not to be discriminated against on respectively grounds of disability or sexuality. Any case which leads the tribunal to assess that balance between two employees will give rise to challenges. It cannot be said that the claim is weak or speculative.
23. I do not accept that the cogency of evidence has been affected. It is difficult to find that 40 days delay affects the evidence, or the tribunal's ability to do justice, at a time when systemic delay (unrelated to the current pandemic) is responsible for delay of over 2 years between presentation and public hearing. In any event, the incident took place on 5 July 2018; the disciplinary was on 20 July. It is likely that a vastly experienced employer has maintained its records of the allegation, investigation and disciplinary process, as well as records of any previous disciplinary or health matters. The factual dispute as to whether the word 'fucking' was used before 'poof' may not be one that the tribunal has to decide in any event, or one that is affected by the delay.
24. I accept that the balance of prejudice favours the claimant. The imbalance in resource and power between the parties could not be starker, but is only part of the point. Dr Yassin's report suggests that the events in this case may be related to a significant element in the claimant's identity, namely managing his protected characteristic. That being so, the tribunal should be cautious to strike out the claim and deprive him of a hearing.
25. It follows from the above that the claim of unfair dismissal is struck out and that the claim of disability discrimination will proceed. A case management order has been made separately.

Employment Judge R Lewis

02.04.2020

Sent to the parties on:

.....21.04.2020.....

For the Tribunal:

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