Case No: 2500332/2018

EMPLOYMENT TRIBUNALS

Claimant: Dr John Sinclair-Day

Respondent: International Paint Limited

Heard at: Manor View, Newcastle **On: 13, 14, 15 & 16 November 2018**

Before: (1) Judge A.M.S. Green
(2) Mrs B Kirby
(3) Mr J Adams

Representation

Claimant: Mr R Owen – Legal Representative
Respondent: Mr J Bryan - Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the claimant's claim for constructive unfair dismissal is dismissed. His claim for direct age discrimination is dismissed on being withdrawn by consent. The tribunal does not have jurisdiction to hear his claim for indirect age discrimination as it was presented out of time and there are no just and equitable reasons for extending the time limit pursuant to Equality Act 2010, section 123(1)(b).

REASONS

1. The claimant was employed by the respondent from 6 October 1986 to 25 January 2018. He had been given six months' notice of termination of employment. The respondent is part of the Akzol Noble group which is a global industrial company and coatings manufacturer. The respondent operates from Stoneygate Lane in Felling. The claimant tendered his resignation on 25 July 2017. He presented his claim to the Tribunal on 21 February, having gone through a period of early conciliation with ACAS

between 6 February 2018 and 9 February 2018.

2. He claimed unfair constructive dismissal direct age discrimination and indirect age discrimination, all of which arose from a common set of facts. During the final hearing he withdrew his claim for direct age discrimination, which we have dismissed by consent. In summary, he claimed that the respondent withdrew protection of his salary against inflation by implementing a new salary review system which is called the Hay system. This triggered his resignation. He also claims the Hay system was indirectly discriminatory against the over 55's. The claimant is 57 years old. He claims that the respondent awarded him and nil percent salary increase because of his age. He claims that he had a contractual entitlement to an annual pay rise at least in line with inflation. The respondent denies the claims. It contends that the claimant had no contractual entitlement to an annual pay rise in line with at least with inflation and this was borne out by the fact that he accepted several low annual pay increases without complaint when the respondent awarded the claimant a nil percent pay rise and 2017, it did so as to the proper application of the Hay system which was not indirectly discriminatory.

3. The parties agreed a list of issues in advance of the hearing in relation to constructive unfair dismissal. There are several questions:

Constructive dismissal

a. Did the respondent act in repudiatory breach of the claimant's contract?

b. Was there an express or implied term of the claimant's contract of employment that his base salary would increase annually at a rate at least equal to inflation, measured by reference to the consumer price index if his performance was on or above target, or if he was promoted?

c. If so, did the respondent breach that term on or around 17 March 2017 by failing to award the claimant with such an increase to his base salary?

d. If so, was that a significant breach going to the root of the contract?

e. If so, did the claimant resign in response to that breach?

f. If so, did the claimant affirm the contract such that the claimant can no longer rely on those matters as contributing to a breach of such term?

Indirect age discrimination

g. Did the respondent apply to the claimant a provision, criterion or practice (“PCP”), namely the introduction of a pay and grading system to employees in the non-collectively bargained workforce based at Felling? The claimant's protected characteristic is that he

is over 55.

h. Did the respondent also apply or would apply that PCP to persons who do not share the claimant's protected characteristic?

i. Does the PCP put, or would put persons with whom the claimant shares the protected characteristic at a particular disadvantage compared to others? The particular disadvantage claimed is the substantial adverse effect on pension entitlement because of age and length of service.

j. Does the PCP put or would put the claimant to that disadvantage? The particular disadvantage claimed is the substantial adverse effect on his pension entitlement because of his age and length of service.

k. If so, can the respondent show the PCP to be a proportionate means of achieving a legitimate aim?

Time limits

l. In relation to the discrimination claims, have any of the claimant's claims been brought outside the time limit set down in section 123 (1)(a) of the Equality Act 2010 ("EqA") as adjusted for early conciliation? The respondent's position is that any claim in respect of the 2017 pay award and the introduction of a pay and grading system to employees in the non-collectively bargained workforce, based at Felling in 2015 is out of time. If any such claims were presented prima facie out of time, is it just and equitable to extend time for submission of those claims under section 123(1)(b) of the EqA.

4. The parties filed and served an indexed and paginated hearing bundle. The following people adopted their witness statements and gave evidence. We heard from the claimant and Mr Aidan Mernin We then heard from Mrs Kate O'Brien, Mr Mathew Trueblood and Mr K Kruithoff. The representatives made closing submissions and Mr Bryan also provided us with written submissions, both from the outset and the end of the hearing.

5. The claimant must establish that he was constructively dismissed, and he must do so on a balance of probabilities. The claimant must prove his claim that he was indirectly discriminated because of his age and he must prove three things. The first is that there was a PCP. The second is that it put people in his age group at a particular disadvantage and the third is that it put him at a disadvantage. If the claimant discharges this burden, the onus passes to the respondent to prove a non-discriminatory reason.

6. There is also the question of time bar. There are time bar issues relating to the claimant's claim for indirect discrimination. It was agreed during the hearing that the claimant had presented his claim out of time and we discuss below, whether the Tribunal has jurisdiction to hear his indirect age discrimination claim on just and equitable grounds.

7. In reaching our decision, we have considered the oral and the documentary

evidence together with the written submissions and the oral submissions. We also considered our detailed records of proceedings. If have not referred to documents, this does not mean that we have not considered them.

8. The applicable law relating to constructive dismissal is to be found in section 95 (1)(c) of the Employment Rights Act 1996 which provides that for the purposes of unfair dismissal, an employee is treated as having been dismissed if he or she terminates the contract under which he or she is employed with or without notice in circumstances in which he or she is entitled to terminate for a reason connected to the employer's conduct. The issues are determined in accordance with common law, as set out by Lord Denning in **Weston Excavating (ECC) Ltd v Sharp [1978] QB 761**.

9. The claimant alleges that he had a contractual term which entitled him to an annual base salary increase at least equal to inflation, measured by reference to the consumer prices index if his performance was on or above target, or if he was promoted. He must show whether the term of that contract was express or implied. A term may only be implied into a contract if it can be presumed that it would have been the parties' intention to include it in their agreement. A term can be implied by custom and practice or by conduct. If the claimant establishes the existence of an implied term, we have to be satisfied of the following. First, the respondent breached that term. Second, the breach was a significant one going to the root of the employment contract. Third, the breach was the effective cause of his resignation. Fourth, he did not affirm the contract or agree to vary the contract.

10. Turning to indirect age discrimination section 19(1) EqA provides as follows. A person A discriminates against another B if A applies to B a PCP which is discriminatory in relation to a relevant protected characteristic of B's. For the purposes of subsection 1, a PCP is discriminatory in relation to a relevant protected characteristic of B if:

    a. A applies or would apply it to persons with whom B does not share that characteristic.

    b. It puts or would put persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it.

    c. It puts or would put B at that disadvantage, and

    d. A cannot show it to be a proportionate means of achieving a legitimate end.

11. Turning to the alleged constructive dismissal, the first issue is whether there was an express or implied term of the claimant's contract of employment that his base salary would increase annually at a rate of at least equal to inflation, measured by reference to the consumer price index if his performance was on or above target or if he if he was promoted. The short answer is no. The claimant exhibited his witness statement. He exhibited

his written contract of employment dated 7 March 1986 [59 & 60]. There is no express term conferring any right to expect that his base salary would increase annually or at least equal to inflation. No other evidence of an express contractual terms was offered in support of his claim.

12. It is trite law that a contract of employment may be constituted in writing verbally or through implication by custom and practice or conduct. There is no requirement for the contract to be reduced to writing. In the absence of an express term conferring the right to salary increases at a rate at a rate at least equal to inflation, the claimant must prove the existence of such a term being implied into his contract. We saw no evidence of such a term. Furthermore, when the claimant was cross examined, he conceded that there was no automatic entitlement to inflation proof pay rises nor under the collective bargaining arrangements. Mr Bryan put it to him that there was certainly no right to an inflation proof pay rise increase. He was asked if he accepted that, to which he replied “yes”. Mr Bryan then went on to give him space to qualify his answer if he wanted to. The claimant did not qualify his answer. Mr Owen did not re-examine him on that answer.

13. Mr Bryan then took the claimant to a table that had been prepared showing pay awards that he had received between 1994 and 2017 [350]. The claimant accepted that in six of the years between 2009 and 2017 he received below inflation awards. He also accepted that this also applied to those employees who were part of the collective bargaining unit at Felling. on further cross examination, Mr Bryan said “you are not saying that you were entitled to an increase at least at the rate of inflation every year”. The claimant replied “no”. There was evidence that he received above inflation pay rises prior to 2008 as set out in that table.

14. Even if we were to accept that prior to 2008, the claimant was entitled to annual pay rises at least at the prevailing level of inflation he can no longer rely on that argument because the evidence points either to a variation of his contract from 2009 onwards, depriving him of such right or breaches to which he acquiesced because he continued to work without protesting. We also found Mrs O'Brien's evidence helpful in providing background information regarding the process of negotiating pay increases. In paragraph 8 of her witness statement she describes negotiating with the trade union on behalf of the collective bargaining unit. The trade union opens the negotiation seeking an at least in line with inflation increase although they knew they had no such entitlement. She also referred to John Dixon, the HR business Partner at Felling, saying that whilst there may be a right to ask for a pay rise, there was no right to be awarded one. Under cross examination, Mrs O'Brien acknowledged that inflation was in the mind of the employer, but it was not a given. This is borne out by the data in the table [350] in the years 2009 to 2017. There were six occasions when the collective bargaining unit’s pay increases were below inflation.

15. When the respondent gave the claimant a nil percent pay rise on or around 17 March 2017, It did not do so in breach of the claimant's contract of employment. The respondent was using the Hay system that it had adopted in 2015 which is linked to salary and performance. Because there was no breach as claimed by the claimant, it would be otiose to consider the

remaining issues identified by the parties concerning constructive unfair dismissal.

16. We now move on to the indirect discrimination case. The first thing that we have to consider is whether the Tribunal has jurisdiction to hear the claim. We do not believe that the Tribunal has jurisdiction to hear the claimant's claim that he was indirectly discriminated because of his age for the following reasons:

    a. Section 123 (1) (a) of the EqA provides that complaints of unlawful discrimination must be presented to an employment tribunal before the end of the period of three months beginning with the date of the act complained of. There is an escape clause which allows the tribunal to hear any such complaint which is out of time, provided that it is just and equitable. That is provided for in section 123 (1)(b) of the EqA.

    b. There are potentially two dates from which the time limit should be calculated in this case. The first is the date when the Hay system was introduced. It was agreed that this was 1 April 2015 and this date was identified in the list of issues as the PCP. However, during discussion with the parties, there was potentially a different date, namely when the claimant's nil percent pay rise was applied to him. The parties agreed that this was set out in a letter that was addressed to the claimant dated 15 March 2017 which he received under cover of an email on 17 March 2017.

    c. If we take the first scenario, the claimant would have been required to present his claim to the Tribunal on or before 30 June 2015. In the second scenario, the claimant should have presented his claim on or before 16 June 2017. Both end dates could have been extended by early conciliation under the ACAS scheme.

    d. The claimant's claim form was presented to the Tribunal on 21 February 2018 after a period of early conciliation under the ACAS scheme where ACAS received the early conciliation notification on 6 February 2018 and issued its certificate on 9 February 2018.

    e. In both scenarios, it was agreed by the representatives that the claim for indirect age discrimination claim had been filed out of time and we recognise that we have a wide discretion to allow an extension of time under the just and equitable test. However, it does not necessarily follow that the exercise of discretion is a foregone conclusion.

    f. In a discrimination case, we remind ourselves that in **Robertson v Bexley Community Centre, trading as a Leisure Link 2003 IRLR 434, CA** it was held that when employment tribunals consider exercising discretion under section 120(1)(b) EqA:

        There is no presumption that they should do so unless they can justify failure to exercise the discretion quite the reverse

tribunal cannot hear a complaint unless the applicant convinces that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule.

g. The claimant therefore must convince us to extend the time limit. Mr Owen submitted that it would be just inequitable to extend the time limit for the following reasons.

   i. The claimant was unaware of the impact of the Hay system until the pay award, which was made on 1 April 2017.

   ii. The claimant was awaiting the outcome of his grievance which directly related to his nil percent pay rise. He was notified of the outcome by letter dated 18 July 2017.

   iii. The claimant tendered his resignation by letter dated 25 July 2017 and the respondent acknowledged receipt of the letter on the same day.

   iv. Notwithstanding the fact that the claimant had exercised his appeal rights under the grievance procedure, he hoped that the respondent would change its mind about the nil percent pay rise during his six months' notice. However, we saw no evidence of that happening.

   v. Mr Owen was instructed to advise the claimant in October 2017.

   vi. He also argued that the claimant would suffer more prejudice by our not extending the time limit than the respondent if we were allowed the claim in.

h. Mr Bryan repeated his written submissions and also responded to Mr Owen, essentially repeating the position set out in **Robertson**.

i. We would have been sympathetic to the claimant had he filed his claim very soon after his grievance appeal was determined; that is on around or as soon as possible after 18 July 2017, although we acknowledge that there is no general principle that it will be just and equitable to extend the time limit where the claimant is seeking redress through an employee's internal grievance procedure before embarking on legal proceedings. However, the claimant didn't do that and instead he waited until 21 February 2018 before presenting his claim.

j. Nor could it be said that he was ignorant of his rights because he sought advice from Mr Owen in October 2018. Once he instructed Mr Owen, he could, for example, have presented his age discrimination claim. At that stage there was no reason not to do so because the fact that he was still employed at the time was not a bar for him making such a claim. It was open for him to do so and he could have subsequently amended his claim to include his

constructive dismissal claim after his employment terminated. That also did not happen.

k. We were not persuaded that it would be just and equitable to extend time based on the claimant's hope that the respondent would change its mind after he tendered his resignation.

l. It is important to remember that resignation is a unilateral act by an employee and it doesn't require the employer to accept it to be effective. The claimant clearly intended to terminate his employment when he tendered his resignation letter and gate six months' notice. The respondent was not required to reconsider its position and the claimant should not have relied on that eventuality happening to justify delaying submitting his age discrimination claim.

m. There may be prejudice to the claimant but we cannot ignore the fact that, at best, he presented a claim seven months late or at worst, two years, 34 weeks and one day late.

n. In any event in the final analysis, the correct start date was 1 April 2015, which was identified as the date when the PCP was introduced in set out in the agreed list of issues. We think that the respondent would suffer more prejudice if the claim was allowed in under the just and equitable ground. The claimant did not act promptly in presenting his claim.

o. In either scenario once he knew the facts giving rise to his claim, he delayed taking advice. Under all the circumstances, we do not believe it would be just and equitable to extend the time limit for presenting his indirect age discrimination claim.

17. It must not be forgotten that employment tribunal time limits are not procedural niceties that can be waived by the parties. They are nearly always expressed in mandatory terms. If a claim is out of time and cannot be brought within the statutory formulas for allowing an extension of time, then the Tribunal must refuse to hear the case.

18. Legal and procedural certainty is a principle that applies equally to claimants and respondents. If a claimant suffered wrong, then he or she has a right which can be invoked in order to seek redress. However, respondents also have rights to continue their business without incurring unnecessary cost in defending claims brought many months or, in some cases, years after the events that are complained of.

19. For the avoidance of doubt, when we considered the factors in reaching her conclusion, we were aware of and we did consider section 33 of the Limitation Act 1980. We recognise it as a useful guide, but we are not required to adhere to it slavishly.

20. In conclusion, we also feel that it is important to record that the claimant was well regarded by the respondent and had been rewarded with a promotion to MM6 level which was the most senior management role below executive

level, given his length of service, which was in excess of 30 years. The obvious inference that we draw is that he was a loyal employee who devoted his professional life to the service of the respondent and its predecessors. On a human level, it is sad that his working relationship with the respondent ended in the way that it did.

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Employment Judge Green

Date 26 November 2018