



EMPLOYMENT TRIBUNALS

Claimant: Mr Akmal

Respondent: Royal Mail Group Limited

Heard at: Birmingham **On:** 27 November 2020

Before: Employment Judge Hindmarch

Representation

Claimant: In person

Respondent: Miss Hall - Solicitor

JUDGMENT

The claim is struck out, in part because it is out of time, and otherwise because it has no reasonable prospects of success.

REASONS

1. This case came before me for an Open Preliminary Hearing by Cloud Video Platform on 27 November 2020. The Claimant was a litigant in person and the Respondent was represented by a Solicitor, Miss Hall. There was an agreed bundle running to 158 pages and separate documents comprising an agreed chronology and a witness statement from a Mr Mohammed (on behalf of the Claimant) who was not available to give evidence. The Respondent's witness was a Mr Steven Edgley, Plant Manager, from whom I also had a written statement.
2. At the outset of the hearing it was established that the Claimant had not seen Mr Edgley's witness statement. The Respondent's Solicitor agreed to email him a copy and we took an adjournment to allow the Claimant to read and digest it. There was no witness statement from the Claimant.
3. The purpose of the Hearing before me was to decide the Respondent's application for a strike out order on the basis that all or some of the claim was out of time and/or for having no reasonable prospect of success. The hearing was listed following a Case Management Preliminary Hearing before Employment Judge Broughton on 4 August 2020. For that hearing each party had provided a list of issues, and the Claimant's list had included claims of direct discrimination and harassment. After the hearing the Claimant amended this to include a claim of indirect discrimination. At the hearing before me the Claimant told me he no longer wished to bring a claim of indirect discrimination and I noted that claim was now withdrawn.

4. I heard evidence firstly from Mr Edgley, whom the Claimant cross-examined. I then heard evidence from the Claimant who was cross-examined by Miss Hall. I had written submissions from the Respondent and invited Miss Hall to address me on these in detail, for the Claimant's benefit. I then heard submissions from the Claimant. Given the timings I decided to reserve Judgment. In this decision I refer to the Bundle page numbers where appropriate and I refer to individuals named in the documents by their initials, save for Mr Edgley who gave evidence before me.

The Facts

5. The Claimant commenced employment with the Respondent in May 2010 and remains employed, currently in the role of Operational Postal Grade at the Respondent's National Distribution Centre.
6. Following a period of early conciliation from 20 December 2019 to 20 January 2020 the Claimant commenced proceedings. There is some confusion as to the date of presentation of the claim. The West Midlands Employment Tribunal stamped date of receipt is 20 March 2020. However another date stamp of "CPFEW O5 Feb 2020" appears on the claim form. The Claimant told me in evidence "the claim went first to Leicester, then Sheffield, then Birmingham", but that he could not remember exactly when he sent it.
7. The Claimant is of Pakistani origin and his claims were based on his protected characteristic of race.
8. There were eight allegations made by the Claimant which he said amounted to direct discrimination and/or harassment and these were as follows:-
 - a) By AK, FA and BM making a false allegation on 19 July 2018 that the Claimant was involved in an incident,
 - b) By being sent home on 19 July 2018 by VN without any explanation,
 - c) Being suspended on 20 July 2018 by DM without any explanation,
 - d) Wasn't given an opportunity to defend the complaint on 1 August 2018 fact finding meeting,
 - e) By JS, the note taker, taking notes that were not a true reflection of the meeting on 1 August 2018.
 - f) By TS, investigating manager, finding that there was a case to answer by favouring one side without doing investigation,
 - g) ES failing to fully investigate the complaint made on 21 January 2019,
 - h) Steven Edgley failing to fully investigate the Claimant's complaint.
9. The Respondent's contention was that a) to g) above were out of time. The Respondent accepted h) was in time. The Claimant alleged all matters above were a continuing act.
10. The Claimant was a trade union representative for the Respondent for a period of six-seven years, but at the time of the incident complained of he was no longer in this position. Whilst in this role he accepted he would have had access to legal advice.

During the process adopted by the Respondent which forms the basis of this claim, the Claimant was fully supported by his trade union.

11. On 19 July 2018 the Claimant was at work. He accepts he was loudly shouting "vote for Elvis", this being reference to his colleague and the forthcoming union elections. A number of other colleagues of the Claimant made a complaint about his behaviour and a manager, VN, sent the Claimant home. The Claimant alleges VN offered him no explanation. The Claimant alleged in his evidence the complaints about him were made because managers, mainly of English and Indian nationality, did not want someone of Pakistani origin to stand in the elections. The Claimant accepts some complaints about him were made before he was sent home, but says others were only made afterwards.
12. The following day the Claimant attended for work and was suspended by DM. the allegation made is that DM did not offer any explanation at the time. The suspension letter of the same day, 20 July 2018, page 36 of the bundle states "*I am writing to confirm your precautionary suspension from work with pay on 20/07/2018 pending further investigations into alleged Inappropriate Behaviour/Bullying and Harassment towards a number of individuals*". Clearly therefore some explanation was given. On 23 July 2018 the Claimant wrote to DM, pages 40-42 of the bundle, stating, "*On 19 July at 21:45 ... shift manager (VN) approached me on the floor. He said to me he need to chat to me in the office. In the office he mention to me that there has been an incident in the soft searching area and 3 people had made a verbal complaint to HIM about me and he sending me home on a cooling off period*".
13. It is clear from the above that it cannot be said the Claimant had been offered no explanation by VN or DM.
14. By letter of 25 July 2018 TS invited the Claimant to attend a fact-finding interview with him. The Claimant alleges he was not given the opportunity to defend the allegations at this interview and that the note taker JS made inaccurate notes. There were examples in the bundle of JS's note taking at both meetings with the Claimant but also with other persons interviewed during the fact-finding meeting. The notes appear comprehensive and detailed, in fact almost verbatim. Whilst it can be seen the Claimant, on receipt of the notes, stuck through large parts and made substantial amendments to them, the other witnesses largely agreed the notes of their meetings.
15. The notes of the fact-finding interview confirm that TS asked the Claimant a range of questions. The Claimant disputes this and says he was only asked if he had any issues with the colleagues who had complained about him. The Claimant accepts he never mentioned any issues concerning race at the fact-finding interview.
16. The next allegation is that TS, in his investigations, was not thorough and favoured one side. Having interviewed the Claimant and those complaining about him, TS decided to invite the Claimant to a formal conduct meeting. In fact, it was then decided by the Respondent that an alternative case manager deal with matters and on 19 September 2018 (page 83 of the bundle) TS wrote to the Claimant stating his case was being passed to SP.

17. On 7 December 2018 SP wrote to the Claimant stating *"it has now been decided after careful consideration there is no need to progress with the case further. This matter is now closed"*. The Claimant makes no allegation concerning SP.
18. Thus the Claimant's dealings with TS ended on 19 September 2018 when TS was "removed" from the investigation and the matter was passed to SP. Whilst the Claimant was indeed suspended and subjected to an investigation, no conduct/disciplinary action was ever taken against him.
19. The next allegation concerns ES that she failed to investigate a complaint made by the Claimant on 20 January 2019. On that date the Claimant raised a grievance using the Respondent's "stage 2 Grievance Form". In essence the grievance concerned the 2018 incidents which the Claimant asserted amounted to bullying and harassment. He made no mention of race.
20. ES was appointed to deal with the grievance and wrote to the Claimant on 12 February 2019 inviting him to a grievance meeting. The meeting took place on 19 April 2019 and notes were taken and sent to the Claimant for comment. The Claimant made no mention of race. ES carried out an investigation by asking JS about his note taking and about the questions asked by TS at the fact finding interview. On 29 April 2019 ES delivered the grievance outcome decision to the Claimant. ES upheld one part of the grievance in that the Claimant had highlighted discrepancies to her concerning conversations held after the incident on 19 July 2018 and in the statements made by witnesses. To this end she recommended a manager independent to the National Distribution Centre carry out a *"full investigation ... to understand if the allegations were made in bad faith, as well as understanding the role played by (National Distribution Centre) Management."*
21. She concluded *"my recommendation of an investigation is not because I have seen and heard evidence which I believe categorically shows the complaints or the management team dealt with the incident in bad faith, but a recommendation to ensure this incident is investigated thoroughly and Mr Akmal gets the opportunity to achieve closure on this incident"*.
22. The role of carrying out this investigation fell to Mr Edgley. The Claimant alleges he failed to fully investigate the complaint. I heard evidence from Mr Edgley. He was passed the investigation by ES on 10 June 2019. He had never previously met the Claimant or had any dealings with him. Due to issues with availability of both the Claimant and Mr Edgley, they were not able to meet until 2 October 2019. Again, the Claimant made no mention of race. Mr Edgley then reviewed all notes made following the July 2018 incident, and spoke with DM, TS and ES. He concluded his investigation on 29 December 2019 and produced an investigation report.
23. Mr Edgley reviewed all of the paperwork pertaining to the 2018 investigation and the 2019 grievance investigation by ES. He spoke with ES, DM and TS. His report (pages 146 – 148 of the bundle) concluded there was no need for a "more intensive investigation" but that training had been recommended for the management team at the National Distribution Centre.

24. In his witness evidence before me Mr Edgley acknowledged he may not have understood the brief from ES, but if he had not been thorough enough it had nothing to do with the Claimant's race. He had undertaken diversity training and was disappointed to be facing an allegation of race discrimination. The Claimant did not challenge Mr Edgley on these points in cross-examination.
25. Before Employment Judge Broughton at the Case Management Preliminary Hearing on 4 August 2020 it was noted "*the Claimant ... raised a grievance but did not allege that his race was a factor as he did not even consider this until he had spoken to ACAS a year later*". Of course we know from the ACAS Early Conciliation Certificate that the Claimant spoke to ACAS in the period 20 December 2019 to 20 January 2020.
26. Under cross-examination before me the Claimant said that ACAS had given him advice about the various protected characteristics and that "*I went through the list and that is when I thought of race*". He said he did not think of race at the time of the various matters he complains of as he had no intention to bring a claim to the Employment Tribunal; rather he was trusting that matters would be resolved internally.

Submissions

27. I had written submissions from the Respondent. In summary the Respondent argues that each of the eight allegations were discrete, in that each concerned a different stage of the Respondent's internal process and involved different personnel, and that they did not form part of a continuing act. In the alternative if there were said to be continuing "state of affairs" in respect of the allegations they ended at separate points: the 2018 investigation ending with TS finding no case to answer on 19 September 2018, and the 2019 grievance ending with ES reaching her conclusion on 29 April 2019 (NB As already noted above the Respondent accepted the allegation against Mr Edgley was in time).
28. If I found that any act was out of time, the Respondent's submissions addressed me as to whether it would be just and equitable to extend time. The Respondent contended (based on the case of British Coal Corporation v Keeble – see 'The Law' below) that some of the allegations were years out of time, the Claimant had offered no reason for delaying, the effect on cogency of evidence and, and the strength of the claim.
29. The Respondent also made submissions in relation to its contention the claim had no reasonable prospect of success in any event. It referred me to the evidence of Mr Edgley in particular in which he said race played no part in his actions, and was unchallenged in that regard.
30. I heard oral submissions from the Claimant. He took me through the factual chronology of events and said that all the decisions had been made by managers "due to power and position and misuse of policy". He also contended the file of a colleague a Mr Mohammed should be firstly considered before any understanding of his (the Claimant's) complaint could be understood. He said Mr Mohammed had been subject to a similar (2018) investigation as he had, but that managers had investigated them separately.

The Law

31. The time limit in relation to a race discrimination complaint is contained in s123 of the Equality Act 2010 and provides:

*“(1)... a complaint ... may not be brought after the end of
(a) the period of 3 months starting with the date of the act to which the complaints relates,
(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”*

32. in other words acts occurring outside the primary time limit in s123(1) may be allowed to form part of a valid claim if they are part of a ‘continuing act’.

33. In Hendricks v Metropolitan Police Commissioners (2002) EWCA Civ 2686, the Court of Appeal held that the test of whether there was an act extending over a period of time was whether there was an ongoing situation or a continuing state of affairs in which the Claimant was treated less favourably. In Pugh v National Assembly for Wales UKEAT/0251/06, the EAT held that the Tribunal should consider matters alleged ‘in the round’ and ask whether the Respondent was responsible for an ongoing state of affairs. Further, Lyfor v Brighton and Hove University Hospital Trust (2006) EWCA Civ 1548 held the Tribunal can decide that some acts should be grouped into a continuing act, while others remain connected.

34. The case of Hale v Brighton and Sussex University Hospital Trust NHS Trust UKEAT/0342/17 (EAT) held that the decision to investigate disciplinary proceedings against Mrs Hale was an act that continued until the outcome/conclusion of such proceedings.

35. If any of the allegations are out of time the Tribunal must not extend time (under the ‘just and equitable rule’) unless the Claimant convinces it that it is in fact just and equitable to do so. The exercise of the discretion to extend time should be the exception, not the rule (Bentley Community Centre (t/a Leisure Link) v Robertson (2003) EWCA Civ 576).

36. This brings me to British Coal Corporation v Keeble (1997) IRLR 336, where the EAT set out a number of factors that might be considered when determining whether to exercise the discretion to extend time,

- The length 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 appropriated professional advice once they knew of the possibility of taking legal action.

37. The power to strike out is contained in Rule 37 Employment Tribunal Rules of Procedure and provides “(1) ... a Tribunal may strike out all or part of a claim... on any of the following grounds – (a) that it ... has no reasonable prospects of success”

38. The House of Lords in Anyanwu and another v South Bank Students' Union and South Bank University (2001) IRLR 305 held that discrimination claims should not be struck out, except in the plainest and most obvious cases. In Ezias v North Glamorgan NHS Trust (2007) EWCA Civ 330 the Court of Appeal held that the threshold for striking out a claim on the grounds it has no reasonable prospects of success is high, and where there are facts in dispute it should only be done in exceptional circumstances without evidence being tested. In short unless the facts alleged by the Claimant disclose no arguable case in law, caution is essential. The Claimant's case should be taken at its highest.

39. The Tribunal has to consider (a) whether any of the grounds in rule 37(i) has been established and the (b) whether to exercise its discretion to strike out.

Conclusion

40. Dealing firstly with the time point. I am willing to accept the 2018 investigation, from the date the allegations were made against the Claimant (19 July 2018) until the Respondent confirmed to the Claimant it was taking no further action (7 December 2018) was a continuing act. It was a continuing state of affairs commencing with allegations being made, an investigation taking place, and ultimately a decision being made. These matters were sufficiently connected to amount to a continuing act. However the claim was not presented until more than a year had passed since the end of the act. The Claimant has offered no explanation for the delay, other than he hoped matters would be resolved internally. There are time limits for a reason, and these should not be easily disregarded. The discretion to extend time is one available to me but only where good reason to extend time is preferred. The Claimant should have been aware of the time limits. He had been a union representative himself for six-seven years and had the benefit of his trade union supporting him throughout the matters he complains of. I therefore conclude I should not extend time.

41. As regards the grievance raised by the Claimant on 20 January 2019, the decision in relation to that was reached by ES on 29 April 2019. She partially upheld the grievance and recommended a review which was carried out by Mr Edgley. I am prepared to accept the grievance and the review were sufficiently connected to amount to a continuing act. They were an ongoing situation or state of affairs, thus, these matters are in time.

42. I now turn to whether the matters which are in time should be struck out, on the basis there is no reasonable prospects of success. I have reminded myself discrimination cases should not be struck out except where it is obvious that there is no reasonable prospects of success. There is here little factual dispute. I heard evidence from both the Claimant and Mr Edgley about the allegations of race discrimination. I found Mr Edgley to be credible when he said he had no conscious or unconscious bias towards

the Claimant, and that he conducted his investigation fairly in the circumstances where no race discrimination allegations had in fact been made by the Claimant. Indeed no such allegations were made at all during the 2018 investigation and 2019 grievance, the Claimant accepted he did not even consider race being an issue until he spoke to ACAS. The Claimant contended before me that the race allegations stem from his belief those colleagues who complained about him in 2018, did not want a Pakistani union representative. However he never once made this allegation either in the 2018 investigation, nor in the 2019 grievance and review. He only thought of race being an issue when he spoke to ACAS. His case appears to amount to a 'hunch' on his part as to his colleagues motives, against a background if no disciplinary proceedings being pursued against him. I am satisfied that this is one such case I can strike out.

43. My finding is that against these particular circumstances, this is such a case where I can conclude the case has no reasonable prospects of success. Even taking the Claimant's case at it's highest, that managers (in 2019) were making decisions "due to power and position and misuse of policy" it cannot be said that race played any part in such decision-making.
44. In submissions Mr Akmal referred to his colleague being treated differently than him in the 2018 investigation, by way of the Respondent appointing different investigating officers for each of them. I cannot see what that has to do with race, and in any event I have found the 2018 matters to be out of time.
45. For the reasons above I dismiss the claim.

Employment Judge **Hindmarch**

15/12/2020