



EMPLOYMENT TRIBUNALS

Claimant: Ms R Lehane

Respondent: Televue Marketing Limited

Heard at: Leicester **On:** Monday 6 August 2018

Before: Employment Judge Blackwell

Members: Mr K Rose
Mrs L Woodward

Representation

Claimant: Ms U Obaseki, Solicitor

Respondent: Mr N Shah, Solicitor

RESERVED JUDGMENT

Ms R Lehane

1. The Complaint of direct race and/or religious discrimination pursuant to Section 13 of the Equality Act 2010 in relation to comments made by Rajendra and Bakul Mistry succeed.
2. The Complaint of direct race and/or religious discrimination, the less favourable treatment being dismissal fails and is dismissed.
3. The Complaint of unfair dismissal pursuant to Section 94 of the Employment Rights Act 1994 succeeds.
4. The Complaint of wrongful dismissal also succeeds.
5. The Complaint of unauthorised deduction from wages in respect of the period of 11 July to 27 July 2017 also succeeds.
6. The Complaint of a failure to pay accrued but untaken annual leave fails and is dismissed.
7. The failure to provide pay statements in accordance with Section 8 of the Employment Rights Act 1996 is dismissed on withdrawal by the Claimant.

REASONS

1. As with Mr Mann's case we intend to approach Ms Lehane's in the same way, namely to deal firstly with the allegations made against Messrs Rajendra and Bakul Mistry of discriminatory comments.

2. Those comments are as follows:-

"1. Are you going to have follow Sharia Law said by Bakul Mistry?

2. You know you are going to have to live with your mother-in-law forever. Are you okay with that seeing as it's not the white thing to do, said by Rajendra Mistry?

3. Are you going to learn how to cook Muslim food? You can't feed his mum pizza, said by Bakul Mistry.

4. You're going to feel really uncomfortable being the only white person in the family, said by Rajendra Mistry."

3. Both Mistry brothers deny that any such comments were ever made.

4. Given the culture that we have found existed within the work place and the wholly unacceptable birthday card which Mr Rajendra Mistry seemed to think was appropriate, we prefer the evidence of Ms Lehane.

5. However Ms Lehane has a further hurdle to jump in that she candidly accepted during cross examination that the remarks set out above were made about the time that her relationship with Mr Mann became general knowledge within the work place. It seems to be common ground that that was not later than July 2017.

6. Thus Section 123 of the Equality Act comes into play:-

"1) Subject to section 140A and 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) Proceedings may not be brought in reliance on section 121(1) after the end of:-

(a) The period of 6 months starting with the date of the act to which the proceedings relate, or

(b) Such other period as the employment tribunal thinks just and equitable."

7. It is common ground that this head of claim is out of time. It therefore is for us to determine whether it would be just and equitable to extend the time limit in the circumstances of this case.

8. Mr Shah correctly points out as a matter of law that an extension of time should be the exception rather than the rule. He draws attention to the authority of **BCC v Keeble and Others** [1997] IRLR at page 336 in which it was found that Tribunals would be assisted by considering the factors listed in Section 33 of the Limitation Act 1980.

9. The first point to be considered therefore is the prejudice to which each party would suffer as a result of the decision reached. So far as the Respondents are concerned they have already been put to the expense of defending the claim. We have found the claim to have merit and have accordingly found in Ms Lehane's favour. Thus if we do not extend time she will lose the appropriate remedy. On the other hand of course the Respondents will have to pay such award.

10. The next factor is the length of and the reasons for the delay in bringing the claim forward. The matter is first mentioned in the originating application and is sufficiently pleaded to put the Respondents on notice of the nature of the claim. It is true that it was not properly particularised until March 2018 and we accept that it could have been properly particularised at the time that the claim form was submitted.

11. The next matter is the extent to which the cogency of the evidence is affected by the delay, the delay being of the order of some 14 months. Given that the Respondents evidence consists of flat denials, it does not seem to us that cogency has been affected.

12. The next matter concerns any requests for information and appears not to be relevant on the facts here. It appears that in relation to taking advice Ms Lehane first took advice in September of 2017, some 2 months after her dismissal.

13. We therefore conclude that this is a case where it would be just and equitable to extend the time, balancing all the factors set out above.

14. We therefore have jurisdiction to hear the claim and accordingly uphold it.

15. Again in an effort to assist the parties to come to terms we believe that Ms Lehane's award for injury to feelings will fall at the lower end of the middle band of the Vento decision.

Discriminatory dismissal

16. We adopt insofar as it applies the reasoning given in relation to Mr Mistry. The case on the Respondents evidence for the dismissal of Ms Lehane is not so compelling. The evidence against her seems to be as follows:-

16.1 The business card at page 220:-

- a) In that regard it is plain that her name then was not Rachael Mann and is still not Rachael Mann. The Respondents put forward no evidence that they had attempted to contact the telephone or e-mail particulars set out on the card.
- b) That Ms Lehane's middle name is Ann and that appears in the ebay correspondence.
- c) That on two occasions a return address sticker shows Ms Lehane's address. It appears to us that the writing in the two examples is different.
- d) That Ms Lehane was in a relationship with Mr Mann.

Notwithstanding that we have found that the Mistry's made discriminatory remarks to Ms Lehane, we are still satisfied that the dismissal was because the Mistry's genuinely believed that she had a hand in the business being carried out by Mr Mann. Her claim of less favourable treatment by way of dismissal in respect of the protected characteristics of race and/or religion must therefore fail.

16.2 Unfair dismissal pursuant to Section 94. Applying the same approach as we have done in relation to Mr Mann we accept that the reason for dismissal was conduct in that the Mistry's genuinely believed that Ms Lehane was acting in concert with Mr Mann.

16.3 Did they have reasonable grounds to hold that belief. We have set out above the evidence which they rely upon. We have also indicated that they did nothing to follow-up the particulars on the business card which was alleged to be that of Ms Lehane.

17. In our view the evidence they had falls far short of reasonable grounds warranting dismissal.

18. It seems to us that they dismissed mainly on the basis of association with Mr Mann.

19. For the same reasons as set out above the dismissal of Ms Lehane is also procedurally unfair. That brings into play the **Polkey** principle. However other than to pursue the particulars on the business card we do not know what other investigation could have been carried out and all we have is Ms Lehane's evidence that the telephone number is not hers.

20. We cannot therefore see that a fair procedure could have produced any prospect of a fair dismissal.

21. As to contributory conduct there is insufficient evidence for us to make any such deduction either to the basic or compensatory awards.

Wrongful dismissal

22. Did Ms Lehane commit a repudiatory breach of contract? The burden of proof lies with the Respondents. She is subject to the same terms as Mr Mann. However for the reasons we give in relation whether the Respondents had reasonable grounds to believe in the conduct complained of, there is insufficient evidence for us to determine that Ms Lehane has committed a repudiatory breach. Therefore her claim for wrongful dismissal succeeds.

Unpaid wages

23. For the same reasons given in relation to Mr Mann, Ms Lehane's claim succeeds but will in any event be subsumed in the compensatory award in respect of unfair dismissal.

Accrued but untaken annual leave

24. The Respondents put forward the calculation at page 415 and Ms Lehane accepts that if it is accurate she has received all holiday pay outstanding. Her evidence was that she believed she had taken 2 days less than that which is recorded by the Respondents. Again we asked for a calculation and none was provided. Again Ms Lehane did not provide any evidence to support her contention that she had taken 2 days less than was recorded by the Respondents.

25. We therefore prefer the Respondents evidence and Ms Lehane's claim under this heading fails.

Employment Judge Blackwell

Date: 16 August 2018

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

18 August 2018

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FOR EMPLOYMENT TRIBUNALS