EMPLOYMENT TRIBUNALS

Claimant: Mr C Otigbah

Respondent: Tesco Stores Ltd

Heard at: Manchester Employment Tribunal **On:** 12 October 2022

Before: Employment Judge Dunlop (sitting alone)

Representation

Claimant: In person
Respondent: Miss B Breslin (counsel)

RESERVED JUDGMENT

1. The Tribunal has no jurisdiction to hear the claimant's claims of unfair dismissal and unauthorised deductions from wages (holiday pay) as they were presented out of time. Those claims are dismissed.

2. The Tribunal extends time for the presentation of the claimant's claim that his dismissal was an act of direct discrimination on grounds of his race on the basis that it is just and equitable to do so.

3. The Tribunal has no jurisdiction to hear the claimant's other claims of race discrimination (including harassment claims) as they were presented out of time and it is not just and equitable to extend time. Those claims are dismissed.

REASONS

Introduction

1. This was a preliminary hearing which had been listed to determine whether the Tribunal had jurisdiction to hear Mr Otigbah's claims, having regard to the date on which they were presented.

2. Mr Otigbah's claim are for:

2.1 Unpaid holiday pay;
2.2 Unfair dismissal;
2.3 Discrimination on grounds of race.

3. It was agreed between the parties that each of the claims were presented outside the primary time limit (indeed, Mr Otigbah had acknowledged this in his claim form). The question for today, was, therefore, whether time could be extended.

4. I explained to Mr Otigbah that a different test applies to different parts of his claim. The test in relation to the unpaid holiday pay and unfair dismissal parts of the claim is stricter than the test in relation to discrimination.

5. I noted that, since the initial preliminary hearing, Mr Otigbah had (in accordance with case management orders made) filed a document setting out further particulars of his discrimination claim. That document detailed some twenty acts of direct discrimination dating from 2017 which Mr Otigbah wishes to rely on. He also named four "comparators". It seems that these are white employees who are said to have remained in employment despite committing disciplinary offences of a similar level of gravity (or even more serious) than the matters Mr Otigbah was dismissed for. Finally, the document makes five allegations of harassment, some of which are very broad. The earliest of these seems to date back to 2018. Many of the allegations in each section of the further particulars document are generalized and/or vague, and it is likely that further information would be required before the respond could properly respond to them. It may be that the respondent would also take an issue over whether the claim would need to be amended to enable some of these matters to proceed, although that has not been raised to date.

6. I also discussed with the parties at the start of the case how I should approach the decision I have to make. I made it clear that I would hear evidence from Mr Otigbah about his actions (and inaction) following his dismissal. I would not hear evidence about the connection between the earlier alleged acts of discrimination and the dismissal.

7. I considered whether I could properly proceed with today's application in view of the fact that the discrimination claims remain unclear. Having discussed the matter with the parties, I was satisfied that it was right to proceed given that the parties had prepared the hearing and were expecting it to go ahead. I proceeded on the basis that all the matters set out in Mr Otigbah's further particulars document would be included as claims in the case, subject to the time limit point.

The Hearing

8. The parties had prepared a 120-page joint bundle of documents which I read and had regard to. That included a 3-page document from Mr Otigbah entitled "Reasons for the delay in filing on time". Essentially, that was a witness statement explaining his position for today's hearing. Mr Otigbah took an oath and confirmed that statement as his evidence. Mr Breslin cross-examined him on that evidence and I also asked some additional questions.

9. Miss Breslin then made submissions on behalf of the respondent. Although she did not produce any written argument, she had submitted a comprehensive bundle of authorities made up of the following cases, which I have had regard to in reaching this decision:

    Porter v Bandridge [1978] ICR 1145
    Trevelyans v Norton [1991] ICR 488
    Robertson v Bexley [2003] EWCA Civ 576
    Cullinane v Balfour Beatty UKEAT/0537/10
    Miller v Ministry of Justice UKEAT/0003/15
    Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23
    Cygnet Behavioural Health Ltd v Britton [2022] EAT 108

10. Mr Otigbah also made submissions, and I informed the parties I would reserve my Judgment.

Findings of Fact

11. Mr Otigbah is a black British man. He has worked as a tennis coach with some notable successes. He presented his own case in an articulate and careful way.

12. Mr Otigbah worked at Tesco Extra in Bolton from 26 September 2017 until 5 November 2021. He worked on the nightshift, and he says that he was the only black member of staff on that shift. A dispute arose in relation to a security guard named Sue Singleton. Mr Otigbah says that she was racist and dishonest and he raised this with management. As a result, on his case, he was subjected to bullying by Ms Singleton and other white employees who were her friends. This included complaints made against him to managers, which Mr Otigbah says were fabricated and malicious. (I set this out by way of background, but emphasise that I have not made any determination as to the truth of this allegation.)

13. In early March 2021, Mr Otigbah was suspended from work due to allegations made against him by Ms Singleton and other colleagues.

14. In late March 2020 Mr Otigbah contemplated suicide due, at least in part, to the difficult situation at work. Following a discussion with his manager the police were alerted and, following a welfare visit, he was taken to his GP. Thankfully, Mr Otigbah made a good recovery. Medical notes from the time record that he felt he had been bullied at work for over three years and believed this was due to his skin colour.

15. Ms Singleton left the employment of Tesco around March 2021.

16. In summer 2021 Mr Otigbah engaged a firm of solicitors, Paul Doran, to write to Tesco. At the time, he was still suspended and facing disciplinary allegations. I have not seen the letter, but understand it was a letter proposing severance of his employment with Tesco.

17. A disciplinary hearing was held on 7 September 2021. This related to five incidents where Mr Otigbah was alleged to have said or done something

inappropriate to a colleague. Two incidents involved Sue Singleton. The other three incidents involved three other individual colleagues. The dates of the alleged incidents range from 13 March to 1 June 2021.

18. Mr Otigbah was verbally dismissed for gross misconduct on 7 September 2021. This confirmed in a letter dated 10 September 2021.

19. Mr Otigbah appealed against his dismissal by email dated 22 September 2021.

20. Mr Otigbah submitted documents to support his explanation for why his claim was presented late. These include emails to and from his (then) solicitors. There is an email where Mr Otigbah sends the solicitor his appeal letter, it is dated 10 October 2021.

21. On 23 October 2021 Mr Otigbah spoke to Paul Doran solicitors and was told that they would not be able to represent him at a Tribunal hearing due to the cost. His statement says that he then "commenced on a mission" to find legal representation. This was difficult as most solicitors were "inundated with clients" and were unable to take on the case on a "no-win no-fee basis".

22. The respondent has asked me to reject Mr Otigbah's evidence on this point as it is not supported by documentary evidence in relation to other firms approached at this time. I find that Mr Otigbah did make some efforts to contact other firms – he would not anticipate any need to retain documents related to firms which he quickly established would be unable to represent him. Further, he told me (and I accept) that some of these interactions would have taken place by telephone or by a chat function on the firm's website. Mr Otigbah did not produce phone records but I accept his verbal evidence that he did make such calls. Mr Otigbah's account of the sort of responses he received in these discussions is very credible. To say that he was "on a mission" is dramatic language and perhaps suggests a more energetic approach than Mr Otigbah actually took, but I am content that he did continue to try to secure legal help, unsuccessfully, in this period.

23. The appeal hearing took place on 5 November 2021. The outcome of the appeal was that the dismissal was upheld. This was confirmed in a letter dated 23 November 2021. The letter does recognise that Mr Otigbah's "*suspension was too long and took too long to come to an investigation and this has been fed back and recognised by the store*."

24. Mr Otigbah told me that his dismissal led to almost immediate financial difficulties. This is supported by documents in the bundle including an email from 15 November 2021 in relation to a debt of just under £250 and an email dated 28 December 2021 relating to energy company debt.

25. On 9 December 2021 Mr Otigbah commenced Early Conciliation. He spoke to ACAS and understood, from this conversation, that there may be an issue as to time limits. A certificate was issued, closing the Early Conciliation, on 19 January 2022.

26. In early 2022 Mr Otigbah entered into a voluntary arrangement to manage his debts. The documentary evidence of this is incomplete, but it appears that he almost immediately defaulted on the arrangement.

27. Mr Otigbah gave evidence that he took an overdose in January 2022. He referred to that in his ET1 as being the explanation for his lateness, and also referred to it in his statement. The respondent asked me to reject this as a matter of fact as (unlike the 2020 incident) there was no medical evidence. Mr Otigbah told me he had gone to his GP but had been unable to get an appointment.

28. I am prepared to find that Mr Otigbah was suffering from poor mental health in January-February 2022, and that that was sufficiently serious to make it hard for him to make decisions about the case. I base that on his own evidence, the history of mental health difficulties arising out of work problems, and the situation he found himself in – of having lost his job and having difficulties with debt. The evidence does not, in my view, support a finding that Mr Otigbah was incapacitated during this period, or that he would have been unable to bring a claim, although I accept it made it more difficult for him.

29. Email correspondence shows Mr Otigbah was in touch with Monaco Solicitors in late February 2022. An email received in response to his enquiry highlights the importance of time limits in the Tribunal. Ultimately, Mr Otigbah did not proceed with Monaco solicitors due to the cost.

30. In late February 2022, Mr Otigbah was applying for Universal Credit.

31. In early March 2022, there is email correspondence showing Mr Otigbah making enquries of KBL Solicitors. In a reply dated 8 March 2022 a partner from that firm sets out their charges. She refers to the fact that Mr Otigbah was seeking support from his home insurers in relation to funding legal representation, but goes on to say that "arguably your claim is already out of time". In a further letter of the same date she sets out the firm's charges in more detail and emphasises (in bold and underlined text) "You must not delay taking steps if you want to proceed with your claim and must act immediately."

32. Mr Otigbah also told me that he had other problems during this time such as his BT connection (including internet) being cut off and problems with his car insurance. I accept his evidence that he did have these difficulties at certain times, caused by the financial situation he found himself in. At times, I accept that he had to travel to a friend's business premises in order to access the internet. I note, however, that Mr Otigbah is very vague about this, particularly regarding the dates when he was affected by these matters, and that he has not put these matters in his statement – they only came out belatedly during questioning. Given that, and given that the emails he has presented demonstrate that he was able to access the internet at least at some points throughout this period, I am unable to conclude that these problems presented a severe obstacle to him contacting ACAS or presenting his claim.

33. The claim was presented on 1st April 2022.

34. There is some further correspondence in the bundle relating to attempts made by Mr Otigbah to secure advice from the Greater Manchester Law Centre, but that is dated September 2022 and so post-dates the submission of the claim.

Relevant Legal Principles

The unfair dismissal and wages claim

35. The time limit for presentation of unfair dismissal claim is set out in s.111 Employment Rights Act 1996. I do not set out that section in full. It provides for a three-month time limit from the date of dismissal to the presentation of the claim. That can be extended where a claimant commences ACAS conciliation within the time period. If the time limit is exceeded, s.111(2)(b) provides that the claimant may be presented:

    "within such period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonable practicable for the complaint to be presented before the end of that period of three months."

36. That test is commonly known as the "reasonably practicable" test. To obtain an extension of time, the claimant must show both that it was not reasonably practicable for him to present his claim within the primary time period, and also that he presented it within a reasonable period thereafter.

37. Something is "reasonably practicable" if it is "reasonably feasible" (see **Palmer v Southend-on-Sea Borough Council [1984] ICR 372,** CA). Ignorance of one's rights can make it not reasonably practicable to present a claim within time, but only if that ignorance is itself reasonable. An employee aware of the right to bring a claim can reasonably be expected to make enquiries about time limits: **Trevelyans (Birmingham) Ltd v Norton [1991] ICR 488** Employment Appeal Tribunal ("EAT").

38. In **Marks & Spencer plc v Williams-Ryan [2005] EWCA Civ 470**, consideration of whether it is reasonably practicable to bring a claim in time, the following factors will be considered:

    a) what, if anything, the employee knew about the right to complain to a tribunal and of the time limit for doing so; and

    b) what knowledge the employee should have had, had they acted reasonably in the circumstances.

39. The time limit for presenting the wages claim is set out at Regulation 30 Working Time Regulations 1998. It is also a three month limit, with time running from the date on which wages should have been paid. Again, the regulations stipulate that a "reasonably practicable" test applies where an extension of time is sought.

The discrimination claim

40. The primary time limit for a discrimination claim is set out in s.123 Equality Act 2010 as being three months from the discriminatory act. Again, this can be extended when the claimant commences ACAS conciliation within this time frame.

41. S.123(3)(a) provides that "*conduct extending over a period of time is to be treated as done at the end of that period*". This means that apparently earlier acts of discrimination may be in time (and therefore not require any extension of time) if they are found to be 'continuing acts' rather than individual instances of discriminatory conduct. Of course, such an act will only be in time, if the claim was brought within the primary limitation period, dating from the end point of the continuing act.

42. Again, the law provides for Tribunals to extend time in certain cases. The test is different. It is set out at s.123(1)(b) which provides that a claim may be brought within three months or within "*such further period as the employment tribunal thinks just and equitable.*" This is commonly called the "just and equitable" test.

43. This is a broader test that the reasonably practicable one, and enables the Tribunal to take into account any factor that is relevant in the particular case. However, the fact that the Tribunal has such discretion does not mean that claimants are safe to assume that it will always be exercised in their favour, as noted by the Court of Appeal in **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434**:
"there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule."

44. The factors set out in **British Coal Corporation v Keeble [1997] IRLR 336** may be relevant. Those include the length of, and reasons for, the delay; the extent to which cogency of evidence may be affected and the steps taken by the claimant to obtain advice. However, this is not a checklist to be mechanistically applied (**Adedeji**). Ultimately, it is for the Tribunal to determine what the relevant factors are, and how much weight to place on those factors.

45. Where dealing with a course of conduct case, it has recently been confirmed that the question of whether it is just and equitable to extend time need not be an "all or nothing" question:
"*I am inclined to think that the answer is that the tribunal should consider first whether, taking all of the incidents as a course of conduct extending over time together, it is just and equitable to extend time, taking into account any issues of forensic prejudice by reference to the earlier incidents that are said to form part of the overall conduct. The tribunal may conclude, having done so, that it is just and equitable to extend time in relation to the whole compendious course of conduct. But if, because of issues of forensic prejudice in relation to earlier incidents, the tribunal concludes that it is not just and equitable to extend time in relation to the whole of the compendious conduct over time, it may then need to give further consideration to whether it is alternatively just and equitable to extend time in relation to the most recent incident in its own right, standing alone, on the basis that the same forensic difficulties might not arise, or arise so severely, in relation to it.*"
Concentrix CVG Intelligent Contact Limited v Obi [2022] EAT 149, para 72

46. The decision in **Obi** was taken at a final hearing. Earlier authorities establish that a Tribunal should not conclude that a claim is time-barred at a preliminary hearing when it has been unable to establish whether particular allegations form part of a continuing act. (That assessment, which will usually require hearing the evidence in full, can in many cases only properly take place at a final hearing). At a preliminary hearing, the claimant need only show that he has a reasonably arguable basis for the contention that allegations are sufficiently linked to constitute a continuing act. The corollary of this point is that, even if the claim (or parts of it) survive a preliminary hearing, the Tribunal at the final hearing may still determine that earlier allegations are out of time if it is satisfied that they do not, in fact, form part of continuing acts.

Submissions

47. The claimant submitted that he had done his best to advance his claim promptly. He had been faced with difficulties in securing legal advice, compounded by Covid lockdowns which made accessing advisors more difficult, and by the precarious financial situation that he had been left in by his summary dismissal. His mental health had been poor, and when it became apparent that he was not going to be successful in obtaining advice he had acted quickly to submit the claim by himself. The claim was important because he had been a victim of discrimination over a lengthy period of time. He was employed by a big company who had not acted when they should have done. It would be in the interests of justice for the claim to proceed.

48. The respondent submitted that the claimant's evidence did not come close to showing that it was "not reasonably practicable" for him to submit his claim in time. He was in receipt of legal advice and had been advised about the importance of time limits. There was insufficient evidence of any medical difficulty, and, even on the claimant's evidence, this only affected him for a limited period in January 2022. It did not explain the other delays. He had been able to take other administrative steps such as pursuing his internal appeal, sending emails and applying for benefits.

49. In relation to "just and equitable", Miss Breslin emphasised that this was not a short delay, but one of several months. She stressed the real prejudice that the respondent would face. Many of the issues underlying the claim were now old, and evidence would be stale. Ms Singleton had left employment, as had various other individuals who were named in the claim. There was no real excuse for Mr Otigbah not bringing the claim earlier and the exercise of discretion should be the exception rather than the rule.

Discussion and conclusions

Unfair dismissal

50. The first point to clarify is the date on which time starts to run. The claimant in his ET1 had suggested that he was dismissed on 5 November 2021, which was the date of his appeal hearing. However, he readily accepted in evidence that the date of dismissal was actually 7 September 2021. This

means that the primary limitation period ended on 6 December 2021. He had not commenced ACAS early conciliation in that period and so there is no extension to be factored in.

51. I am satisfied that it was reasonably practicable for Mr Otigbah to present his complaint within that time period. He was aware, from his earlier engagement with Paul Doran solicitors, that he had employment rights which could be enforced through a Tribunal claim. It seems likely that he would have been informed about time limits at that point but, in any event, if he was ignorant of time limits at that point, I do not consider such ignorance to be reasonable.

52. In the period between 7 September and 6 December Mr Otigbah was able to conduct his internal appeal (including using email and the internet to do so). The mental health episode he relies on post-dates this period (having taken place, on his evidence, in January 2022) and there is no other specific bar to him having contacted ACAS and commenced his claim. I accept that Mr Otigbah's life was not easy at this point, particularly in the light of his financial difficulties, but that reflects the circumstances of many Tribunal claimants and I do not find that those circumstances prevented him from bringing his claim. Instead, I find that Mr Otigbah prioritised attempting to find legal advice over submitting his claim, and that is not enough for him to satisfy the "not reasonably practicable" test.

53. For completeness, I find that the second limb of the test is also not made out. Acting reasonably, Mr Otigbah would, at the very latest, have presented his claim within a day or two of the very clear indication he received from KBL Solicitors on 8 March 2022 that there were serious time issues with the claim and that he needed to act urgently.

Wages claim

54. The thrust of Mr Otigbah's holiday pay claim is that he expected to be paid in respect of accrued untaken holiday following his dismissal. Instead, he discovered that the respondent had treated some of his time on suspension as annual leave, meaning that there was no accrued holiday to be paid. Mr Otigbah says this was done without his knowledge or consent, and that those periods therefore cannot properly be considered to be annual leave, and his accrued entitlement ought to be paid to him. Of course, I have made no assessment of whether this happened as Mr Otigbah alleges or, if it did, whether that was something the respondent was entitled to do.

55. Again, the starting point is identifying the date on which time started to run for bringing this claim. Both parties appeared to assume that this would be date of termination. However, a wages claim will rarely run from the date of termination. Often, wages will be payable on a later date, in accordance with the respondent's payroll. There was no evidence before me as to when the claimant's final wages had been paid (and therefore when outstanding holiday pay would, presumably, have been paid if it had been accrued).

56. Mr Otigbah told me that he was paid every four weeks, so his payment date changed each month. He had not been paid in September, before his

dismissal, so would have expected payment in the later part of that month, but he could not be more specific than that.

57. On the balance of probability, it therefore seems likely that the date payment should have been made was on or after 9 September 2021, which would mean that ACAS conciliation was commenced within the primary time period for this claim. The claim ought to then have been presented within one month of the close of Early Conciliation i.e. by 19 February 2022.

58. Of course, the claim was not presented by that date, it was presented on 1 April 2022. Given the delay after early conciliation, I am satisfied that there is no date when payment would (realistically) have been due which would mean that the claim had been brought in time. For the same reasons as I have set out above, I consider that it would have been reasonably practicable for the claimant to have presented this claim within the primary time limit.

59. Again, in the alternative, I am satisfied that the claim was not presented within such further period as was reasonably. Acting reasonably, Mr Otigbah would have presented his claim within a day or two of the firm warnings he received on 8 March, and not waited a further three and a half weeks.

Discrimination Claim

60. I reached a different conclusion in respect of the discrimination claim, applying the "just and equitable" test. I consider that it is just and equitable to extend time consider the claimant's claim that his dismissal was an act of discrimination. My reasons for this are as follows.

61. Firstly, there were several genuine reasons for the delay in Mr Otigbah presenting his claim. These were:

    61.1 Mr Otigbah chose, reasonably, to follow the internal process before submitting a claim.
    61.2 Mr Otigbah's attempts to obtain legal advice (including attempts to secure funding through his home insurance providers) and the difficulty he faced in doing so due to his financial situation.
    61.3 Mr Otigbah's serious financial problems. These would have taken time to deal with in terms of correspondence etc, but would also have caused significant worry, distraction and mental strain would made presenting a claim more difficult.
    61.4 I have found Mr Otigbah's mental health was poor, particularly in January and February, and this also made presenting a claim more difficult.

62. Although I have found these matters were not sufficiently serious to make it "not reasonably practicable" for the claim to be presented in time they are nonetheless matters which carry weight and which weigh into my assessment of whether it is just and equitable to extend time in Mr Otigbah's favour.

63. I have also considered the length of the delay. It is not a matter of a few days, it is a significant period. I accept the respondent's argument that it will inevitably suffer a degree of prejudice due to this delay. Given the Early Conciliation provisions, if conciliation had been started a few days earlier, the claim could realistically have been brought around the start of February and been in time as regards the dismissal itself. The additional delay caused by the claimant's failure is therefore, for practical purposes, in the region of two months rather than the four months which the respondent has based its submissions on (based on the fact that the early conciliation was not, in this case, effective in extending time).

64. Inevitably, if this case comes to final hearing the tribunal will be considering matters which are relatively stale. In the context of a case such as this, a two-month delay is a relatively small part of that picture. The respondent took a very long time to investigate the allegations against the claimant, a matter acknowledged in its own appeal outcome. The Tribunal process itself involves an inherent delay whilst cases are processed and prepared for hearing (in fact, assuming the final hearing in this case goes ahead, as listed in January 2023, the parties in this case have experienced a much shorter litigation timetable than many similar cases do at the present time due to the volume of cases in the system). It would seem an injustice for the claimant to be deprived of the entirety of his claim in circumstances where his actions account for two months of the delay, when the respondent and the Tribunal are accountable for much more significant portions.

65. Regarding the specific prejudice raised by the respondent, I note that Ms Singleton is said to have left the respondent's employment at an early stage of the claimant's lengthy suspension. Whilst her absence might give rise to prejudice, that is not prejudice that can be specifically attributed to the claim being out of time. Miss Breslin informed me that three other individuals mentioned in the claim – Mr Wilkinson, Mr Vaizey and Ms Wood have also left the respondent's employment and another (unnamed) is about to leave soon.

66. Reviewing the claimant's further particulars, Mr Wilkinson is alleged to have made a comment in 2017 which the claimant complains of. He was not involved in the allegations in respect of which the claimant was suspended, nor the disciplinary process, so far as I can see.

67. Mr Vaizey is alleged to have made a comment in 2018 which the claimant complains of. He was not involved in the allegations in respect of which the claimant was suspended, nor the disciplinary process, so far as I can see.

68. Ms Wood made one of the five allegations for which the claimant was disciplined.

69. The claimant's further particulars mention numerous individuals and cover an extended period of time. It is not surprising that some of them have now left. The fact that someone has left employment does not necessarily mean that it is impossible to obtain witness evidence from them. It does, of course, make it more difficult. It is important, in my view, that the disciplinary officer and appeal officer seemingly remain in post. I also assume, given the size of the respondent, that those matters which formed part of to the formal

disciplinary process will have been properly documented, with statements taken from staff and so on. I recognise that may not be the case for allegations which the claimant makes now which were not subject to formal investigation by the respondent at the time.

70. I have also had regard to the prejudice that would be suffered by the claimant if he was not permitted to advance his claim. The claimant makes serious allegations and it is a matter about which he feels strongly. I take account of the fact that, as far back as March 2020 he was explicitly stating to his GP that he was being bullied at work and believed that it was due to his skin colour. This claim is not an after-thought or a make-weight for Mr Otigbah, it was clear from the way he presented himself today that this has been a burden to him for a long period of time. To have the claim dismissed without adjudication of any of the substantive issues would, I am sure, affect him deeply. That is prejudice which it is also appropriate to take into account.

71. I consider that the best way to do justice between the parties is to allow Mr Otigbah's race discrimination claim to proceed only as regards the allegation that his dismissal was an act of direct race discrimination. The earlier matters, both distinct from the disciplinary investigation and those which led to it, may be introduced by way of background evidence only (and some of them may be important background) but the only claim which will actually be determined is the claim that by dismissing him, Tesco treated Mr Otigbah less favourably than it would have treated a white employee in the same circumstances. It is just and equitable to allow that claim to proceed.

72. I do not consider that it is just and equitable to allow the allegations of earlier acts of discrimination set out in the further particulars to proceed. The two main reasons for this are, firstly, that the forensic prejudice identified by the respondent applies much more strongly to those earlier acts and secondly, that to permit those allegations to go forward as allegations of discrimination in their own right would require further case management (including, potentially, disputes as to whether the allegations in the further particulars reflect matters already pleaded, or whether amendment may be needed) and would lead to a longer final hearing. It is highly unlikely that that final hearing would be accommodated before 2024, leading to a further delay for both parties of at year, possibly much longer, which would seriously exacerbate the forensic prejudice concerns.

73. Given that the entirety of the claim was presented out of time, I am satisfied that this approach is permissible on the authorities, and that the fact that I am unable to reach a determination today as to whether any of the earlier matters would form a 'continuing act' with the dismissal does not act as a bar to me determining the matter in the way that I have.

Next steps

74. Case Management Orders through to the final hearing have already been made by Employment Judge Ord. The List of Issues prepared by her will now mostly fall away, given the limited nature of the claim that has been allowed to proceed. Should the parties consider that any further case

management orders are required, they may write to the Tribunal. Otherwise, they must proceed with preparing the case for hearing on the basis that the claim that will be determined is as set out in paragraph 71 above.

Employment Judge Dunlop
Date: 20 October 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
21 October 2022

FOR EMPLOYMENT TRIBUNALS