EMPLOYMENT TRIBUNALS

Claimant: Mr F Egure

Respondent: The Secretary of State for Justice

Heard at: Manchester **On:** 24 June 2019

Before: Employment Judge Holmes

REPRESENTATION:

Claimant: In person
Respondent: Mr Redpath of Counsel

JUDGMENT ON PRELIMINARY HEARING

It is the judgment of the Tribunal that:

1. The claimant's application to amend his claims is refused.

2. The respondent's application for an order striking out the claims, or some of them, and/or a deposit order is refused.

REASONS

1. Reasons having been given orally, as the claimant requested written reasons, these are provided. The Tribunal has today been considering, in a preliminary hearing, applications made by both the claimant and the respondent. This preliminary hearing arises out of a previous preliminary hearing held by Employment Judge Warren on 18 February 2019 , when she identified the preliminary issues to be determined at this preliminary hearing and they were:

(1) In relation to the claims at paragraph 3 of her Order, whether any part of the claim was brought in time and if out of time whether the Tribunal should extend time;

(2) At 2.2, whether the claimant should be allowed to amend his claim to include allegations relating to the recruitment process; and

(3) Whether any or all of the claim had no reasonable prospect of success and should be struck out, or in the alternative a deposit order made.

2. Following that preliminary hearing the claimant clarified the amendments that he wished to make , and did so in an email of 22 March where, in addition to seeking to amend in respect of the recruitment process , he also indicated an intention to amend to include constructive dismissal. Consequently, those are the applications that the Tribunal has heard today. Mr Egure has appeared in person , and Mr Redpath of counsel has again represented the respondent.

3. The Tribunal is going to consider these matters in the order in which they were set out, to some extent, in the previous hearing in that it is going to deal with the amendment issues first , since it seems that that may well determine other issues in terms of what the claims are before the Tribunal. With the agreement of the parties the Tribunal will give its rulings in relation to the amendment issues , and then consider the other applications made by the respondent.

The amendment application.

4. In relation to the amendment application, as I have indicated , it is effectively in two parts: one is to take what had hitherto been set out in the narrative to the claim form , that the claimant submitted himself, as “background matters” relating to his recruitment to the Prison Service , (under the Secretary of State for Justice which is now the respondent), which took place in 2016 through to 2018, and indeed it is one of the claimant's potential complaints that this took a long time, was unduly delayed and was indeed discriminatory. In the document attached to his claim form he deals with these matters on the second page (they are not numbered on the original , but it is the second page, page 18 of the bundle that has been helpfully produced to the Tribunal today) where in the next to bottom paragraph he says, “it would probably be useful to give a bit of historical background to my reasoning and perception that this service has encouraged staff and their discriminatory actions towards me”. He then sets out over the next paragraph , and indeed until the final page of this document , the history of the recruitment process he went through before finally becoming employment by the respondent at HMP Manchester in early 2018.

5. That process was carried out by an organisation with the initials SSCL, Shared Services for short, and , in terms of the conduct that the claimant seeks to complain of, it is conduct that was primarily at their hands in terms of the process that he underwent at that time. That has given rise to a discussion that was held in the previous preliminary hearing, and indeed is noted in paragraph 9 of the discussion, as to whether the respondent, i.e. the Secretary of State, would accept vicarious liability for SSCL and the Judge directed, as indeed has happened, that the

respondent inform the claimant as to whether that would be the case. That has happened , and the respondent has indeed confirmed that he will not accept vicarious liability for SSCL, so this gave rise to the possibility that if such a claim were to be included that SSCL would potentially have to be added as a party.

6. The claimant, however, in an email to the Tribunal of 27 March, indicated that he did not want to joint that entity or company as a respondent. That was taken, as it was somewhat ambiguous, that he was referring to sections of his claim set out in the previous case management orders at section 6.2, and it was thought he may thereby be withdrawing those insofar as they were claims that he had already made. That was not his intention; he indicated that he did not want to bring fresh claims against SSCL and have them joined as a party, but by the second part of his application today he does seek to be allowed to bring those claims against this respondent. That is the amendment that he seeks to make in relation to his race claims, but , quite separately , he seeks also to amend to include a claim for constructive dismissal. The Employment Judge discussed with him at the outset of the hearing as to what exactly that type of claim may be, the claimant having ticked none of the boxes on the claim form in relation to dismissal or infeed full notice pay, and the Tribunal pointing out Mt Egure, as he accepts, that he lacks qualifying service to present a claim of unfair dismissal, he only being employed for some four or five months or so.

7. Consequently, the claimant would not be entitled to present a claim of unfair dismissal , but constructive dismissal, as was explained to him, could also be put forward on the basis of a breach of contract claim i.e. a claim for notice pay, and that is in fact after discussion , what Mr Egure seeks to do, a constructive dismissal , of course , being a breach of contract, if established and the measure of damages being the notice to which the claimant would have been entitled if he had actually been dismissed. He resigned without notice , and so did not work any notice and was not paid any notice. Consequently, if he was to succeed in a constructive dismissal claim , if he can bring one his measure of damages would be the notice pay to which he would otherwise have been entitled.

8. In terms of that application, the claimant accepts that he did not previously bring such a claim, and indeed when one looks at the narrative of his claim form which he submitted on 14 November 2018, after his resignation on 1 September that year, (although it is actually put at 31 August in the claim form), but either which way, he clearly had resigned by the time he presented these claims, But in these claims there is no mention in fact of his resignation and certainly no claim in relation to it. The claimant explains that, which the Tribunal accepts, on the basis that he is not legally qualified , and this is all new to him. He was not aware of what precisely he could claim, he was not represented or advised at the time, but has taken some advice since, which is why he has decided at this stage to seek to amend his claims to include the constructive dismissal claim. In essence , he says he has made a mistake, one that arises from his lack of knowledge of the law and procedure, and in terms of what he would allege , if permitted to bring such a claim , he does confirm that he would effectively be relying upon those matters which he has already set out in his claim form as contributing acts of race discrimination as particulars of the breach of contract that he would have to show that the Secretary of State was guilty of, so he would not be seeking to add any new allegations he would be relying upon

the same allegations to found his constructive dismissal claim. In essence, that is the basis of his application , and how he puts it forward to the Tribunal today.

9. In terms of the other application to amend his race claims, the claimant did in his document attached to his claim form set out these matters, but he did so by way of background , and did not at that time seek to actually make claims in respect of those matters. He now again, with the benefit of some reflection and indeed possibly advice, considers that he should include those claims as claims and not merely by way of background, and consequently he wishes to make those as additional claims to those which he is already making against the respondent, and he wishes to make them against this respondent and not against SSCL. Again he relies upon his lack of knowledge of the law and the procedure that he did not do so before, or certainly when he brought the claims.

10. The respondent , through Mr Redpath , objects to both of those applications. The reasons for the objections are primarily that these are late applications of a nature that the claimant was aware at the time he presented his claim form before the Tribunal in November 2018; he was well aware of all of these matters; he had already resigned and if he wanted to complain of constructive dismissal he could and should have done so then, and to the extent that he wishes now to bring additional race claims it was open for him to do that in this claim form at that time but he chose instead to recite these matters merely as background and not to see to claim until at the very earliest the previous preliminary hearing where he made his first indication that he wanted to add these claims.

11. In terms of what would be involved if the Tribunal accepted his application, particularly in relation to the race claims, the respondent says that this is a wholly separate matter involving primarily SSCL. It would involve different witnesses and a whole new set of claims that have not been before the Tribunal, and in respect of which there has been no previous grievance, or indeed other than perhaps one brief email, any serious complaint made by the claimant. In other words, these are not matters which have been investigated at all by the respondent prior to the application to amend. So unlike other cases , where perhaps there has been a grievance during the course of the employment, where matters have been looked at, these are matters which would be looked at, as it were, afresh and would be likely to involve SSCL who are not going to be a party because the claimant does not want them to be, but almost certainly would have to provide the relevant witnesses together with any relevant witnesses from the respondent. This would therefore, the respondent effectively submits, considerably expand the scope of the claims and indeed of course the scope of the hearing, the length of the hearing, and would involve further expense on the part of the respondent in dealing with these new claims.

12. So for all those reasons the respondent objects to the applications and invites the Tribunal not to grant them.

Discussion and findings on the amendment applications.

13. In terms of the law to be applied, it is of course that the Tribunal has a discretion in relation to amendments. It is a case where the exercise of the discretion has been guided by caselaw for many years but the leading case of which is a case

called ***Selkent Bus Company v Moore [1996] IRLR 661***, and that remains the leading case in terms of how the Tribunal should approach applications of this nature. In that case Mr Justice Mummery, as he then was, identified a number of relevant circumstances in a non exhaustive list of considerations that the Tribunal should be taken into account when deciding whether to allow or not to allow an amendment, and the first of those is the nature of the amendment, second is the applicability of time limits and the third is the timing and the manner of the application. Those are the primary considerations, but they are not the only ones, it being clear that this was not an exhaustive list and ultimately what Mr Justice Mummery said in that case, as has been approved in many cases thereafter, is that the paramount considerations are the relevant injustice and hardship involved in refusing or granting an amendment. Questions of delay as a result of adjournments and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision, as has been said before, ultimately this is a matter for the Tribunal's discretion and ultimately it may have to apply a balance of prejudice test.

14. In terms of those three initial factors, the nature of the amendment is twofold: the first in relation to the constructive dismissal is to add a wholly new claim which is not before the Tribunal. The existing claims before the Tribunal are discrimination claims: this would be a wholly new type of claim because it is a breach of contract claim for constructive dismissal. So it is quite a substantial change although , of course, the claimant is going to rely upon the same facts in support of his constructive dismissal claim as he does in respect of his race discrimination claims. But it is still a new claim , and indeed it is a slightly different claim , because it could be the case that the Tribunal found that the respondent had behaved, for want of a better word, "badly" towards him, but not on the basis of his race. If the Tribunal was satisfied that the employer had nonetheless acted in such a way as broke the contract it would not matter if it was racially motivated or not: that might found a separate constructive dismissal claim. That rather emphasises the different nature of the claim.

15. In terms of the applicability of the time limits, as a constructive claim/a breach of contract claim, the relevant time limit would have been three months from the effective date of termination, which was 1 September 2018. The test of extension of time for that type of claim is whether it was not reasonably practicable to have presented it within time. In other words, other than by way of amendment, if this was a fresh claim form being presented say in March, at the earliest, of 2019 then that claim would be out of time , and the claimant would have to establish why it was not reasonably practicable of him to have brought it within time. That test is a strict test, and usually want of knowledge is not a good ground for lack of reasonable practicability. Where the facts are known and a claimant is in a position to bring a claim, ignorance of the law is not usually found to be a want of reasonable practicability. That would be the test if this were a fresh claim; that is not necessarily the test to be applied in an application for amendment but it is a very relevant factor in terms of the exercise of the discretion if one looks at what the time limit would have been , and how it would have been applied had this claim been brought afresh when the application was first made.

16. In terms of the timing and the manner of the application, the manner of course was that it was indicated in the claimant's emails, it was not apparently indicated at the preliminary hearing, or , if it was it was not noted. Clearly it was then made by the claimant, and in terms of the timing of it , it was in March 2019. Again time goes on.

17. So in terms of that application, the Tribunal has had to consider whether it should be granted, and in doing so it inevitably looks also at the other application because the two are somewhat linked , and whereas the race application is slightly different because the claimant is not seeking to add a new type of claim, he is nonetheless seeking to add claims that go back prior to his employment starting with the respondent and relating to issues which, on the face of it SSCL are responsible for , and for which the respondent does not accept liability , but that does not mean to say would not be found. It would be a live issue, whose responsibility any proven acts was. If those claims were permitted then the Tribunal would have to hear evidence about that process, and almost certainly from witnesses from SSCL even if they were not parties. There may also be respondent witnesses but in essence that part of the process is wholly separate from the management of the claimant once he became employed at HMP Manchester. In other words, the same witnesses would not be involved , because they were not involved in the recruitment process.

18. Therefore that would considerably extend the scope of the claims both in terms of time , because we would be going back a further period of time, in fact over 12 months before the claimant started employment, and would considerably increase the scope of the Tribunal's enquiry. Different witnesses would be required , and it seems that it is likely that the length of the hearing would almost double if the Tribunal was going to have to investigate all those matters as well.

19. Consequently, in respect of both applications the Tribunal does consider that the balance of prejudice falls very much against the claimant ,and that the respondent's objections are valid ones. To some extent , in relation to the first application for constructive dismissal , the claimant can comfort himself to this extent, which is that if he succeeds in his race claims , and contends that he resigned as a result of the discrimination (if the Tribunal finds there was any), then he can include that as part of his loss arising out of the discrimination. He would have to establish that that loss had been caused by the discrimination but that would be a rather lower hurdle than he would have to satisfy if he was to maintain a constructive dismissal claim. Secondly, in terms of remedy the maximum that he could achieve if his constructive dismissal claim was allowed , and then succeeded, would be his notice pay: four weeks at most, maybe less than that, but that would be the extent of the financial benefit this may bring to him. This is an element which , if he did succeed in his race claims , and did succeed in establishing that he resigned because of them, he would be awarded in any event, or certainly would be awardable in any event. So, in terms of what he loses by dint of not being able to bring that claim , compared with his other claims then in the balance of things it is , frankly, not very much. Given the focus of his claims does appear to have been from the very beginning, quite rightly, his race discrimination claims, then the Tribunal sees no great injustice to him in not allowing him to put forward a late, slightly different , and rather more legally complicated claim of constructive dismissal. So the Tribunal does not allow that amendment.

20. In relation to the race claims, then because this predates the matters that the Tribunal is going to deal with by some considerable time, and one might add , of course, the applicable time limits in relation to those are even more pertinent, because the three month time limit applicable in discrimination cases would have long expired even before the claimant started employment , let alone during any of the periods during which SSCL were processing his application, so those claims are already considerably out of time. The claimant does mention them as background and they may well be relevant background, but again the Tribunal sees, in terms of the balance of prejudice , that the focus being upon what happened when the claimant actually did get employment , and his treatment then , that the balance of prejudice would weigh heavily in favour of the respondent if they had to then at a very late stage investigate these matters, for which they may not even be responsible, and have to meet these new claims which , could and arguably should, have been presented in the original claim form, when in any event they would have been met with the objection that they were considerably out of time. So again, balancing what the claimant loses by not being able to bring those claims against the focus that rightly should be applied to the claims arising from when he did get employment , then the Tribunal, whilst appreciating this was a matter that came about through error on his part, considers that it should not exercise its discretion to allow those claims, so the claimant's applications for amendment are refused.

The respondent's applications.

21. That brings us now to the respondent's applications, and , of course, that basically means the Tribunal can proceed on the basis of the claims as they are. The respondent's applications , essentially , are to either strike out all of the claims or, if the Tribunal is not with the respondent on that, to order deposits in respect of all or some of them , on the primary basis that they are out of time with the exception of a claim arising out of incidents in the middle of June 2018. Nonetheless the respondent says , in the alternative ,that the claims, including that one, have either no reasonable prospect of success, entitling the Tribunal to strike them out, or , at best little reasonable prospects of success , entitling the Tribunal to consider making deposit orders.

22. In terms of the application as it was put by Mr Redpath today , there was a lot of focus on time limits and one of the things that the Tribunal was directed to consider in this preliminary hearing was the issue of time limits, and whether any of the claims should be found to have been out of time and if so whether or not it should grant any extension of time.

23. In relation to time, there were submissions as to what claims were and what claims were not in time. Mr Redpath did a calculation in relation to that , and conceded that the claims that are set out at paragraph 6 of Employment Judge Warren's preliminary hearing (pages 41-42 of the bundle) , when one corrects as one must 6.2.1 where the original document has 27 July but it should clearly be 21 June. Looking at those dates, the very last entry at 6.2.8 goes back to April 2018. In terms of whether claims were or were not in time, then working from the presentation of the claims on 14 November and allowing for the claimant going to ACAS under the early conciliation procedure , which has the effect of stopping the clock and thereby can extend time for presentation, the Tribunal's calculation is that the earliest date

that an act would be in time would be Sunday 17 June. So consequently claims about events on 21 June or indeed 19 June (because the claimant also mentions that date) would be in time. Obviously anything thereafter is in time, but anything that predates 17 June 2018 is out of time on its face.

24. That, however, is not the end of the story , because in terms of whether claims are presented in time or not , there are provisions which enable the Tribunal to find that claims are not out of time if they are part of conduct extending over a period of time. That is the effect of section 123(3) of the Equality Act 2010 and it is very often the case in discrimination cases that a claimant takes a number of individual acts but seeks to link them together , and invites the Tribunal to conclude that they did form part of a series of conduct extending over a period of time. That, says Mr Redpath , who is obviously alert to that possibility, is something the claimant cannot do here , and there is no prospect of him being able to do so because he has effectively three separate incidents going back to April 2018 . He has no way of connecting them. It is not sufficient, he submits, that the claimant simply says "I have the protected characteristic of my race. I was treated the way that I was by my employers. That is enough to reverse the burden of proof and on each of these occasions I can effectively satisfy the Tribunal that I have a prima facie case of race discrimination". That connection , says Mr Redpath, is absent and there is no theme, there is no link, between these various incidents. Consequently the claimant has no prospect of establishing that they are part of a series of conduct. If that is the case notwithstanding that 21 June, and indeed what then followed which was the 8 July claim , in relation to trigger points for sickness absence, then anything before them is doomed to failure as being out of time , and that therefore those claims must be struck out, or at the very least a deposit order made. But Mr Redpath goes further than that, and says even in relation to those claims that are in time the claimant has little or no reasonable prospect of succeeding in those claims.

25. In terms of the application, of course the respondent is primarily seeking to strike out these claims. In doing so they will be conscious, as Mr Redpath doubtless is, of cases such as ***Anyanwu v South Bank Students Union [2001] IRLR 305*** which is authority for the proposition that only in the very clearest circumstances should discrimination cases be struck out. The reason for that put forward by Lord Stone in his Judgment was this:

"For my part, such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of process except in the most obvious and plainest cases. Discrimination cases are generally fact sensitive and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."

That is a principle that has been applied on many occasions since, but is not a rule of law , and there are discrimination cases which can , and, on occasion , should be struck out, and Mr Redpath's submission effectively is that this is one such case.

26. In terms of a link between the claims, this of course strays into the area of conduct over a period of time, and in terms of the approach to be taken to that particular legal issue there have been again a number of cases in which Tribunals

have given guidance and the most relevant of those of course is ***Hendricks v Metropolitan Police Commissioner [2003] IRLR 96***, and that, along with other cases, is authority for the proposition that merely because there is a series of apparently unconnected acts does not preclude a Tribunal nonetheless looking at the conduct of the respondent as a whole , and concluding that it was part of such conduct. In terms of whether that should be elevated to a practice or a policy, it is quite clear again from the authorities that the Tribunal should not elevate those words to that status: a claimant does not have to establish a policy or practice or something of that nature. What the authorities make clear is that the Tribunal has to look at all the facts.

27. In terms of how the claimant puts his case, the Tribunal was struck by something he said in the course of his submissions in reply, which was that HMP Manchester was “like a village”. Everybody, as it were, knew what was going on. He openly used the term “conspiracy”. The Tribunal would not have to be satisfied that there was a conspiracy , but it may be satisfied that there was a discriminatory state of affairs. That is something which Tribunals often have to consider in organisations, and the sort of point that the claimant made is one that is often made: it can often be a small world . Whilst, on the face of it, there may be no apparent connection between the actions of A, B and C , upon closer examination a Tribunal could be satisfied that in fact there was. The Tribunal does take the point that in respect of two of the claims that are made there is a common feature, a common actor, and that is Anita Barrett. She is one of the persons about whom the claimant complains in relation to the aftermath of the 21 June incident. She was his line manager, and it is she that he complains of in the 8 July incident , when he claims, and we do not quite know what the respondent’s case is on this, that he was wrongly told that the trigger point for a warning in respect of sickness absence was two days , whereas it was actually four days. Again this person features in both of those incidents. The other actors are Mr Robert Harrison, who was involved in the incident on 21 June, and prior to that Mr Greenhalgh who was the person who dealt with the claimant in relation to an incident in April 2018.

28. The Tribunal accepts that it may well be that there is no connection between these acts, but equally the Tribunal accepts the claimant's point that this may be found to be “a small village” where managers, HR and people of that nature do talk to each other , and did talk to each other. It may be that there was some interplay between them. This seems to the Tribunal to be a classic case where it can only begin to determine whether these matters amount to a series of conduct extending over a period of time when it has heard all the evidence, and whilst at the moment the respondent may say there is a dearth of that evidence that may be so, but the proper place to determine that is in a final hearing. So , for those reasons the Tribunal rejects the applications for striking out any of the claims, whilst observing that clearly the 4 April one predates the claims being in time by some months. Ultimately that will be a matter for the Tribunal that determines the final hearing.

29. Equally whilst it could consider making deposit orders the Tribunal is not satisfied that the respondent has shown that the claimant has little prospect of these claims succeeding , or the time limit points being made out. A deposit order is not as draconian of course as a striking out order, but it can of course operate to dissuade a claimant from pursuing claims. If the deposit is not paid, of course, then the claims to

which it relates then cannot proceed. It is often said to be “a shot across the bows” of a claimant, but the Tribunal considers that whilst the authorities do not say that the Tribunal should not make deposit orders in discrimination cases with the same force as those cases relating to strike out, the Tribunal does consider that very similar considerations apply in relation to deposit orders. On the basis of the submissions made the Tribunal does not consider that the case is made out for any deposit orders either.

30. On that basis, it will be apparent that the Tribunal is not going to determine any time limit points. The claimant needs to be aware that if the Tribunal conducting the final hearing finds that any of the claims were presented out of time , and are not saved by the argument that they are part of conduct extending over a period of time, he will need to seek the Tribunal’s discretion to extend time for the presentation of the claims. That is not something that he has done today , and the Tribunal has not invited him to do , because the first hurdle was whether or not he should be required to do so as to when the Tribunal could find that they were not conduct over a period of time. The Tribunal may still find that , in which case he does not need the extension, but he will in the alternative, and should prepare in his witness statement, an alternative basis that if the Tribunal finds any of the claims, particularly anything pre 16 June 2018, were out of time , he would have to put forward the reasons for why he should be allowed to present that claim out of time , if the Tribunal so finds, on the basis that it would be just and equitable to allow him to do so.

31. The Tribunal will not determine the time limit issues today, which of course means they go forward to the final hearing. The respondent is not precluded from arguing them, far from it, they are live issues in the final hearing, but this Tribunal is not going any further today, and will therefore dismiss both parties’ applications.

Case Management.

32. The Tribunal went on to make case management orders, which are set out in a separate document.

Employment Judge Holmes

Dated: 23 July 2019
JUDGMENT AND REASONS SENT TO THE PARTIES ON

2 August 2019

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