EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Mr R Lipka **v** **J Van Vliet (Nottingham) Limited**

RECORD OF AN ATTENDED PRELIMINARY HEARING

Heard at: **Nottingham** **On: Tuesday 26 November 2019**

Before: **Employment Judge P Britton (sitting alone)**

Appearances
For the Claimant: **In person**
For the Respondent: **Mrs A Datta of Counsel**
Polish Interpreter: **Mrs M Johnson**

JUDGMENT

The claims of discrimination are dismissed in their entirety them having been presented out of time and it not being just and equitable to extend time. The remaining claims will procced.

CASE MANAGEMENT SUMMARY

Issues

1. The agenda for today's case management discussion was set out in the record of the Preliminary Hearing heard by Employment Judge Blackwell on 8 October 2019. Thus as per his order number 2, I have to determine first whether the claim of discrimination on the grounds of race and/or sexual orientation should be allowed to proceed, the events in issue having occurred at latest May 2016 according to the record of that hearing. Stopping there, in fact as is clear from the bundle before me today and in particular Bp[1]30-31 the complaint, which is in reality one of harassment, pursuant to section 26 of the Equality Act 2010 (the EqA) was made in writing by the Claimant to his employer on 3 February 2016. He received a reply on 8 February of that year (B 31) to the effect that his colleagues had been spoken to about what he alleged thence:

> *"And at present he wished no further action to be taken. As requested I will keep this complaint on file for future reference".*
>
> *Should any further instants occur please speak to Jason (the Manager) directly or contact me personally…"*

[1] Bp=bundle page

This was signed by Dawn Hasell, Group HR Manager for the Respondent group.

2. As was made plain at the last Preliminary Hearing and confirmed to me today there are no subsequent complaints made by the Claimant in that respect. The claim (ET1) in terms of all matters was presented by him to the Tribunal on 5 December 2018. Thus it follows that the events complained of are approximately 2 years and 10 months out of date. Thus I have to determine whether it is just and equitable to extend time for him to continue with that claim dependant upon in particular the Claimant's explanation.

3. It cannot be a "continuing act" apropos **Hendricks v Commissioner of Police for the Metropolis** [2003] IRLR 96 CA because there are no complaints of a discriminatory nature made post the events to which I have now referred. Indeed the principle claim before the Tribunal is otherwise one of unfair dismissal and also breach of contract/failure to pay wages. So there is no continuing act "extending over a period" in relation to the discriminatory based claims so as to keep them within time.

4. As to his explanation, suffice it to say that the Claimant knew that he could raise matters with ACAS if he felt concerned as per the evidence he gave me today in relation to what a work colleague Jason Madelin told him circa February 2016 or may be possibly earlier, when at that stage the latter had been dismissed from the employment. It is important to stress that James was back in the employment by the time of material events relating to the unfair dismissal for reasons that will become clear.

5. It follows that I do not consider that it is just and equitable to allow the Claimant to proceed with the discrimination based claim and therefore it is dismissed for lack of jurisdiction.

6. The breach of contract/ non payment of wages claim. This was also on the agenda for consideration today on the basis of whether or not those claims were out of time. In that respect I in particular have focussed upon the statement of particulars of the employment which was signed by the employer and the Claimant on 20 June 2017 and which is at Bp 34-37 and also what I would describe as a grievance which the Claimant wrote on this topic and gave to his employer, and which I have been able to establish today was on 28 May 2018 and which is at Bp 38. In summary what this is about is that the Claimant was asked to move from his then place of work for the Respondent in Derby and instead work at their premises at Queens Drive in Nottingham. The statement of particulars confirms this change in his employment from 2 May 2017. The issue as per his grievance is that he had been informed that he would be paid £9.00 per hour rather than £8.00 in terms of agreeing to the transfer and also his travelling expenses. And in the grievance he referred to how that had been promised to him about a year previous and that the employer to put it simply reneged on the agreement. Further before me today he explained that when he was asked to move he made plain he did not wish to but it was in effect a take it or leave it position because otherwise he would be no longer employed; but that it had been agreed with the then Manager, Paul Cook that he would in compensation for agreeing to take the transfer be paid £9.00 per hour rather than £8.00 and get his travelling expenses as the return trip would otherwise engage him in considerable cost as the mileage concerned would be approximately 40. He told me that on an occasion (unspecified) he received a lump sum, which I take was by way of compensation as at that time for the transfer, but that it was not then continued apropos the travelling and hourly rate increase agreement. So that is first of all a claim for unlawful deduction of wages otherwise known as non payment pursuant to Part II of the Employment Rights Act 1996. As to expenses that would be covered by breach of contract and the claim

would not arise apropos the provisions in the Employment Tribunals Act 1996 until the contract of employment had ended. In otherwords his right to bring an action before this Tribunal in relation thereto would crystallise when he was dismissed from the employ on 27 September 2018.

7. I remind myself that non payment of wages is a continuing act so to speak and that time therefore runs from the last non payment in terms of bringing a claim to Tribunal within the thereafter 3 month period subject to the requirements for ACAS early conciliation.

8. In that respect there is an ACAS certificate in this case and therefore the issue then becomes as to whether it would cover these claims. As I understood it from the Claimant the matter about which he went to ACAS was his dismissal, but then if I cross reference to the learned commentary as to whether or not additional certificates need to be obtained for any other heads of claim, it is clear to me from the IDS Handbook Employment Tribunal Practice and Procedure, 2014 edition and in particular at 3.16 - 3.18, that only the one ACAS certificate is required. Counsel having considered the commentary does not seek to dissuade me. Therefore it follows that as ACAS early conciliation extends time for the purposes of the unfair dismissal claim thus the same applies in relation to these two heads of claim. Therefore I am going to allow them to proceed.

9. Stopping there I do not consider that they have either no reasonable prospect of success or only little reasonable prospect of success, thus meaning either strike out or a deposit order. The Claimant clearly submitted the grievance to which I have referred and on the face of it he never received a reply. If that be correct, then this was obviously a continuing state of affairs and prima facie the transfer was a variation in the original contract of employment, hence the issue is was this therefore agreed to in terms of that he should be paid for travelling plus an increased hourly rate and what is the status of the lump sum payment? It follows these are triable issues.

10. The third issue on the agenda as set by Employment Judge Blackwell was whether the unfair dismissal claim should be either struck out as having no prospect of success or a deposit order made it having only little reasonable prospect of success.

11. The core documentation in relation to this matter commences at Bp 39. In summary the Claimant's job was in part to work in the warehouse where there would be racks and at least one forklift and also to make deliveries in a van. Two work colleagues immediately reported on the morning of Wednesday 26 September 2018 that at approximately 5:00 am when all three were at work he smelt strongly of alcohol and was "looking a bit strange (like drunk)". The first of these statements is from Thomas Morkunas who I understand is Lithuanian. He therefore reported it to the more senior person on duty that morning, namely Jason Madelin who takes up the story and observed the same. Understandably he dissuaded the Claimant from driving the van and that he should stay on site. The matter was reported up the management chain and the Claimant was suspended that day from work and sent home. In due course he was informed of the disciplinary charge he had to face in a letter to him on 26 September 2018, inviting him to a disciplinary hearing and informed of his right to be accompanied. Although that letter said that the outcome might be "disciplinary action", it did not spell out he might be dismissed. I then have the notes of the disciplinary hearing at Bp 44 and which took place on 28 September 2018. The Claimant admitted that he had had a drink the night before but said "not over limit, had drink at 10:00 pm so 6 hours later". In other words meaning by the time he arrived at work. He then however offered the explanation "*could be many reasons why I smell of drink – diabetes – hepatitis"* and that in any event they should have taken a sample of

blood from him before concluding that he was unfit for work or maybe even called in the Police. Stopping there, I ascertained today from the Claimant that he is a hepatitis C sufferer but he does not have diabetes. Later on according to the minute the Manager hearing the disciplinary, Paul, put to the Claimant *"if it were me I would know if I was over the limit".* The answer of Rad was "*could have been up to the limit".* He confirmed that he had driven himself to work that morning. Later on when asked "*so do you accept you were over the limit?". "I do not deny it, you can't prove it."* The Claimant received a letter confirming he was dismissed with immediate effect and without notice pay on 28 September 2018. The reason was cited from the Employee Handbook namely paragraph 4.1.2, Gross Misconduct "attending work under the influence of alcohol".

12. Stopping there, the Claimant perhaps does not understand that the test for determining the fairness or otherwise of a dismissal is whether the employer in dismissing him acted fairly within the range of reasonable responses having regard to the size and administrative resources of the employer, equity and the substantial merits of the case. Prima facie it had clear cut evidence from two of its employees that he smelt heavily of alcohol and showed some signs of being under the influence, and it had in the Claimant somebody who had accepted that he had been drinking the night before but could not accept that he would therefore have been unfit. Matters were then muddied as to whether or not the issue was whether he was "over the limit" or whether he had attended at work under the influence of alcohol. I am well aware in terms of my extensive experience as an Employment Tribunal Judge that to attend work under the influence of alcohol is a serious matter particularly where the employee works in such as warehouse conditions or may be required to drive as part of his duties. The reasons why it would be a serious misconduct offence are obvious and do not need rehearsing.

13. So prima facie the Respondent had reasonable grounds in terms of the evidence that it had before it to dismiss. The Claimant appealed on 1 October (Bp48) and set out in detail the reasons for that appeal. Essentially the first premise being that the employer had no proof that he was under the influence although he was using the word "drunk". A subsidiary to that was "alcohol smells can be caused by various health factors". He referred to that by now he was on a sick note but I have established that that was by reason of work related stress and of course it would be stressful to be facing disciplinary proceedings and thence be dismissed. The Respondent informed him that for the appeal it would require him to produce medical evidence in particular focussing on:

> *"All current medication you have been prescribed and were taking at the time of the incident, along with any information regarding current health issues that you feel may contribute to you smelling strongly of alcohol.*
>
> *Once I have seen this information I will contact you with the date of your appeal hearing."*

14. The Respondent pleads in the ET3 that he never replied. There is a major conflict because the Claimant was very clear indeed to me today that he did so reply and in writing and provided some medical evidence. He received no reply and there never was an appeal hearing. As to the bundle before me there is no such letter/e-mail sending in the medical evidence or any reply thereto. I do not have the medical evidence. I bear in mind the bundle has been prepared by the Respondent and the Claimant has not helped himself today because he did not produce a statement, albeit particularly focussing on such as the out of time issues, as directed by EJ Blackwell to be completed and sent into the Tribunal and the Respondent by 12 November.

15. However I have of course to take his case at its highest at this stage and prima facie there is potentially a significant procedural failure in that the employer did not hold the appeal. That in turn could affect the overall fairness of the process in terms of the well-known authority of **Taylor v OCS Group Ltd (2006) IRLR 613 CA.**

16. Having said that of course unless the medical evidence was very persuasive to the effect that he would not have been over the influence of alcohol at 5:00 am, any such medical evidence is unlikely to be of much value given the Claimant was drinking. The second issue is any such medical evidence would need to address would be as to whether the Claimant's hepatitis C condition would have meant that he would be smelling of alcohol when in fact there was no alcohol left in his blood. This would require the Claimant to first convince the tribunal as to exactly what alcohol he had consumed the night before and over what time span and then an expert's back calculation to work out what the level of alcohol in his blood was at 5:00 am I so observe because if the dismissal was procedurally unfair , then the issue as to assessing compensation and that context the likelihood as to how long the employment would have lasted and also the extent of contribution are matters for assessment by the Employment Judge presiding at the main hearing. In this respect the band of reasonable responses test is not engaged. And, if the Judge concluded that the Claimant was under the influence of alcohol, then any award is highly likely to be reduced to nil.

17. But as to ordering strike out, it follows that I am not prepared to do that as there is this clear triable issue viz the appeal and which requires findings of fact and which is not my function today. As to ordering a deposit I observe as follows:-

17.1 The employer had on the face of it clear evidence which it could reasonably believe in that the Claimant had attended work under the influence of alcohol.

17.2 It had part admissions that he had been drinking the night before.

17.3 The issue then becomes should it have stopped in terms of reasonable investigation to obtain medical evidence via the Claimant on the issue he raised in the disciplinary hearing as to whether or not such as hepatitis could have given a misleading impression as to being under the influence of alcohol. This it failed to do.

17.4 As to whether it would have been reasonable for it so to do is perhaps answered by the appeal and in turn as to whether or not the Claimant did provide the letter as he said with the appropriate medical evidence or not. Should not the employer anyway have heard the appeal and thence been able to enquire further of the Claimant and if necessary obtain for itself with his consent medical evidence? It follows that I cannot say that his claim for unfair dismissal has only little reasonable prospect of success.

18. That is why I will not order a deposit but prima facie and subject to persuasive medical evidence from the Claimant which he will have to obtain for the hearing that I have listed, otherwise there is the most substantial contribution in this case and I explained to the Claimant that the Tribunal Judge could if he concluded that was the case make significant reductions in the basic and compensatory awards which the Claimant would otherwise receive and could even reduce the same to nil.

19. Those are my observations. Of course it might be that therefore the parties may be able in the spirit of realism to be able to compromise these matters. Having said that, however I now make orders for the main hearing including providing a date for the same. I am extending the hearing to two days on the basis that the Claimant seems to be thinking he can call witnesses in support, although I pointed out to him that there is no point in calling the "workforce" if the only persons present at the time, apart from himself, were the two eye witnesses to who I have referred. As it is it may be that the Respondent will now decide to call them, otherwise it can of course rely upon what the Manager who made the decision to dismiss had before him which obviously would include those two eye witness accounts.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. There is already of course the bundle to which I have referred and which had been prepared by the Respondent. If the Respondent has other documents that it needs to produce, ie anything relevant and necessary to the remaining issues then it must supply the same to the Claimant by **Friday 20 December 2019.**

2. The Claimant must then reply thereto enclosing any additional documents he wants in the bundle, including any medical evidence that he is going to rely upon, by **Friday 10 January 2020**.

3. The Respondent will then complete the trial bundle and send the Claimant a further copy by **Friday 24 January 2020**.

4. Also not later than **Friday 24 January 2020** the Respondent will send to the Claimant the witness statements of all witnesses on whom it intends to rely. The Claimant will then send to the Respondent the statements of all witnesses on whom he intends to rely, including himself, by **Friday 14 February 2020**. The witness statements are to be cross-referenced to the bundle and will be the witness's main evidence. The Tribunal will not normally listen to witnesses or evidence not included in the exchanged statements. The Claimant's witness statement must include a statement of the amount of compensation he is claiming, together with an explanation of how it has been calculated and a description of his attempts to find employment. If he has found a new job, he must give the start date and the take home pay. Witness statements should not routinely include a précis of any document which the Tribunal is to be asked to read. Witnesses may of course refer in their witness statements to passages from the documents which are of particular importance, or to the inferences which they drew from those passages, or to the conclusions that they wish the Tribunal to draw from the document as a whole.

5. The hearing will take place on **Wednesday – Thursday, 26 - 27 February 2020 at Nottingham.** The parties must be in attendance on each day in order that the Tribunal can start at 10:00 am prompt.

6. The **Tribunal is to ensure that there is an approved interpreter in Polish present** for the resumed hearing. If possible, and assuming she is of course available ,the Judge would suggest it should be Mrs M Johnson as she has been the interpreter for today's proceedings.

NOTES

(i) The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.

(ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

(iii) The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

(iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management': https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20170406-3.2.pdf

(v) The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so.*" If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

_____

Employment Judge Britton

Date:15 January 2020

Sent to the parties on:

…….

For the Tribunal:

……..