



EMPLOYMENT TRIBUNALS

Claimant: Mr B Russ

Respondent: Custom Insulation Services Limited

Heard at: Nottingham **On:** Monday 7 January 2019

Before: Employment Judge Hutchinson (sitting alone)

Representatives

Claimant: In Person

Respondent: Mr J Gidney of Counsel

JUDGMENT

The Employment Judge gave judgment as follows: -

1. I am satisfied that I have jurisdiction to hear all the claims of direct race discrimination.
2. I am not satisfied that the Claimant's claims of discrimination have no reasonable prospect of success and they should be allowed to proceed subject to the deposit order.
3. I am satisfied that the allegations referred to in the attached deposit order have little reasonable prospect of success and the Claimant is ordered to pay a deposit in respect of each of those allegations in the sum of £200.
4. I allow the Claimant to amend his claim to add a claim of unfair dismissal and a claim of victimisation in respect of that dismissal.

REASONS

Background to this Hearing

1. The Claimant presented his claim to the Tribunal on 6 December 2017. At that time, he was still employed by the Respondents as a general operative and had been so employed since 27 January 2014.
2. He said that he had suffered race discrimination and attached to the claim was a letter dated 4 December 2017 in which he tried to set out his complaints of discrimination which dated back to 6 January 2016.

3. The claim was accepted and served on the Respondent on 22 January 2018. The case was listed at that stage for a hearing on 7, 8 and 9 January 2019 with a case management telephone hearing set for 23 March 2018.

4. The Claimant was dismissed from his employment for alleged gross misconduct on 11 January 2018. This was referred to in the response filed by the Respondents on 16 February 2018.

5. Prior to the case management hearing the Claimant provided an agenda in which he said that he wished to apply to amend the claim to add a claim of unfair dismissal.

6. The hearing on 23 March 2018 could not take place because of a lack of judicial resources and the hearing was rearranged for 11 June 2018.

7. At that hearing Employment Judge Camp did not have before him the previous agenda. He referred to the dismissal of the Claimant and pointed out to the Claimant that if he wished to pursue a claim of unfair dismissal his claim may be out of time.

8. He ordered the Claimant to provide further particulars of his claim and listed the matter for a further case management Preliminary Hearing which took place on 3 August 2018.

9. At that Preliminary Hearing he set the agenda for today's hearing to deal with the following preliminary issues: -

9.1 Given the dates of early conciliation (18 April to 24 May 2017) and the date the claim form was presented (6 December 2017) is the Tribunal prevented by Section 18A of the Employment Tribunals Act 1996 ("Section 18A") from considering the Claimant's existing complaints (ie those that are made in the claim form) that concern matters arising after 24 May 2017 and if so should those complaints therefore be dismissed? This is the "early conciliation issue".

9.2 Were all of the Claimant's existing complaints presented within the time limit set out in Sections 123(1)(a) and (b) of the Equality Act 2010 ("EQA")? Dealing with this issue may involve considering subsidiary issues including: -

9.2.1 Whether there was conduct extending over a period?

9.2.2 Whether time should be extended on a "just and equitable" basis? This is the "time limits issue". It may also be relevant to preliminary issues 9.2.3 and 9.2.4 below. Time limits more generally will be relevant to issue 9.2.5 below;

9.2.3 Whether any part of the Claimant's claim has no reasonable prospects of success and if so whether pursuant to Rule 37, all or any part of the claim should be struck out ("this strike out issue");

- 9.2.4 Whether any specific allegation or argument forming part of the Claimant's claim has little reasonable prospect of success and if so whether pursuant to Rule 39, the Claimant should be ordered to pay a deposit (and if so how much) as a condition of continuing to advance any such specific allegation or argument ("deposit issue");
- 9.2.5 Whether the Claimant should be permitted to amend his claim to add the following complaints: -
- 9.2.5.1 Unfair dismissal under section 94 Employment Rights Act 1996.
 - 9.2.5.2 An allegation that he was victimised under the EQA by being dismissed, relying on the presentation of his claim as the relevant protected act. This is "the amendment issue". It is possible that when deciding this issue, the prospects of the Claimant successfully persuading the Tribunal at any hearing that he was dismissed because he presented this claim will be taken into account.

10. Employment Judge Camp ordered that the Claimant should be accompanied by an interpreter which was provided by the Court at the hearing today.

The Hearing Today

11. At the hearing today, the Claimant was assisted by the Court interpreter. He gave evidence and there was an agreed bundle of documents. Where I refer to page numbers it is from that bundle. Mr Gidney, Counsel for the Respondent had helpfully provided me with submissions prior to the hearing which included a chronology of events.

12. At the commencement of the hearing Mr Gidney confirmed that he did not wish to pursue the first issue set by Employment Judge Camp regarding whether the Tribunal was prevented by Section 18 of the Employment Tribunal Act 1996 from considering the Claimant's complaints about matters occurring after 24 May 2017.

13. At the hearing I was also supplied with the agenda provided by the Claimant in respect of the case management Preliminary Hearing which did not take place on 23 March 2018.

14. I deal with each of the matters in the order set out in the agenda for the hearing by Employment Judge Camp.

Out of Time Issues

15. Mr Gidney had helpfully provided me with a chronology which itself was the chronology used by Employment Judge Camp in his case management order of 3 August 2018: -

Date	Event	Page
03.17	Race discrimination allegation 1: Claimant given less profitable work by Bob Smith.	15
18.04.17	Claimant notifies ACAS of a dispute with the Respondent	2
26.04.17	Race discrimination allegation 3: Paul Baker told the Claimant that the Respondent wanted to get rid of him.	16, 76
16.05.17	Race discrimination allegation 4: Paul Baker walked around the warehouse asking people to put a complaint in against the Claimant.	16, 76
24.05.17	Claimant issued with an ACAS Early Conciliation certificate.	2
06.06.17	Race discrimination allegation 6i: Interview notes of Richard Holden either lost or not taken in the grievance process.	51, 76
09.06.17	Race discrimination allegation 5: Paul Baker turned up two radiators in an area that the Claimant and another Polish employee were working.	17, 76
Undated	Race discrimination allegation 6iii: Grievance witnesses not interviewed.	77
07.09.17	Earliest date any act of race discrimination can be in time.	53
29.09.17	Race discrimination allegation 6ii: Grievance process deliberately drawn out.	76
18.10.17	Race discrimination allegation 6iv: Grievance dismissed.	52
17.11.17	Race discrimination allegation 6v: Grievance appeal dismissed.	77
06.12.17	Claimant's Claim Form (relied on as a protected act).	3-35, 77
11.01.18	Race Victimisation allegation (subject to amendment application): Claimant's summarily dismissed for gross misconduct. Unfair dismissal allegation (subject to amendment application): Claimant's summarily dismissed for gross misconduct.	96- 97,77
10.04.18	Earliest date any act of unfair dismissal or race victimisation can be in time.	-
07.01.19	Preliminary Hearing (Claimant's application to amend his ET1.	

16. The only complaints of race discrimination that were in time were those allegations 6ii, 6iv, and 6v. The other allegations that the Claimant intended to proceed with namely allegations 1, 3, 4, 5 and 6 were all presented out of time.

17. The relevant legislation is Section 123 of the Equality Act 2010 which provides:

“(1) ... 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.

(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.”

18. In his submissions Mr Gidney referred me to the cases of: -

- **Robertson v Bexley Community Centre** [2003] IRLR 434
- **British Coal Corporation v Keeble** [1997] IRLR 336

19. Mr Gidney accepted that most of the race claims related to the grievance process (numbers Cii, Civ and Cv) and are in time. He acknowledged that whilst claims numbered 6i and 6iii are out of time the allegations related to the same grievance process. I am satisfied that this is part of the same single act of discrimination and that it should be treated as occurring at the end of the grievance process and therefore all the allegations relating to the grievance process are therefore in time.

20. Allegations 1, 3, 4 and 5, I agree are separate incidents and cannot fairly be described as part of the same single act as the determination of the Claimant's grievance. As Mr Gidney says they have been raised out of time and are late between a period of 3 months and 6 months.

21. Mr Gidney says that these can only proceed if I conclude that an extension of time should be allowed on just and equitable grounds. The burden is on the Claimant to satisfy me that it would be just and equitable to extend the time and the exercise of the discretion is the exception rather than the rule.

22. The factors that I need to take into account are: -

22.1 the length and reasons for the delay.

22.2 The extent to which the cogency of evidence is affected.

22.3 The extent to which the Respondent has cooperated with the request for information.

22.4 The promptness of the Claimant once he knew of the facts giving rise to the cause of action.

22.5 The steps taken by the Claimant to obtain appropriate advice when he knew the possibility of taking action.

23. I accept that the length of delay is substantial for Tribunal hearings. As referred to above it is for a period of between 3 and 6 months. The reason for the delay I am satisfied was that he was going through the company grievance process which took a period of 3 months. Once the grievance process was complete he acted promptly and made his complaint to the Tribunal within a matter of a couple of weeks.

24. There will be some difficulties with the cogency of the evidence particularly as some of these matters now relate to incidents that took place 2 years ago. Mr Gidney pointed out that Mr Bob Smith against whom the oldest allegation had been made has died and the Respondent will not be able to produce any

evidence from him. On the other hand, although the complaints that the Claimant makes are not fresh matters these were raised in his grievance and documentary evidence was obtained at the time in respect of the grievance including witness statements. These are documents that will be available to the Tribunal. From the documents I have seen the claims appear to be investigated thoroughly and so cogency of evidence will not be such a problem as it might be.

25. There is no evidence that the Respondents have failed to cooperate with requests for information.

26. I am satisfied that the Claimant was right to go through the internal process including appeal before he submitted his claim to the Tribunal. He remained an employee with the organisation and it was quite understandable for him to try to resolve the matters internally before he made his application.

27. As I have outlined above the Claimant acted promptly once he knew of the facts giving rise to his cause of action i.e. that his grievance had not been upheld.

28. In deciding whether it is just and equitable to extend the time I take into account that the Claimant did not have legal advice available to him and could not afford it and that there were also difficulties with him as a Polish citizen understanding the employment laws as they apply to England and Wales.

29. If I did not grant the "just and equitable" extension of time many of his claims of race discrimination could not be heard and this would cause considerable prejudice to the Claimant.

30. In all the circumstances weighing up the balance of prejudice I am satisfied that it would be just and equitable to extend the time limit in respect of his original claims of race discrimination and that I do have jurisdiction to hear the claims.

The Strike Out Issue

31. The relevant statutory provision is Rule 37 of the Employment Tribunal Rules of Procedure 2013 which provide:

"(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds: -

(a) that it is scandalous or vexatious or has no reasonable prospect of success.

(b) that the manner in which the proceedings have been conducted by or on behalf of the Claimant or the Respondent (as the case may be) has been scandalous, unreasonable or vexatious.

(c) for non-compliance with any of these Rules or with an order of the Tribunal.

(d) that it has not been actively pursued.

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of a claim or response (or the part to be struck out).

32. The contention made by Mr Gidney is that the strike out issue should be considered on: -

- (i) the time issues and;
- (ii) the contention that there are no facts relied on from which the Tribunal could properly conclude that the reason for any unfavourable treatment was the Claimant's race.

33. Mr Gidney referred me to the following cases: -

- **Tayside Public Transport Co Limited (t/a Travel Dundee) v Reilly** [2012] IRLR 755
- **North Glamorgan NHS Trust v Ezsias** [2007] IRLR 603
- **Ukegheson v London Borough of Haringay** [2015] ICR 1285
- **Anyanwu v South Bank Students Union** [2001] IRLR 305
- **Jaffrey v Department of Environment Transport and Regions** [2002] IRLR 688
- **Chandhok v Tirkey** [2015] IRLR 195

34. Mr Gidney acknowledges that: -

34.1 The power should only be exercised in rare circumstances.

34.2 Cases should not be struck out on this ground when the central facts are in dispute.

34.3 The correct approach is to take the Claimant's case at its highest, as it is set out in the claim, unless contradicted by plainly inconsistent documents.

34.4 As a general principle discrimination cases should not be struck out except in the very clearest circumstances.

34.5 That said the above guidance is not to be taken as amounting to a fetter on the Tribunal's discretion.

34.6 Whilst striking out discrimination claims are rare, where there is a time bar to jurisdiction, or where there is no more than an assertion of difference of treatment and a difference of protected characteristic, strike out may well be appropriate.

35. In this case I am satisfied that: -

35.1 The allegations are very serious.

35.2 The central facts of the case are in dispute.

35.3 At its highest the case could amount to less favourable treatment because of the Claimant's race.

35.4 I am satisfied that there is not in this case a mere assertion.

35.5 It would not be appropriate for me to strike out the case even

though I am satisfied that it is a weak case.

Deposit Order

36. The relevant provision is Rule 39 of the Employment Tribunal Rules of Procedure 2013. That states:

“(1) Where at a Preliminary Hearing the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party’s ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented as set out in Rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides a specific allegation or argument against the paying party for substantially the same reasons given in the deposit order: -

(a) The paying party shall be treated as having acted unreasonably pursuing that specific allegation or argument for the purpose of Rule 76 unless the contrary is shown and;

(b) The deposit shall be paid to the other party or if there is more than one to each other party (or the parties as the Tribunal orders), otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.”

37. Mr Gidney referred me to a number of cases and in particular: -

- **Hemdan v Ishmail** [2017] IRLR 228
- **Van Rensburg v Royal Borough of Kingston Upon Thames** [2007] UK EAT/0095/07
- **Wright v Nipponkoa Insurance (Europe) Limited** [2014] UK EAT/0113/14

38. As Mr Gidney described the principles for me to consider are:-

38.1 Identify claims with little prospect of success and to discourage their pursuit by requiring a sum to be paid and risk of costs if the claim fails.

38.2 I am not restricted to considering purely legal issues but entitled to have regard to the likelihood of the party being able to establish the facts essential to the case. I can reach a provisional view as to the credibility of the assertions being put forward.

38.3 It is important that I engage and understand the basis of the Claimant's claims before making any such conclusion.

38.4 I must take a proportionate view of the totality of deposit orders made and reach a conclusion that is open to me on the exercise of my discretion. It is important that the order is one that is capable of being complied with and that a party without the means or ability to pay should not be ordered to pay a sum that he or she is unlikely to be able to raise.

39. The Claimant's financial circumstances are that he has been in full time employment since 3 December 2018 having spent a period of about 3 months of unemployment prior to that. He now has net earnings of £1,600 per month and has £800 in savings in his bank account. He does not have any other savings. He pays the following outgoings namely: -

- Rent £360 per month
- Car insurance £60 per month
- Petrol £200 per month

40. He is a married man and his wife works and earns £800 per month and they have a daughter who is 8 years old. Childcare costs them £320 per month.

41. I am satisfied that all his allegations have little prospect of success. In particular: -

41.1 That he was given less profitable work by Mr Bob Smith.

41.2 That Paul Baker told him that the Respondent wanted to get rid of him.

41.3 That Paul Baker walked around the warehouse asking people to put a complaint in against him.

41.4 That Paul Baker turned up 2 radiators in an area that the Claimant and another Polish employee were working.

41.5 The manner in which the grievance was dealt with.

41.6 His claim that he was unfairly dismissed.

41.7 That his dismissal amounted to an act of victimisation.

42. In respect of his complaints of race discrimination he relies on himself being of Polish national origin and/or not of British national origin. It is agreed by the parties that an offensive remark was made to the claimant in January 2016 and that when he made a complaint about it in the form of the grievance it was upheld. He does not make a complaint to the tribunal about that remark although he believes it to be relevant as a matter of background to his claim.

43. Most of the complaints relate directly or indirectly to a manager Paul Baker. He says that the reason for his treatment was his national origin and he relies solely on the fact that there was no good reason for it and that it was unfair. He can't think of any reason for this to be done other than his national origin. He also alleges that he could see it on people's faces that he was being mistreated because he's from Poland. The burden of proof is on the claimant to establish a prima facie case the reason for his treatment was because he was Polish. I am satisfied that for this reason the claims of discrimination are weak and the allegations and arguments have little reasonable prospects of success.

44. I am also satisfied that his claims of unfair dismissal and victimisation have little reasonable prospect of success. It is said by the Respondents that the Claimant was dismissed for gross misconduct. The Claimant accepts that he had done something wrong along the lines of what he was dismissed for, but he alleges that it was not gross misconduct and that in any event he would not have been dismissed for it if he had not previously brought his tribunal claim. I am satisfied that his allegation that the dismissal was motivated by the tribunal claim is unlikely to succeed. His unfair dismissal claim has similar issues because he accepts having committed some form of misconduct and if the respondent can establish that was the reason for his dismissal the tribunal only has to be satisfied that dismissal fell within the band of reasonable response. That claim also has little reasonable prospect of success.

45. I am satisfied that the Claimant should make a deposit of £200 in respect of each of these seven allegations listed above making a total of £1,400.

46. I warned the Claimant that the consequences are that if he is not successful with these claims that the Tribunal will be obliged to consider making an order of costs against him. No doubt the Respondents will inform the Claimant of the likely cost that could be incurred and he could be liable for but they are and will be considerable. I invited him to consider carefully whether he wished to proceed with his claim.

Amendment of Claim

47. This relates only to the claims of unfair dismissal and victimisation. The unfair dismissal claims arose after he had submitted his original claim to the Tribunal. The victimisation claim relates to a protected act namely the filing of the Employment Tribunal claims which he says was a significant factor in his dismissal. He says that his dismissal was unfair in accordance with the provisions of Section 94 of the Employment Rights Act 1996.

48. Mr Gidney referred me to the cases of: -

- **Prakash v Wolverhampton City Council** [2006] UK EAT/0140/06
- **Selkent Bus Company Limited v Moore** [1996] IRLR 661

49. As Mr Gidney pointed out to me the principles to be applied are as follows:
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49.1 I must take into account all the circumstances and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

49.2 I should consider the nature of the amendment application itself and

whether it is minor or substantial.

49.3 I must have regard to the relevant time limits, if the new claim is out of time, to consider whether time should be extended under the appropriate statutory provision.

49.4 I must have regard to the timing and manner of the application.

49.5 The paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment.

49.6 Different types of discrimination claims are different claims and amendments to plead new discrimination claims are likely to be refused on the grounds that they seek to introduce entirely new claims.

49.7 In determining a new cause of action the focus is not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old.

49.8 Where a new claim is permitted by way of amendment it takes effect from the date on which permission to amend was given and does not "relate back" to the date when the original claim was presented.

49.9 One of the factors that may be taken into account when determining amendment is an assessment of the merits of the new claim.

50. I accept that the claim of unfair dismissal and victimisation relating to that dismissal are entirely new claims and in no way amount to a clarification of previous claims.

51. I am satisfied that if the Claimant is not able to rely on these matters there will be hardship to him if he is limited to his other claims of race discrimination.

52. The amendments are substantial and the time limit for presentation of both the claims was 11 April 2018.

53. I take into account that the Claimant was unrepresented at the time of making his claim and throughout these proceedings. He had indicated in his agenda for the case management Preliminary Hearing on 23 March 2018 that had to be "pulled" because of a lack of judicial resources that he wished to amend his claim to add a claim of unfair dismissal and victimisation. If that hearing had gone ahead I have no doubt that he would have made the application at the hearing and the Employment Judge would have granted the application.

54. I agree that victimisation is a very different type of claim to race discrimination but I am satisfied that it would be appropriate to allow the Claimant to amend his claim to add these allegations.

55. I note the contention made by the Respondents that the act of misconduct i.e. refusing a management instruction to work in the spray booth was admitted by the Claimant. I have dealt with this in the issuing of a deposit order because it may be difficult for him to establish that dismissal was not within the band of reasonable responses. That is different from saying that the claim has no reasonable prospects of success and therefore not allowing the claim to go

forward. Not all acts of refusal of management instructions amount to gross misconduct. The Tribunal will need to consider the circumstances if the Claimant does decide to proceed with the claim and pay his deposit.

56. I acknowledge that the claims of unfair dismissal and victimisation are weak but they are not weak enough for me to not allow him to amend his claim and proceed and I am satisfied that it would be appropriate to allow the amendments in the circumstances of this case.

Employment Judge Hutchinson

Date 27 March 2019

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE