



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Perrone

**Respondent:** Procomm Site Services Ltd

**Heard at:** Liverpool

**On:** 13 September 2019

**Before:** Employment Judge Barker

## REPRESENTATION:

**Claimant:** Mr K McNerney, Counsel

**Respondent:** Miss C Elvin, Litigation Consultant

# JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The claimant's application to amend his claim to include a further claim or claims of discrimination by reason of sexual orientation as a result of constructive dismissal on 2 October 2018 is refused.
2. The claimant's remaining claims of direct discrimination and harassment on the grounds of sexual orientation as set out in the original ET1 claim form are allowed to be presented late on the ground that it is just and equitable to do so.
3. The respondent's application that the claimant's claims are either struck out or that the claimant be ordered to pay a deposit to be allowed to proceed as per rules 37 and 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 is refused.
4. The matter may proceed to a final hearing.
5. To prepare the case for a final hearing and to set down good case management orders, this matter is listed for a preliminary hearing with a time estimate of one hour to be conducted by telephone at 2.15pm on 31 October 2019.

# REASONS

1. The claimant lodged claims of discrimination by reason of sexual orientation in a claim form presented to the Employment Tribunal on 1 March 2019.
2. The claimant was employed by the respondent from 20 February 2017 until 2 October 2018 as a Yard Operative. The claimant resigned from his employment, such resignation taking effect on 2 October 2018.
3. At a preliminary hearing case management discussion on 17 June 2019 before Employment Judge Whittaker, matters to be determined at this hearing were set down, which were:
  - (a) Whether the claim of victimisation which relates to the outcome of the claimant's grievance of 2 July 2018 should be struck out on the basis that it has no reasonable prospects of success;
  - (b) whether or not the claimant should be ordered to pay a deposit as a condition of being allowed to pursue that claim of victimisation pursuant to section 27 of the Equality Act 2010; and
  - (c) whether all of the claims of the claimant, including the claim of victimisation, should be struck out on the basis that they were presented out of time.
4. The matter was set down for this preliminary hearing and the parties were ordered to prepare an agreed bundle of documents and exchange witness statements and skeleton arguments in advance of today's hearing.
5. By email to the Manchester Employment Tribunal on 12 September 2019, the claimant's solicitors made an application to amend the claimant's claim such that the his resignation on 2 October 2018 be considered by the Tribunal to be an act of discrimination; either less favourable treatment as per section 13 of the Equality Act 2010, or a detriment suffered as a result of victimisation as per section 27 of the Equality Act 2010.
6. The respondent's representative objected to the claimant's application to amend on the following grounds:
  - (a) at the previous case management hearing on 17 June 2019, it was confirmed by the claimant's legal representative that no claim in respect of his resignation was being pursued. This was recorded in the case management summary at paragraph 6;
  - (b) the claimant was seeking to amend his claim to circumvent the difficulties he faces in respect of his other discrimination allegations being out of time;
  - (c) the amendment sought was itself out of time, being some six months after the original submission of the ET1, seven months after the early

conciliation and almost 12 months after the claimant's effective date of termination;

- (d) the amendment sought is not simply a “re-labelling exercise”, as a claim for constructive dismissal was not particularised or pleaded originally and therefore the claimant was attempting to add a new head of claim;
- (e) documents, witness statements and skeleton arguments had already been exchanged in relation to this preliminary hearing, and the application to amend had been submitted less than 24 hours before the start of this hearing itself, and that the claimant, having been represented by solicitors throughout the proceedings, ought to have sought this amendment much sooner.

7. The Tribunal heard evidence from the claimant and also from Mr Upton, the respondent's Depot Manager.

8. If this judgment is silent as to some issues that were raised in evidence during the hearing, this is not because that evidence has not been considered, but that it was not sufficiently relevant to the issues that the Tribunal had to decide to be included in this decision.

#### **The claimant's application to amend**

9. The claimant's representative noted that if the claimant was successful in his application to amend to add a new claim of discrimination arising out of his constructive dismissal on 2 October 2018, the respondent's application to have the claimant's claim struck out on the basis that the other complaints were out of time would fall away. This was because the claim form and application to ACAS for conciliation had been lodged within the requisite time limit from the date of the claimant's resignation on 2 October 2018.

10. It was also the claimant's case that the application to amend was merely the re-labelling of facts and issues already pleaded. It was accepted by the claimant that the application to amend could not contain a free-standing constructive unfair dismissal claim under section 98 of the Employment Rights Act 1996, as the claimant did not have the requisite period of service.

11. However, it was the claimant's case that his constructive dismissal was in response to the handling of his grievance in July 2018 by the respondent, which was the final act of discrimination following on from previous discriminatory acts, and that as such the resignation amounted to either less favourable treatment and/or a detriment by reason of victimisation suffered by the claimant.

12. The Tribunal notes that a constructive dismissal cannot be an act of harassment in itself (as per ***Timothy James Consulting v Wilton [2015] ICR 764 EAT***) but notes that a dismissal can be as per section 39(2)(c) of the Equality Act 2010 a prohibited act.

13. Having considered the claimant's original pleadings and the amended particulars of claim, I find that the claimant did not have a claim relating to his dismissal in his original particulars of claim. The amendment sought is therefore an

additional factual allegation that is being pleaded that changes the scope of the existing claim and is not merely a re-labelling exercise.

14. Considering the well-established guidance to Tribunals when considering amendments set down in *Selkent Bus Company Limited v Moore [1996] ICR 836, EAT*, the Tribunal must carry out a balancing exercise of all the relevant factors including the interests of justice and the relevant hardship that would be caused to the parties by granting or refusing the amendment. The nature of the amendment is a crucial consideration, and is the timing and manner of the application and the applicability of time limits. As stated above, the nature of the amendment sought here by the claimant is not merely a re-labelling of facts already pleaded.

15. In addition, and considering the timing and manner of the application, the Tribunal notes that at the case management hearing on 17 June 2019, the respondent had been led to understand by the claimant in an express statement during that hearing that there would be no claims brought relating to the circumstances of or the reason for his resignation. The Tribunal also notes that the claimant was represented by solicitors throughout these proceedings and was represented by counsel on 17 June 2019.

16. The Case Management Order of Employment Judge Whittaker was sent to the parties on 4 July 2019. Case Management Orders relating to the exchange of skeleton arguments required these to be exchanged by 3 September 2019. The case management discussion and associated orders notwithstanding, the claimant's representatives did not make their application to amend until the day before this hearing. No reason was given for the delay. Furthermore, as noted by the respondent, this new element to the claimant's discrimination claim is being raised six months after the presentation of the claim form and almost 12 months after the resignation itself.

17. Considering the balance of hardship and injustice to the parties and the respondent's right to know the case that it has to meet and also considering the claimant's access to legal advice throughout these proceedings and the lack of any viable reason given for the lateness of the new claim, the claimant's application to amend is refused.

#### **Are the claimant's complaints out of time?**

18. Given the refusal to allow the claimant's application to amend above, the claimant's last complaint of discrimination relates to the handling of his grievance and the outcome of that grievance process which was issued by Mr Upton and dated 23 July 2018. The claimant resigned on 2 October 2018, approached ACAS in December and issued proceedings in the Tribunal on 1 March 2019.

19. It is the respondent's case before this hearing that both the complaint about the grievance in July 2018 and also complaints about instances of direct discrimination and harassment which took place between April 2017 and January 2018 are out of time. The respondent disputes that these events were "conduct extending over a period" which, as per section 123(3)(a) of the Equality Act 2010, is to be treated as done at the end of that period. The respondent notes the significant

gap between the last allegations of harassment and less favourable treatment in January 2018 and the grievance itself in July 2018.

20. The claimant drew to the Tribunal's attention the fact that he was suffering from poor mental health which a medical report acquired by the respondent identified as being caused by an incident of harassment suffered at work in June 2017. The claimant was, during the whole process between January 2018 and his resignation in October 2018, providing the respondent with notes from his GP documenting his lack of fitness to attend work because of "stress related problems".

21. The issue for the Tribunal to decide is whether it would be just and equitable to extend the time for the claimant to present his claim as per section 123(1)(b) of the Equality Act 2010.

22. The evidence before me demonstrates that the claimant was suffering from mental health problems at the time. The claimant had tried to resolve the conflict at work by way of his grievance and was not able to achieve such a resolution.

23. The claimant issued proceedings having taken the decision to resign in October 2018. The claimant's first contact with ACAS to commence conciliation was approximately two months out of time. The presentation of the ET1 was made within the appropriate period thereafter. The claimant therefore seeks a two month extension of time.

24. Although the respondent complains about the delay affecting the quality of the evidence available, I note that most of the respondent's evidence is accompanied by contemporaneous notes. A two month delay following the conclusion of the claimant's grievance would not, I find, materially affect the quality or the cogency of the evidence available.

25. Furthermore, on a preliminary consideration of the evidence, the claimant appears to have at least an arguable case that the earlier allegations of discrimination which begin in April 2017 and end at the commencement of the claimant's sick leave in January 2018 could be considered conduct occurring over a period as per section 123(3)(b) of the Equality Act 2010. The claimant's counsel, Mr McNerney, quite rightly points out that a determination of whether that is conduct extending over a period is a matter for the final hearing and a full Tribunal.

26. Also, in considering whether it is just and equitable to allow a claim to proceed late some consideration of the merits of the claimant's claims fall to be considered. Having heard evidence from the claimant and from Mr Upton as to the events complained of by the claimant, the claimant's claims of direct discrimination and harassment and victimisation are, I find, at least arguable.

27. Therefore, the allegations made by the claimant relating to the period from April 2017 to January 2018 and again in July 2018 may continue to a final hearing.

**The respondent's applications to strike out the claimant's claim of victimisation and/or require the payment of a deposit**

28. It is the respondent's application to the Tribunal that the claim of victimisation, which relates to the outcome of the grievance raised by the claimant, be struck out

on the basis that it has no reasonable prospects of success, or should be subject to the payment of a deposit as a condition of being allowed to pursue it on the basis that it has little reasonable prospect of success, as per rules 37 and 39 of the Employment Tribunals Rules of Procedure 2013.

29. The respondent submits that the grievance outcome was not an act of victimisation and is incapable of amounting to a detriment, as the respondent made an effort to investigate the claimant's grievance and facilitate a return to work. The respondent's case is that it gathered evidence from which it reasonably concluded that the claimant's allegations were not made out, and therefore had good reason for dismissing the claimant's grievance. Furthermore, the claimant did not take up the respondent's offer of an appeal against the grievance outcome.

30. The claimant submits that the outcome of the claimant's grievance in July 2018 was so inadequate as to amount to a detriment because of victimisation. It was put to Mr Upton that he failed to ask several of the witnesses whose names were given to him by the claimant any questions about the events complained of. Of those who he did interview, several were not asked if they had heard any homophobic abuse. Most of the questions to the witnesses simply related to whether or not they knew that the claimant was gay.

31. It is noted that Mr Upton contacted the claimant on seven occasions between the beginning of May and 2 July 2018, requesting information relating to the problems with staff that was causing his sickness absence, in an attempt to encourage his return to work. He contacted the claimant by a letter on 1 May, by telephone on 25 May and 4 June, again by letter on 7 June, by telephone on 25 June and 26 June and again by letter on 27 June.

32. In the letter of 27 June the claimant was offered the opportunity to send in written representations of his grievance by 3 July. The claimant's evidence was that he was ashamed and embarrassed to discuss the abuse that he had suffered due to his sexual orientation and so felt unable to attend a meeting in work. He did, however, write a letter dated 2 July 2018 to Mr Upton setting out full details of his grievance, and again on 14 July 2018, which letter supplied Mr Upton with a list of seven names of people who he considered were witnesses to the homophobic abuse. The claimant also noted "*given lots of agency workers have witnessed it and left because they didn't want to work in an atmosphere like that*" the claimant's expectation was that a large number of witnesses would have potentially been available to provide evidence to any investigation.

33. It is striking that Mr Upton, having contacted the claimant on numerous occasions to attempt to resolve the situation, when in receipt of a significant amount of information which set out details of those problems and their nature, that is, homophobic abuse, conducted only a small number of short interviews with members of staff. Not all staff were interviewed, and those who were produced statements which were only one or two short paragraphs long.

34. The claimant's allegation that his concerns were not taken seriously by management and that management failed to properly consider his concerns and therefore allowed the behaviour of the respondent's employees to go unpunished, are arguable. It is the claimant's case that the investigation was inadequate because

the complaint was about his sexual orientation. This is also, on the pleadings before me, arguable.

35. A strike out order or a deposit order is therefore not appropriate in relation to the claimant's allegation of victimisation and are refused.

**Further preliminary hearing**

36. The matter is set down for a further case management discussion preliminary hearing to take place on **31 October 2019** at **2.15pm** by telephone. The purpose of this hearing is to set down Case Management Orders to prepare the case for a final hearing and to list the final hearing itself.

Employment Judge Barker

Date: 26 September 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

16 October 2019

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](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.