EMPLOYMENT TRIBUNALS

Claimants:		**Respondent:**
Mr Selorm Amuzu (1) Mr Sunday Oloyede (2)	**v**	Bouygues E&S FM UK Limited (now known as Bouygues E&S Solutions Limited)

Heard at: Reading **On:** 18 December 2020

Before: Employment Judge Hawksworth (sitting alone)

Appearances
For the Claimant: Dr J Whonderr-Arthur (lay representative)
For the Respondent: Mr J Cook (counsel)

RESERVED JUDGMENT

The judgment of the tribunal is that:

1. The claim form did not include complaints of race discrimination, and permission is refused to amend the claimants' claims to include these complaints.

2. The claimants' claims do not contain any complaint which the tribunal can deal with. For this reason the claims cannot proceed and are dismissed.

REASONS

Introduction

1. The claimants worked as security supervisors at the National Physical Laboratory. They were initially employed by Amey. On 1 April 2016 the claimants' employment transferred to the respondent pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (the TUPE regulations). The claimants remain employed by the respondent.

2. The claimants presented their claims on 26 June 2019 after a period of Acas early conciliation from 22 May 2019 to 22 June 2019. The response was presented on 24 October 2019. The respondent defends the claim.

3. Employment tribunals only have the powers granted to them in law. This means they can only consider claims which the law has said they can deal with, known as claims which are within their jurisdiction. In this case, the claimants' claim form does not say that they are bringing a complaint which the employment tribunal can deal with. A public preliminary hearing was listed for 18 December 2019 to consider whether the claims should be struck out (or a deposit order made) on the basis that the claims are not within the jurisdiction of the tribunal and/or have no (or little) reasonable prospect of success. That hearing was postponed because of judicial resources, and was re-scheduled to take place on 1 April 2020.

4. The hearing on 1 April 2020 was converted to a telephone private preliminary hearing for case management, in response to the pandemic. At that hearing, Employment Judge Gumbiti-Zimuto made an order (a 'case management order') that the claimants should by 8 April 2020 provide further information as to the legal basis of their complaints, including specifying the statutory provisions or other grounds for the complaints.

5. The employment judge also issued a notice and order under rule 27 of the Employment Tribunal Rules of Procedure 2013, dated 1 April 2020. The rule 27 order said that the judge was of the view that the tribunal had no jurisdiction to consider the claims and that the claims would be dismissed unless the claimants had explained in writing by 22 April 2020 why the claims should not be dismissed. He said that the claimants had not identified any claim within the jurisdiction of the employment tribunal and that to the extent that it might be capable of arguing that the claimants' complaints were about unfair dismissal, discrimination or arising from the TUPE regulations, the claims had been presented outside the time limit.

6. The public preliminary hearing was re-scheduled again for 14 May 2020. It could not be heard on that date because it was listed as a private hearing. It was re-scheduled and took place before me on 18 December 2020.

The hearing before me

7. The hearing before me was therefore to decide whether the claims should be struck out (or a deposit order made) on the basis that the tribunal does not have the legal power (jurisdiction) to deal with them and/or they have no (or little) reasonable prospect of success.

8. I first have to consider and reach conclusions on which complaints were included by the claimants in their claim form, whether the tribunal has the legal power to deal with them, and whether the claimants should be given permission to amend their claims. If I conclude that the claimants have brought complaints that the tribunal has the power to deal with (or that the claims can be amended to include such complaints) then I will go on to consider whether those claims have no (or little) reasonable prospect of success.

9. The claimants put their case before me as a complaint of race discrimination. That is a complaint under the Equality Act 2010, which is a type of complaint the employment tribunal has jurisdiction to consider.

10. The hearing was held by video conference (CVP). The claimants produced a bundle of documents with 40 pages. I refer to pages from that bundle as C1, C2 etc. The respondents produced a bundle of documents with 108 pages. I refer to pages from that bundle as R1, R2 etc.

11. I heard submissions from the parties' representatives and reserved judgment. I apologise to the parties and their representatives for the delay in promulgating this judgment, this was as a result of absence over the Christmas period.

Findings of fact

The claimants' claims and further information

12. The claimants' claims were submitted together on one claim form by their lay representative Dr Whonderr-Arthur on 26 June 2019.

13. Section 8.1 of the form asks the claimants to indicate the type of claim they are making by ticking one or more of a number of boxes. One of the boxes says 'I was discriminated against on the grounds of:' and it then has a number of options including race. The claimants have not ticked any of the boxes relating to discrimination. They have only ticked one box, the one which says 'I am making another type of claim which the Employment Tribunal can deal with'. The claim is described in a text box as 'Demotion from role without notification after TUPE from previous employer'. No other box has been ticked.

14. In section 8.2 of the form (background and details of claim) a narrative has been included. It refers to the claimants being demoted from their positions of Security Supervisor to positions of Team Leader. It records that in 2018 one of the claimants was told that a new senior position of senior Security Supervisor was being created. Mr Oloyede applied for the new position but was not successful. Mr Amuzu did not apply for the new position. The chronology in this part of the form ends in July 2018 when a new supervisor was appointed. There is no mention of discrimination or of race or of any other protected characteristic in this part of the form.

15. Section 15 of the claim form (additional information) contains more narrative and includes the following:

> "The most shocking and very disappointing thing is that they make me (Sunday) feel unwanted and probably have discriminated against me because one of my colleagues was retained into the position, and this happened to be a junior to me in ranking, I felt humiliated in the presence of the junior staff who recognised me as the most senior officer on site and older staff on site."

16. This wording relates to Mr Oloyede. It says 'they…probably have discriminated against me'. It does not refer to any protected characteristic.

17. In a letter dated 2 September 2019, in response to a direction from the tribunal to clarify the claim, Dr Whonderr-Arthur wrote to the tribunal and said that the claim being pursued was 'Unfair Treatment as a result of demotion'.

18. In response to the case management order of 1 April 2020, the claimants provided witness statements on 7 April 2020 which were amended slightly on 10 April 2020. In response to the rule 27 order, they served further amended versions of their statements, Mr Oloyede on 15 April 2020 and Mr Amuzu on 16 April 2020.

19. The claimants' witness statements did not expressly say what complaints they were bringing. At paragraph 17 of his 7 April 2020 statement, Mr Amuzu said, referring to the demotion:

> "What I found sad and shocking was that one of our colleagues who I have worked with for over ten years in the same company and on the same rank has been re-appointed as a supervisor. She is Caucasian and I believe this is discrimination."

20. At paragraph 30 of his 7 April 2020 statement, Mr Oloyede said:

> "I am now left wondering has my colour or ethnic background contributed to the pain and humiliation I suffered at my place of work? Can this happen to someone in this 21st century? I now concluded within that the emotional scar will remain with me forever."

21. Both claimants said:

> "I found Bouygues' action and conduct a deliberate bullying, discriminatory, intimidations and victimisation to get rid of me for no reason.
>
> I believed that I have suffered injury to my feelings. [I] have been subjected to the loss of dignity in the workplace as a result of their demotion. My value as a worker has been demeaned by the Respondent's conduct and action."

22. Victimisation in a legal sense means being subjected to a detriment because of having made an allegation of discrimination, or done some other 'protected act'. Neither claimant has said that they made any allegation of discrimination or did any other act which could amount to a protected act for the purposes of the victimisation provisions of the Equality Act 2010. Victimisation appears to be used here not in a technical sense, but meaning something like bullying.

23. Dr Whonderr-Arthur prepared a skeleton argument. It is dated 7 April 2020 although it does not appear to have been sent until later. Paragraph 14 sets out 'the issues for the employment tribunal to determine'. These are all concerned with the claimants' change of role from Supervisor to Team Leader, including that:

> "5) The demotion, that is changing their title as supervisor to team leader constitute a new job and caused suffering of detriment under TUPE r2006 [sic]
> 6) The change of title from supervisor to team leader with the same job responsibilities as the new supervisors as well as working extra as a guard constitute detriment because others were appointed as Supervisors with the same responsibilities and higher pay (EA 2010 s.65(1)).
> 7) The change of title from supervisor to team leader with the same job responsibilities is unfair treatment and constitute discrimination because new supervisors received higher pay and C's pay remained unchanged (EA 2010 s.65(1)).
> 8) C have suffered distress and detriment as a result of the unfair treatment meted out to C by the R causing injury to their feelings because of the detriment."

24. Paragraph 23 of the claimants' representative's skeleton reads:

> *"Conclusion*
> *23. The C believe that the respondent has committed unlawful direct discrimination by treating C unfairly through demotion and therefore claim:*
> *a. A declaration that the R has discriminated against C directly on the grounds of treating them (C) unequally contrary to EA 2010 and TUPE r 2006.*
> *b. A declaration that the demotion of the C's role constitutes an unlawful direct discrimination.*
> *c. A declaration that C, were and performed Supervisory responsibilities and not team leaders and must receive commensurate salary as the new supervisors who took over from C.*
> *d. Compensation, including compensation for injury to feelings.*
> *e. Interest as the ET deems fair; and*
> *f. R to pay C the current salary for the new supervisors when R reinstated as supervisors."*

25. On 9 May 2020 Employment Judge Gumbiti-Zimuto considered the statements which the claimants had provided in response to his rule 27 order, and decided that the claims should not be struck out under rule 27 but said that the claim was very unclear and he was 'concerned about the prospects of success'. He directed that the claimants attend the preliminary hearing ready to address the employment judge on the question of whether the claims have reasonable prospects of success (pages R81-84).

Chronology of events which are the subject of the claims

26. To consider whether any complaints have been brought within the relevant time limit, I first need to identify the dates on which the matters which are the subject of the claimants' claims took place. In particular, it will assist to identify the date of the last matter complained of.

27. The claimants' central complaint is that after the transfer of their employment to the respondent, their job titles changed from security supervisor to team leader. Despite the change in job title, their salary did not change. They had to train an employee who was appointed as a security supervisor. That person's salary was higher than theirs. The claimant's regarded this as a demotion and made a grievance complaint about it.

28. The latest event referred to in the claim form is the appointment of the new supervisor and the submission of the claimants' grievance which are said to have taken place in July 2018.

29. Mr Amuzu's statement of 7 April 2020 says he was demoted on 6 August 2018. Events mentioned in his statement which took place after that are emails to HR and his line manager on 4, 5 and 26 November 2018 requesting information about his terms of employment and a meeting to discuss issues around the change of job title. He refers to contacting his union on 19 December 2018.

30. In his statement of 7 April 2020, Mr Oloyede says that his successor as Supervisor took over from him in August 2018. He refers to discussions with HR and with his union in November 2018 and with Acas in May 2019.

31. Dr Whonderr-Arthur has included a chronology of events in his skeleton argument. It says that the claimants were demoted on 6 August 2018 and the new Security Supervisors took up their posts on 7 August 2019. Events which took place after that date were communications about the claimants' terms of employment, discussions with Acas and the claimant's grievance. The latest date in the chronology is 20 August 2019 which is the date the claimants were reinstated as supervisors.

32. The claimants' reinstatement as supervisors was the outcome of the grievance. The claimants made a grievance in June 2019. The outcome of the final stage (stage 3) was sent to the claimants on 9 August 2019 (page R104-107). The respondent confirmed that Amey had identified the claimants as working Team Leaders in the TUPE data sent to them. The respondent accepted that there was a flawed consultation process concerning the new structure, arising partly out of the confusion as to the claimants' job titles. There was no loss of pay arising from the designation of the claimants' roles as Team Leaders. The respondent apologised that the 2018 restructuring was not carried out transparently. It was poorly managed, there was poor communication and this understandably led to the claimants feeling frustrated. The respondent agreed that claimants

would be re-classified as Security Supervisors and the employees who were currently Security Supervisors would be re-classified as Senior Security Supervisors. The respondent was in discussions again about a proposed new structure for the security service and once finalized this would be subject to consultation with affected staff; the claimants would be free to apply for any of the newly designated roles.

33. In summary therefore, the appointment of the supervisor which is the central complaint made by the claimants took place on 6 August 2018, and the claimants' grievance complaints about that concluded on 9 August 2019.

Presentation of the claims

34. In the period between August 2018 and August 2019, the claimants were conducting their grievance. They also sought assistance from their union and were going through the Acas early conciliation process from 22 May 2019 to 22 June 2019.

35. The claims were presented on 26 June 2019.

The legal principles

36. In Ali v Office of National Statistics 2005 IRLR 201, the Court of Appeal held that the act complained of by the claimant must be specified in the claim form, and that whether a claim form contains a particular complaint must be judged by reference to the claim form as a whole.

37. It may not matter if the relevant box has not been ticked or if the claim form does not refer to a specific section of a piece of legislation, if the claim overall 'in plain language asserts a particular claim or gives sufficient particulars from which one can spell out such a claim' (Redhead v London Borough of Hounslow EAT 0409/11).

38. If a claim form does not contain a particular complaint, the claimant will need permission to amend the claim in order to pursue that complaint. The key authority on amendment is Selkent Bus Company Ltd v Moore [1996] ICR 836. In determining whether to grant an application to amend, an employment tribunal must carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Relevant factors include:

    38.1. the nature of the amendment (the tribunal should focus 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 (Abercrombie & Ors v Aga Rangemaster Ltd [2013] ICR 213));
    38.2. the applicability of time limits, which will need to be considered if a new claim or cause of action is proposed to be added by way of

amendment. The tribunal can decide the question of whether time should be extended, or can allow the amendment and leave the question of whether time should be extended to be determined at the main hearing (Galilee v Commissioner of Police of the Metropolis [2018] ICR 634); and

38.3. the timing and manner of the application (it is relevant to consider why the application was not made earlier and why it is being made now).

39. The time limit for a complaint of discrimination including race discrimination is set out in section 123 of the Equality Act 2010, which provides that a complaint relating to a contravention of the act at work:

> *"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."*

40. In Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA, the Court of Appeal emphasised that factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh). In Adedeji v University Hospitals Birmingham [2021] EWCA Civ 23 the Court of Appeal considered the case of British Coal Corporation v Keeble [1997] UKEAT 496/98 which referred to the factors in section 33 of the Limitation Act 1933. The Court of Appeal in Adedeji explained that the best approach for a tribunal considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, rather than adopting a rigid adherence to a checklist, as this can lead to a mechanistic approach.

41. Section 123 of the Equality Act is subject to provisions relating to Acas early conciliation. These are contained in section 140B of the Equality Act. Sub-section (3) says that:

> *"In working out when a time limit … expires the period beginning with the day after Day A and ending with Day B is not to be counted".*

42. Day A is the day on which Acas is notified for early conciliation, and Day B is the day on which the claimant receives the early conciliation certificate.

Conclusions on the strike out application

43. I have applied the legal principles set out above to my findings of fact, and reached the following conclusions.

44. I first need to decide whether as a question of fact, the claimants' claims include complaints of race discrimination.

45. Was a complaint of race discrimination by either or both of the claimants included in the claim form? In light of my findings above about the completion of the claim form, I have concluded that it was not. I reach this conclusion by reference to the claim form as a whole. I have concluded that, looked at overall, this claim form was not one from which a complaint of race discrimination could be understood or spelled out, for the following reasons:

    45.1. Neither of the section 8.1 boxes indicating a complaint of discrimination or referring to race were ticked;
    45.2. There was no mention of race, colour, nationality, ethnic or national origin on any of the completed sections of the form;
    45.3. The only reference to discrimination on the form is in relation to Mr Oloyede: he says that he was treated differently to a junior colleague and he felt humiliated because the junior staff recognised him as one of the most senior and older staff on site. This might possibly suggest an age discrimination complaint, but neither claimant has suggested that they are pursuing a complaint of age discrimination. It does not suggest a complaint of race discrimination.
    45.4. There is no reference to discrimination at all in respect of Mr Amuzu;
    45.5. I have taken into account the fact that the claimants were not professionally represented. However, if the claimants had wanted to make a complaint of race discrimination, I would have expected them to have been able to convey this on the form in some way, especially as section 8.1 includes tick boxes which expressly refer to discrimination on the grounds of race.

46. This was not a case in which it could have been said that the respondent was aware of a race discrimination complaint from the grievance process: from the papers which were in the bundles, neither of the claimants mentioned race or race discrimination in the course of the grievance.

47. The claimants did not suggest at the hearing before me that the claim form included any complaint which the tribunal is able to deal with, other than a complaint of race discrimination. For the sake of completeness, I conclude that the claim form did not include the following complaints:

    47.1. Victimisation: the claim form did not include a complaint of victimisation contrary to section 27 of the Equality Act 2010, because the claimants did not allege that they had done any protected act or suffered any detriment as a result of having done a protected act;
    47.2. Unfair dismissal: The claimants remain employed by the respondent. There was no reference in the claim form to an unfair

dismissal complaint and no allegation that the change to the claimants' job title amounted to a dismissal;

47.3. Unauthorised deductions: the claim form referred to the claimants' senior supervisor colleague being paid more than them, but like Employment Judge Gumbiti-Zimuto I have concluded that this was the way in which the claimants calculated their losses arising from what they saw as a demotion, rather than being a claim of unauthorised deduction of wages properly payable to the claimants.

48. I have therefore gone on to consider whether either or both of the claimants should be given permission to amend their claims to include a complaint of race discrimination. I need to carry out a balancing exercise, considering the relevant factors and having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment.

49. I have first considered the nature of the amendment. Amendment would require the addition of an entirely new claim. This is not a case where, because of a related complaint, the tribunal would be considering matters relating to the alleged discriminatory act in any event. Amendment would not amount to a re-labelling of another complaint. No other complaint within the jurisdiction of the employment tribunal is being brought by the claimants.

50. I have next considered the timing and manner of the application to amend. I note first that the claimants had an early opportunity to clarify their claims when the tribunal made a direction asking them to state the nature of the claims being pursued. The claimants' representatives reply of 2 September 2019 referred only to unfair treatment as a result of demotion, which is not a complaint the employment tribunal has jurisdiction to consider. The first time the claimants made any reference to race discrimination was in their witness statements of 7 April 2020. These statements were sent over 9 months after the claims were submitted. This is a significant period of time in the context of a complaint which has a time limit of three months.

51. I have treated these witness statements as applications to amend. As to the manner of the application, even in these witness statements, the basis on which a complaint of race discrimination is put forward is not clear. The allegations of discrimination are tentative. The skeleton argument of the claimants' representative does not mention race discrimination at all, and focuses on unfair treatment.

52. I have concluded that the nature of the amendment and the timing and manner of the application to amend are factors which weigh against the claimants in the balancing exercise.

53. Finally, I have considered the applicability of time limits. Time limits need to be considered where a new claim or cause of action is proposed to be added by way of amendment. The tribunal can decide the question of

whether time should be extended, or can allow the amendment and leave the question of whether time should be extended to be determined at the main hearing. As the amendment application in this case will determine whether the claimants have any claims which can proceed to a full hearing, it is in accordance with the overriding objective, and in particular the need to deal with cases in ways which are proportionate to the issues, for me to decide the question of whether time should be extended.

54. At the time the claimants presented their claim, a race discrimination complaint in respect of the appointment of a new supervisor (if it had been included) would have been out of time. The restructuring process concluded in the appointment of a new supervisor on 6 August 2018 and the three month time limit in respect of that would have expired on 5 November 2018. The claims were presented on 26 June 2019; a race discrimination complaint would have been over 7 months out of time even if it had been included in the claim form. (The notification to Acas for early conciliation does not affect the time limit, because Acas was not notified until after the time limit had expired. The period of early conciliation cannot be 'discounted' from the primary three month period as it has already ended.)

55. By the time of the application to amend in April 2020, a complaint about the appointment of the new supervisor was about 17 months out of time.

56. I have taken into account the fact that the claimants were pursuing an internal grievance from August 2018 and that this concluded on 9 August 2019. There is no general principle that it will be just and equitable to extend the time limit where a claimant seeks a resolution through the employer's grievance procedure before embarking on legal proceedings. A delay caused by a claimant awaiting completion of an internal procedure may justify the extension of the time limit, but it is only one factor to be considered in any particular case.

57. The period of time which expires between the end of an internal process and the claim being presented (or an application to amend being made) will also be a relevant factor. Where a claimant waits for the conclusion of an internal procedure and then decides to bring a late claim or amend an existing claim, they should then act promptly. In the claimants' case, the time period between the end of the grievance procedure on 9 August 2019 and their witness statements which are now being treated as an application to amend was 8 months. This delay in itself was therefore well in excess of the normal three month time limit.

58. I have also taken into account that the claimants have not been professionally represented.

59. There are very significant delays here, in a context where the primary time limit is 3 months. The claimants did not provide any explanation for the delay. If an extension were granted, the tribunal would be examining events which concluded 10 months before the claim was presented, and

around 20 months before the claimants first expressed their complaints as complaints of race discrimination.

60. If I do not extend time to allow the claimants to bring complaints of race discrimination, they will not be able to pursue their complaints at all. If I do, the respondent would be prejudiced by the fact that the tribunal would be considering matters dating back many months, rather than while matters were fresh. This is the case notwithstanding the fact that there has been an internal grievance investigation, because the question of whether there was race discrimination was not raised in that process, and therefore not considered by the respondent.

61. Having conducted this balancing exercise, I have decided that it is not just and equitable to extend time for the claimants to bring complaints of race discrimination. The relevant factors weigh against the claimants, in particular the length of the delay here. I would have reached this same conclusion if I had found that the claim form presented in June 2019 included any claims of discrimination which fall within the scope of the claims the tribunal can deal with. It would also not be just and equitable to extend time to allow a complaint which has first been articulated in April 2020.

62. Although my decision in respect of the time limit would not automatically prevent me from granting an amendment, I have also concluded that the claimants should not be allowed permission to amend their claims to include complaints of race discrimination. Here again the relevant factors, including the fact that the proposed race discrimination complaints still remain unclear at the time of the application and the lengthy delays in making the application to amend, are against the claimants. The balance of hardship falls in favour of the respondent.

63. I do not doubt that the claimants had genuine complaints in respect of the restructuring process which led to the error in their job titles following the TUPE transfer to the respondent. They were entitled to raise those matters as formal grievance complaints as they did. In the course of that process, the respondent has apologised and accepted that the consultation was flawed and that there was confusion as to the claimants' job titles. The claimants' original job titles have been reinstated. However, neither these issues nor anything else raised by the claimants in the claim form are matters which it is within the power of the employment tribunal to consider.

Summary

64. The claimants' claim form did not include complaints of race discrimination, and permission is refused to amend the claim to include these complaints. The amendment would amount to the inclusion of a new claim and it would not be just and equitable to extend time to allow such a claim to be brought.

65. Therefore, the claimants' claims cannot proceed as they do not include any complaint which the tribunal has jurisdiction to hear.

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Employment Judge Hawksworth

Date: 28 January 2021

09.02.2021

Sent to the parties on: .....

J Moossavi

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For the Tribunals Office

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