



EMPLOYMENT TRIBUNALS

Claimant

Respondent

v

Felix Ohiowele

Tesco Stores Ltd

Heard at: Watford
Before: Employment Judge Anderson

On: 7 July 2021

Appearances

For the Claimant: Mr Ibekwe (PTSC Union)

For the Respondent: Ms Whittington (Counsel)

JUDGMENT

1. The claimant presented his complaint that the instigation and completion of the disciplinary process which ended on 6 December 2019 was unlawful harassment because of race outside the primary time limit contained in section 123 of the Equality Act 2010, but it is just and equitable to extend time to the date of actual presentation, 22 October 2020, and the Tribunal therefore has jurisdiction to hear it.
2. The claim is not struck out.

REASONS

Background

1. The claimant attended an investigation meeting on 21 February 2019 after an allegation was made about misuse of a privilege card. A disciplinary process followed which concluded on 6 December 2019 when the claimant was notified that his appeal against a disciplinary sanction issued on 15 March 2019 was upheld. The sanction, a final written warning, was rescinded.
2. After the disciplinary process began, on 16 April 2019, the claimant raised a grievance. This grievance was resolved on 8 August 2020 when the claimant received a letter dated 24 July 2020 dismissing his appeal against the grievance outcome that was issued on 29 April 2020.

3. The parties agreed that the claimant had requested that the two matters of the disciplinary action and the grievance not be dealt with at the same time, though they did not agree on whether the claimant had requested the grievance to be dealt with before or after the disciplinary process. The claimant said he had requested that the grievance be dealt with first. The respondent said that the request was for it to be dealt with after the disciplinary process.
4. The claimant's claim to the tribunal was filed on 22 October 2020. The disciplinary process concluded on 6 December 2019. The respondent raised in its response that the tribunal does not have jurisdiction to hear the claimant's claim insofar as it relates to any alleged acts of discrimination which occurred more than three months prior to the date of presentation of the claimant's claim when taking into account the ACAS Early Conciliation period.
5. Employment Judge Quill directed that a preliminary hearing be listed to consider the following matters:
 - a. To determine whether any of the claimant's claims should be struck out as having no reasonable prospects of success;
 - b. To decide whether a deposit order should be made on the grounds that the claimant's claims stand little reasonable prospects of success: and,
 - c. Whether the claim should be dismissed because the claimant is not entitled to bring it if the statutory time limit has expired.
6. I heard submissions from the parties on the time issue and made a decision on that, before going on to hear submissions on a strike out and whether or not a deposit order should be made.

Time

7. Law
 - a. Section 123 of the Equality Act 2010 sets out time limits for bringing a complaint of discrimination:

123 Time limits

- (1) [Subject to [section 140B](#)] proceedings] on a complaint within [section 120](#) may not be brought after the end of—
 - (a) the period of 3 months starting with the date of the act to which the complaint relates, or
 - (b) such other period as the employment tribunal thinks just and equitable.
- (2) ...
- (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;
 - (b) ...

8. Submissions

- a. Ms Whittington for the respondent said that the claim had been pleaded as two separate acts of harassment, referred to as detriments in the claimant's grounds of claim at paragraph 2.1.2. These were (i) the disciplinary process which concluded on 6 December 2019 and (ii) the delay in concluding the grievance process. Ms Whittington said that there was no link between the two acts which were a complaint about the instigation and completion of one process, and a delay in concluding another. It was difficult to see how dealing with the grievance promptly could be linked to the initial act which the claimant says began with the racially motivated allegation of misconduct made by another employee. She noted that the claimant's representative had asked for the two matters to be dealt with separately.
- b. Ms Whittington said that the burden was on the respondent to show that it was just and equitable to extend time under s123(1) Equality Act 2010. The claimant was represented from 2019 and it was a significant prejudice to the respondent to respond to this claim.
- c. Mr Ibekwe, on behalf of the claimant, submitted that the claim was in time. The disciplinary and grievance processes were dealt with together in accordance with ACAS guidance, and that 'together' was not the same as 'at the same time'. Mr Ibekwe said that it was the claimant's position that there had been a continuing act of discrimination beginning with the disciplinary process and ending when the grievance process concluded.
- d. Mr Ibekwe said that if I did not find that the two acts constituted a potential single continuing act of discrimination then it was just and equitable to extend time for the filing of the claim relating to the disciplinary process. The claimant had awaited the outcome of the grievance process before commencing his claim and he was right to wait and see if the respondent would take action against the employee that the respondent accused of having been motivated by racism, as a result of finding for the claimant in the grievance, before commencing his claim.

9. Decision and reasons

- a. Having heard submissions from the parties and noting that (i) the disciplinary action was overturned on appeal and (ii), the complaint of harassment in relation to the grievance is one of harassment by delay, in a situation where it was agreed by the parties that the processes should not continue at the same time, I do not find that the two acts of alleged harassment are linked.
- b. On that basis, the first act, the complaint that the instigation of the disciplinary process and the process itself was an act of harassment, is out of time.

- c. Having also heard submissions from the parties on whether it would be just and equitable to extend time under section 123(1) of the Equality Act 2010 I find that it is just and equitable to extend time for bringing a claim for the first act to 22 October 2020.
- d. The claimant waited until the grievance process was exhausted before filing his claim. Whilst he did have the benefit of professional advice from his union, and I have determined that the two acts were not one continuing act, the claimant viewed them as such and I accept that was the reason for the delay.
- e. The respondent will now have to deal with a claim of discrimination in the tribunal in relation to the disciplinary process, but I do not find that any prejudice resulting from that is such as to outweigh the prejudice to the claimant of not having his claim heard.

Prospects of Success

10. Law

- a. Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

37.— Striking out

(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) ...

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3)

39.— Deposit orders

(1) Where at a preliminary hearing (under [rule 53](#)) 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)

11. Submissions

- a. For the respondent Ms Whittington said that in relation to the first act the claimant would have to demonstrate that the decision to take disciplinary action was an act solely related to race rather than any other reason, and that it was reasonable for the claimant to claim that

the act had the effect upon him which he claimed it did. Ms Whittington referred to paragraph 3.3 of the claimant's grounds of claim and said that the claimant had not provided any evidence that suggested the act was racially motivated. She also noted that the claimant had not disputed in his pleadings that the respondent had concerns about the claimant's misconduct. She said that the claim had no prospect of success and should be struck out. If I decided against a strike out then a deposit order should be made at a sum high enough to be a detriment to a claim with such little merit and an order for £800 was sought. The claimant remains in paid employment with the respondent.

- b. In relation to the second act, Ms Whittington said that it was not explained in the grounds of claim why the delay was racially motivated harassment or why the delay violated the claimant's dignity. She said that the claimant had asked for the grievance to be dealt with separately to the disciplinary process and much of the delay in hearing the grievance had been to do with the availability of the claimant's representative. The respondent sought strike out of this part of the claim or a deposit order.
- c. Mr Ibekwe for the claimant noted that as this was a preliminary hearing I did not have the full evidence in front of me and said that in discrimination cases it was difficult to obtain evidence in the early stages. The evidence would come to light in the disclosure process. Mr Ibekwe said that to impose upon the claimant a deposit order was a draconian measure. The respondent allowed an individual, or individuals, to instigate disciplinary action against the claimant. The individual who made the allegation was the person who carried out the fact finding exercise. If the person who made the allegation was not white the respondent would not have taken disciplinary action. The claimant expected his grievance to be dealt with promptly and it was not. The claimant wanted his grievance to be dealt with before the discretionary process. Neither a strike out nor a deposit order was appropriate in the circumstances.

12. Decision and reasons

- a. Having heard submissions from the parties I declined to strike out the case in part or in full as having no reasonable prospects of success. I cannot be certain that the case has no reasonable prospects of success on the basis of the pleadings and documents in the preliminary hearing bundle. Whilst the claimant's case appears to be weak it may be that this will change on consideration of a full hearing bundle and witness evidence.
- b. However, the claimant has not set out in his claim any clear reason as to why his contention is that the acts complained of were motivated by racial discrimination. He simply made an assertion. Having heard oral submissions from Mr Ibekwe I am no clearer on

the matter. He could only offer the proposition that the instigator of the disciplinary process was white and the claimant is not.

- c. I have serious concerns that the entire claim is weak and stands little reasonable prospects of success, and therefore order the claimant to pay a deposit in order to continue his claim. Having heard evidence on the claimant's means I ordered that the claimant pay a deposit of £350 in order to continue the claim, within 14 days from receipt of the order.
- d. Ms Whittington drew my attention to the fact that a deposit order is made in relation to a specific act complained of. She is correct and I have therefore now revised my decision given at the hearing, to specify in the deposit order that a sum of £175 is payable in relation to each of the two separate acts.

Employment Judge Anderson

Date: 16 July 2021

Sent to the parties on: ...26 July 2021
THY

.....
For the Tribunal Office