Case No: 3302985/2020

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

v

Mr Waclawczyk

R1: Kier Integrated Services Ltd
R2: Mr Matt Digby
R3: Urbaser Limited

Heard at: Watford by CVP **On**: 4 March 2021

Before: Employment Judge Daniels

Appearances:

For the Claimant: Mr Kozik (representative) and in person
For the first Respondent: Mr Hamed Zovidavi, Counsel
For the second respondent: In person
For the third respondent: Mr Geraint Probert, Counsel

JUDGMENT

1. The claimant was not dismissed. His employment with the third respondent continued (with full continuity of service), despite his purported dismissal on 26 September 2019 following the transfer of a business on 31 September 2019 to the third respondent and his full reinstatement on appeal by the third respondent on 28 October 2019. The claim for unfair dismissal is dismissed.

2. The claims in regard to direct race discrimination from 2014 up to 2018 (as itemised in paragraphs 7-18 (and listed below)) are dismissed. Those claims are substantially out of time and it would not be just and equitable to extend time in respect of any of those claims. The tribunal has no jurisdiction to hear those claims and hence they are dismissed.

3. The remaining two claims in regard to the alleged unlawful victimisation by the making of disciplinary allegations against the claimant in April 2019 and the decision to dismiss him on 26 September 2020 may proceed. It would be just and equitable to allow these claims to proceed in all the circumstances.

REASONS

The facts

4. The claimant was assisted by a Polish interpreter (duly sworn in) in the course of these proceedings, in so far as he requested this.

5. There was an agreed bundle of evidence, a statement from the claimant and detailed written submissions by the first and third respondent.

6. The Claimant, a HGV driver, commenced employment with the First Respondent on or around 2 April 2007. He is of Polish Nationality. He made allegations of direct nationality discrimination in a grievance dated 1 May 2019 regarding various matters between 2014 and 2018. He believed he was victimised by the pursuit of allegations being made against him of health and safety breaches, including being invited to attend a disciplinary hearing by a letter of 25 July 2019 leading to a decision to dismiss him in September 2019 (later overturned on appeal).

7. The claimant suffered from severe stress from about July 2019. The symptoms he had were lack of sleep, agitation, lack of concentration, and he says he abused alcohol on a frequent basis. He notified the employer about this condition in September 2019, when he tried to postpone his disciplinary.

8. On 26 September 2019, immediately prior to a TUPE transfer which took place on 30 October 2019, and which would have transferred the claimant's employment to the Third Respondent, the claimant was summarily dismissed by the first respondent purportedly for gross misconduct.

9. The claimant lodged an appeal against dismissal on 3 October 2019, within five working days and to Rittu Sunil, Head of HR at the third respondent, as referred to in the letter of dismissal.

10. The appeal, which was heard by the third respondent on 18 October 2019, was successful and accordingly on 28 October 2019 the third respondent reinstated the claimant with immediate effect and compensated him for any period during which he was not paid. The third respondent confirmed that the claimant's period of continuous service would not be treated as interrupted.

11. After he began working at the third Respondent, the claimant says he spoke to Estelle Bradshaw in November 2019, who was an HR employee. During this meeting, he said he wished to take this matter to court, and she said that he had 6 months from the dismissal to bring the matter to the employment tribunal.

12. The claimant says he was in a spin at the time and was unable to think straight. His sleep was badly affected. He is a person of Polish origin and described there being a cultural tendency to downplay any health issues and get on with things. He is also a former firefighter and described his approach to health issues being also founded on that culture where one

would not show weakness and one would tend to carry on working, however unwell one felt and not visit a doctor or seek support unless extremely unwell. The claimant explained that it was only later on when he realised how unwell he had been before Christmas and the extent he was "in a spin". He did not even realise a condition like "stress related illness existed" at that time. He said that explained to himself why he had not sought more medical help and reached out at the time, as he felt it would be a sign of weakness. By the end of December 2019 his grievance appeal had been heard by the third respondent and matters appeared to have been smoother over with the third respondent.

13. In January 2020 he began feeling better and to start looking at taking this matter further. He was particularly concerned about his treatment prior to joining the third respondent. He consulted a lawyer on or about 12 February 2020. The lawyer advised him for the first time of the time limits and his Tribunal ET1 claim was lodged within 3 weeks on 6 March 2020. The claimant says he understood that he had 6 months from this date, to bring all claims until then. His lawyers obtained ACAS Certificates, and began working on his claim. The claimant had to send them a number of documents and exchanged multiple emails trying to agree the content of the claim. They then worked quite intensively to get the claim ready, hence 3 weeks lapsing. The ET1 was lodged on 6 March 2020.

14. There were in effect two types of claims. The first was direct nationality discrimination. The claimant appeared to allege the following acts of direct race/nationality discrimination in his particulars of claim:

    14.1 POC paras 7-10: regarding Christmas annual leave: December 2014;

    14.2 POC para 12: Unpaid overtime: 2014 – 2018 period;

    14.3 POC para 13: Not given Saturday overtime: 2014 – 2018 period;

    14.4 POC para 14: Frequently underpaid: through 2016 and lastly 29/03/17;

    14.5 POC para 17: the claimant was allegedly told by his manager not to use the toilet: 07/11/17;

    14.6 POC 18: the claimant was ignored by his manager: 12/01/18.

15. In addition, the claimant complained about these alleged instances on 8 February 2016, on 29 March 2017 and on 6 February 2018.

16. The second aspect of the claim was in respect of the victimisation complaints. The claimant alleges that the second respondent made false accusations against him leading to a disciplinary charge on 25 July 2019 of causing accidents in the workplace and an ultimate decision to dismiss him for misconduct by the first respondent on 26 September 2019. His protected act was the grievance alleging direct discrimination dated 1 May

2019. These claims are now pursued against the second and third respondent.

Relevant legal provisions

Time limits

17. In determining the issue of time bar, regarding discrimination claims, the tribunal must apply section 123(1) EQA 2010:

> *"123 Time Limits Subject to sections 140A and 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."*

18. The key point being that a claim must be raised within 3 months of the date of the act complained of or, if outside this time period, then in such other period as the tribunal determines to be just and equitable depending on the facts and circumstances of the case.

19. For claims of discrimination, an allegation of direct discrimination, which is outside of the ordinary time limit of 3 months, is out of time unless the claimant can demonstrate that it includes acts extending over a period ending within the time limit pursuant to s.123 of the Equality Act 2010 (EQA) or it would be just and equitable to extend time.

20. Upholding the decision of the EAT in the case of **Robinson**, the Court of Appeal, in the case of **Lambeth**, held there is no general principle that employees should always await the outcome of internal grievance procedures before embarking on litigation.

21. In deciding whether it is just and equitable to extend time to permit an out-of-time discrimination claim to proceed:

22. The tribunal is entitled to take into account anything that it deems to be relevant (**Hutchinson v Westward Television Ltd [1977] IRLR 69**).

23. The tribunal's discretion is as wide as that of the civil courts under section 33 of the Limitation Act 1980 (LA 1980) (**British Coal Corporation v Keeble [1997] IRLR 336 and DPP v Marshall [1998] IRLR 494**).

24. Under the Limitation Act 1980, the courts are required to consider factors relevant to the prejudice that each party would suffer if an extension were refused, including:

- The length of 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 they knew of the possibility of taking action.
- The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

(**Section 33, LA 1980**.)

25. While this may serve as a useful checklist, 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).**

26. The emphasis should be on whether the delay has affected the ability of the tribunal to conduct a fair hearing (**Marshall**).

Just and equitable to extend time test

27. A tribunal has a wide discretion when considering whether it is just and equitable to extend time, and an appeal against a tribunal's decision should only be allowed if it had made an error of law or its decision was perverse (**Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576**).

28. The court also held that time limits are applied strictly in employment cases, and there is no presumption in favour of extending time. In fact, tribunals should not extend time unless the claimant convinces them that it is just and equitable to do so. The burden is on the claimant, and the exercise of discretion to extend time should be the exception, not the rule. This was followed by the Court of Appeal in **Department of Constitutional Affairs v Jones [2008] IRLR 128 and Chief Constable of Lincolnshire Police v Caston [2009] IRLR 327**.

29. Examples of when it has been considered appropriate to extend the time limit for discrimination claims include as follows.

30. Firstly, where a claimant was too ill owing to clinical depression to run the proceedings or attend the hearing, and the ET1 was only one day late. The claimant had not contributed to the claim or the delay, and so his father-in-law, who had instituted and run the proceedings, should have been entitled to give evidence on the just and equitable issue. The EAT ordered that the question of whether it was just and equitable to extend time for a discrimination claim should be remitted to an employment tribunal before a different employment judge. This was ordered on the basis that the ET1 was only one day late and there was no evidence to suggest that the delay had prejudiced the employer. The EAT upheld the tribunal's decision not to extend time in respect of his unfair dismissal and breach of contract claims (**Bozeat-Manzi v Telefonica UK Ltd UKEAT/0389/12**)

31. Secondly, where the employee was off sick for an extended period with depression and during the period prior to her dismissal, was having to deal with periodic meetings to review her absence from work because of sickness. The employee was also awaiting the outcome of a grievance process and hoped that an amicable resolution was possible. (**Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640**).

32. However, in contrast, it was not considered just and equitable to extend

the time limit for a discrimination claim when a claimant delayed making a discrimination claim while he pursued an internal disciplinary appeal, as he knew the time limit for bringing a discrimination claim and ignored his union's advice to lodge the claim in time **(Robinson v Post Office [2000] IRLR 804**).

Conclusions

Dismissal

33. I deal with this point shortly. The claimant appealed against dismissal and this was upheld. The facts are not in dispute here. He was reinstated by the third respondent with full continuity. I follow the case of **G4S v Anstey EAT 2006 IRLR 588** and find that employment continued during the appeal. The employee continued in employment, but with the third respondent as a result of the transfer. If the appeal was unsuccessful, the original dismissal would have stood and the employee would not then have been employed immediately before the transfer. In the present case, the contractual obligation to hear and determine the appeal lay with the third respondent. Having determined the appeal in favour of reinstatement, the original dismissal was expunged and the claimant was to be treated as having been employed by the first respondent up until the date of transfer. The claimant's right to have their appeal heard arose under or in connection with the contract of employment. Accordingly, the obligation to reinstate the claimant transferred under TUPE. I see no reason to distinguish **Anstey** on these facts. The claimant was not dismissed. This was reflected by the precise terms of what was agreed with him by the third respondent, on 28 October 2019, namely full re-instatement with continuity of employment going back to the first day of his employment. Therefore, there is no jurisdiction to hear any unfair dismissal claim.

The claims for direct discrimination-time limits

34. The last act of direct discrimination as alleged is the end of 2018. These direct discrimination claims were all presented grossly out of time.

35. Whilst Section 123(1)(b) of the EQA provides the Tribunal with discretion to allow the claim to be heard if it considers it just and equitable to do so, there do not appear to be any just and equitable grounds for extending the time limit here. As per the case of **Robertson** this should be the exception rather than the rule.

The length of and reasons for the delay

36. The claimant issued his ET1 on 6 March 2020 over 12 months after the last direct discrimination act complained of, if not longer. The claimant did not provide any good reason to me for the delay. No reason was as such put forward by the claimant or his representative. Importantly, the ill health and other issues relied upon in respect of these claims were not relied upon nor indeed had they apparently crystallised by that time anyway.

Extent to which the cogency of the evidence is likely to be affected by the delay

37. The respondent's evidence on these matters would, by the related delay, be impacted on to a greater degree than the claimant's evidence. Therefore, in having to defend these claims now, the respondent would be asking individuals to recall incidents which occurred some significant time ago, going back to 2014, and, to some of them, these incidents will have been part and parcel of daily life at a large retailer and not memorable. This would cause prejudice to the respondent and could prejudice a fair hearing.

38. The claimant also did not act promptly in progressing these claims.

39. In all the circumstances there is no continuing act here and there is no good reason for the delay in brining a claim regarding such matters.

40. It would not be just and equitable to allow these claims to proceed. These claims are dismissed.

The claims relating to victimisation-time limits

41. In respect of the victimisation complaints, for the period 1 May 2019 to 26 September 2019, the claimant alleges that the second respondent made false accusations against him leading to an unfair charge of causing accidents in the workplace on 25 July 2019 and ultimate dismissal by the first respondent on 26 September 2019. His protected act/s include the grievance alleging direct discrimination dated 1 May 2019.

42. The third respondent made submissions as follows. It said that all of the claimant's victimisation claims were presented significantly out of time, even if the last date was considered as 26 September 2019.

43. The claimant submitted his claim on 6th March 2020 and an ACAS certificate had been issued on 12th February 2020 (a same day turnaround). The delay concerned was said by the respondent to be lengthy. It was submitted that the claimant had provided no good explanation for why the claim was so delayed.

44. The third respondent's representative referred to **In Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13** (18 February 2014, unreported), where Langstaff P held that a litigant can hardly hope to satisfy that burden unless he provides an answer to two questions (para 52):

> *"The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was."*

45. It was submitted by the third respondent that the discretion to grant an extension of time under the 'just and equitable' formula has been held to be similar to that given to the civil courts by s.33 of the Limitation Act 1980

to determine whether to extend time in personal injury actions (e.g. **British Coal Corpn v Keeble, DPP v Marshall**).

46. Under that section the court was required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action (**see British Coal Corpn v Keeble [1997] IRLR 336, at para 8**).

47. It was submitted that the third respondent was seriously prejudiced, both generally and forensically. Not only would it be required to meet a claim which it would otherwise not have to meet, but in doing so it must address broad factual allegations going back to April 2019.

48. The third respondent said that the facts do not support an extension of time on a just and equitable basis. In particular, it was said that the claimant was represented by the GMB union throughout the appeal process, and accordingly had the benefit of their legal advice or support;

49. The third respondent relied on the informal grievance meeting on 24th December 2019, where he told the third respondent that he had taken advice from a solicitor and intended to take the employer “to court”.

50. The third respondent also noted that in his appeal letter dated 3rd October 2019, the claimant stated that he was taking advice from his union and wished to “avoid the need for any legal action.”

51. The second respondent had no further submissions to make.

52. The claimant opposed the application. I reflect the claimant’s submissions below. I considered all of the facts and note the following points in particular.

The internal appeal and the complexity of this case

53. It is of note that an appeal was ongoing for over a month after the last alleged act until 28 October 2019. The claimant had explained it was his preference to resolve matters internally and this was one factor to take into account for his delaying in the way he did.

54. Further, the fact that his appeal was being considered after dismissal and this ultimately led to his re-instatement added some further complexity as to when and if he had been dismissed and if so when. If not, how did that affect the time limits and who was/were the claim/s against. This was not self-evident and was another factor which explained some degree of uncertainty and delay.

The claimant's health

55. The claimant provided medical notes to confirm his being diagnosed with sleeping tablets in September 2019. He also gave credible evidence that he was unable to sleep, concentrate or make decisions in the autumn of 2019 and his head was "in a spin" during that period and did now know how unwell he was. He also credibly explained his unwillingness to show weakness and see a doctor again. The tribunal has to take into account the different individuals that use the service and not apply a one size fits all approach to parties. The fact that a person has not obtained extensive medical evidence in support of their predicament does not necessarily mean they were fit to bring proceedings at the time. The claimant was credible and consistent as to the real impact his health had on his ability to progress matters until February 2020. I find that he was genuinely unwell between September 2019 and early January 2020 and that he was not fully able to progress his personal affairs during that period. I also do not consider the fact that he was able to do some things, like participate in an internal grievance, as sufficient to conclude he was fine. It is clear to me that he was meaningfully impaired from performing activities and progressing claims during this period.

56. The steps taken by the applicant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

57. The claimant had received some guidance and representation from the GMB at the internal discipline and grievance stage, in October 2019. The third respondent contends that this is crucial. I do not agree.

58. There is no evidence that the GMB took wider responsibility for the conduct of the discrimination matter either generally or thereafter. They appeared to be acting as representative in September and October 2019 and not as retained advisors. And his appeal succeeded and he was reinstated which they may have assumed was the end of the matter.

59. There is no evidence before me that they were asked to give advice on the merits of the victimisation claims or on the time limits, thereafter, or that they gave any such advice. There is no evidence that the claimant knew the true time limit but ignored this.

60. Further, the claimant gave cogent evidence that he did not entirely trust the GMB official in question, albeit he was willing for him to act as an internal representative in the internal appeal. That may well explain why he did not seek further advice after the appeal and his being reinstated. It is at the very least consistent with the apparent facts that the GMB did not advise on time limits thereafter.

61. The time to present a complaint in connection with the victimisation claims would normally have run out or began to run from September 2019 and time ran out on or around the end of December 2019. An ACAS extension of up to one month would have been available to the claimant but was not taken up.

Accidental misinformation by the third respondent

62. Importantly, I accept the claimant's evidence that he had been accidentally told by a member of the third respondent, accidental misinformation, namely that he had 6 months to file a claim. Albeit he admitted he was not focusing on bringing a claim at that point and was pursuing the internal process and/or was simply too unwell to focus on what to do, I do accept that some reliance was placed on this. Being accidentally misinformed by a party as to the proper time limit is a potentially good reason for some delay in lodging a claim.

63. After very careful thought and, despite the burden being on the claimant to show good reasons, weighing all of the above factors and applying the above case law, there are very good reasons on the facts, when accumulated together to extend time on a just and equitable basis. Namely his significant anxiety and ill-health between September 2019 and January 2020; his ignorance of the true time limits; the effect of his ongoing appeal against dismissal and the complicating effect of that issue; his being accidentally misinformed as to the true time limits and the lack of retained professional advice or any third party who had assumed responsibility for time issues, such that I find there are good reasons for the delay.

64. I do not see any cogent or persuasive arguments to say that undue prejudice results to the respondent or that a fair hearing cannot now be held in these circumstances.

65. In all the circumstances, it would be just and equitable to extend time here regarding the victimisation claims which arguably continued to 26 September 2019. (The fact that dismissal was later expunged does not preclude the decision to dismiss him on 26 September 2019 from being a detriment in my view. This will turn on the full facts in my view.)

66. Further, the claimant acted reasonably swiftly once he decided that he was able to and wished to take the victimisation claims further. Turning to consider whether there was undue delay after taking advice, I do not find as such. The usual time limit is 3 months and so filing a claim within 3 weeks of seeking advice was not unduly long a period.

67. The victimisation claims regarding the alleged conduct from 25 July 2019 and up to the decision to dismiss on 26 September 2019 may proceed. it would be just and equitable to extend time in all the circumstances for such claims.

Employment Judge Daniels

23 March 2021

Sent to the parties on:

23 April 21

For the Tribunal: