EMPLOYMENT TRIBUNALS

Claimant: **Mr D Briscoe**

Respondent: **Derby City Council**

Heard at: **Nottingham** **On:** **Friday 12 April 2019**

Before: **Employment Judge P Britton (sitting alone)**

Representation
Claimant: **In Person**
Respondent: **Mr P McMahony, Solicitor**

JUDGMENT

1. The claim for unfair dismissal is dismissed upon withdrawal for lack of qualifying service.

2. The claim of disability based discrimination is dismissed upon withdrawal.

3. I extend time for the remaining claim of race discrimination it being just and equitable so to do and thus the same will now go forward to the next stage of the process in accordance with the orders sent out under separate cover.

REASONS

Introduction

1. During the first stage of today's hearing my having explained the legal framework and in the context of in particular the claim (ET1), the Claimant withdrew the claim of unfair dismissal as he lacked the requisite two year's qualifying service. He also withdrew a claim based upon disability discrimination because, although he had ticked the relevant box in the ET1, he conceded at the outset today that disability discrimination was not engaged. Thus, left was the claim of race discrimination.

2. My essential function today is to determine whether the remaining claim should be permitted to proceed, it being just and equitable so to do, it otherwise being out of time. For the purposes of determining the issue, I will set out the scenario insofar as it is engaged for the purposes of today. I refer to the Respondent as DCC.

The scenario

3. The Claimant was employed by DCC as a Team Leader Social Worker between 18 April 2017 and 30 March 2018. Not in dispute is that this was a one year, fixed term,

temporary contract, which of course therefore would normally have ended on 17 April 2018. Circa 10 November 2017, there was an incident involving an infant to whom I shall refer as Child A. In due course an issue arose as to whether or not the Claimant had failed in terms of his safeguarding duties in relation to said child. It is not my function today to elaborate any further.

4. The Claimant was not suspended but he was moved to another department whilst an investigation got underway circa 22 November 2017. This was undertaken by a Mr Dakin. In the process, the Claimant was interviewed on 19 January 2018 or thereabouts. Prior thereto he knew at least the outline of the allegations. The investigation completed circa 8 March 2018. I have read the letter then issued by DCC by which the Claimant was informed that there was a case to answer of serious professional negligence and that an outcome could be his dismissal. He was provided with the relevant policies and procedures and the investigation pack and informed that the disciplinary hearing would take place before Fiona Colton, a senior employee of DCC, on 21 March. As it is, it did not take place until 9 April I gather in order that the Claimant could obtain trade union representation as he wasn't a member of a trade union.

5. At the hearing he had the representation of Ron Stanley from a trade union known as Friends United. Consequent upon the disciplinary hearing, the Claimant was informed shortly thereafter that, but for the fact that he had by now left the employ of DCC, he would have been dismissed for serious professional negligence/misconduct the case having been proven. I shall call this "the dismissal". As it is by circa 31 March the Claimant had left the employment with the agreement of the Respondent to undertake a similar role as a Social Worker Team Leader, this time with Nottingham City Council. A curious feature of this case in that sense is why that was allowed to occur given the investigation: but as it is once Nottingham City Council became aware of the findings, it dispensed with his services. This may be relevant as to losses should the Claimant in due course succeed on his remaining claim should I permit it to proceed.

6. The Claimant appealed the decision of DCC on 18 April 2018. He received an outcome on 10 May by which his appeal was rejected. The Claimant has informed me that throughout that period he thought that the three month time limit for bringing a claim to tribunal was in suspense because although Mr Stanley had told him in a short discussion after the disciplinary hearing that there was a 3 month time limit, he (that is the Claimant) understood that to mean in terms of the closure of the process.

7. Having had the appeal outcome, he then discussed matters with the British Association of Social Workers (BASW), which is in effect another trade union. Before they would consider taking on his case and given that they could see (and it will come back to something I shall deal with in due course) that a principle point that he was raising was that there was not a level playing field in DCC Social Services and that black workers were less favourably treated, that in order to decide whether they would therefore support what prima facie therefore would be a race discrimination case, they would need him to provide them with more ammunition so to speak including comparator points.

8. The Claimant says to me that he had never been involved in anything like this before and that he did not really understand what that meant but that he did his best. He then referred matters back to the BASW which, in the usual way, assessed his chances of success so to speak and concluded that it was below the threshold at which they would represent him. I am well aware of these kinds of panel-based decisions within trade unions. And so circa 9 July he commenced ACAS early conciliation, the conciliator being Inderjit Johal. Mr McMahony has informed me that first contact in terms of ACAS with Respondent was 16 July. The ACAS conciliation period in this case lasted as is obvious from the certificate until the end date of 23 August. As it is, the Claimant didn't present his claim to the Tribunal until 16 November 2018.

9. That therefore leads me to the appropriate time limits. For reasons I shall come to, I am confining myself to the Equality Act 2010 (EQA) based claim. Thus, Section 123(i)(a) makes plain that in these circumstances a complaint may not be brought after the end of

"a period of 3 months starting with the date of the act to which the complaint relates".

10. In essence this is a claim based upon the Claimant having been discriminated against by the Respondent on the basis that black employees have a higher chance of being dismissed than their white colleagues and that thus the inference is to be drawn, given otherwise he would say the shortcomings in the disciplinary investigation, that a reason for his dismissal was because of this uneven playing field in terms of such matters. That he raised that as an issue is clear from his appeal letter; and it is then cross referenced to his statement and schedule which is before me and which he appendixed to his ET1. And as to his resignation he asserts before me, it not being clear from the ET1, that he thought the writing was already on the wall when he received the letter of 8 March informing him that he would be facing disciplinary charges; and when he received the finding of a case to answer and the invitation to a disciplinary hearing, he therefore resigned. In the circumstances it is possible under Section 39 of the EQA to bring a claim for constructive unfair dismissal if there has been such discriminatory treatment and it is therefore a reason for the departure. That is not at this stage an issue. However, the Claimant may have an uphill task in one respect which is as to whether if he left by agreement with the Respondent because he knew his fixed term contract was going to expire and he had another job to go to at the NCC; and that was the reason why he went because he always knew the job was only fixed term with the Respondent, then how does that trigger in that respect as a last straw for the purposes of a constructive discrimination based dismissal?

11. Otherwise what this clearly would be about would be less favourable treatment short of the constructive dismissal if the DCC did act as alleged disproportionality against black workers in comparison with its non black workforce in social services.

12. In any event the claim as currently pleaded of course ends with the effective date of termination of the employment namely 31 March. Thus the three month time limit expired on 30 June 2018.But into the equation comes the requirement to undertake ACAS early conciliation and receipt of a certificate to that effect before bringing the claim to the Tribunal. This is encapsulated in first the provision at Section 18A of the Employment Tribunals Act 1996 and then specifically in terms of the mechanics of how the ACAS EC period impacts upon time in Section 140B of the Equality Act 2010. So, absent ACAS EC, the last date to bring this claim would have been 30 June 2018. The ACAS EC period is 9 July to 23 August but because it only commenced after the expiration of the time limit, therefore it cannot extend time. So, it is back to that therefore this claim is as a matter of law nearly 5 months out of time.

13. Although not specifically pleaded even if the last act of race discrimination was the dismissal of his appeal on 10 May, then time would have expired on 9 August. ACAS EC would extend time to 23 September 2018. But he did not present his claim until 16 November 2018. Thus it is still nearly two months out of time.

14. What it means is, and because the Claimant is obviously asking today that I exercise my judicial discretion in terms of extending time, that I have to decide, given that explanation, as to whether it is just and equitable so to do. To that effect I heard the Claimant under oath. He has been questioned by Mr McMahony and I have heard submissions.

The law

15. As to the legal framework for exercising my judicial discretion, it is encapsulated by

Robertson v Bexley Community Centre (trading as Leisurely) [2003] IRLR 43 CA as re-affirmed, and in terms of such as the strictness of time limits, by **Chief Constable of Lincolnshire Police v Caston** [2010] IRL327 CA. There is also the helpful guidance as to how to approach the issue of extending time to be found in **British Coal Corporation v Keeble and Others** [1997] IRLR 336 EAT. I remind myself as stated therein that permissible in the exercise of the discretion is consideration of the factors within Section 33 of the Limitation Act 1980 which apply to the Civil Courts and that out of time is not necessary fatal to the exercise of discretion. Exercise of discretion in Civil Courts…

> *"Requires the Court to consider the prejudice which each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case, in particular the length of and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party's sued as cooperating with any request for information; the progress with which the Claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the Claimant to obtain appropriate advice once he or she knew of the possibility of taking action".*

16. Finally, (as I read it implicitly if it is a finely balanced decision)

> *"Tribunal's may if they consider it necessary also consider the merits of the claim but if they do so they should invite the parties to make submissions":* **Lupetti v Wrens Old House Limited** [1984] ICR 348, EAT[1].

Findings on the issue

17. Having heard the Claimant, who I find to be an honest man, and otherwise considered the relevant evidence , I find as follows:-

17.1 Prior to the unfortunate events the Claimant had no experience of Employment Tribunals at all.

17.2 When he got the outcome of the first stage of the disciplinary process, namely the finding of gross misconduct by reason of negligence, he understood that time still did not run because he was given the right of appeal. He thought it meant that the three month time limit ran from the end of the process. I factor in that it was a short and somewhat difficult meeting with Mr Stanley in whom the Claimant had lost confidence. Thereafter there was no follow up written advice from Mr Stanley including on the subject of time limits: indeed I have no correspondence at all from him before me.

17.3 So the Claimant put in his appeal and awaited the outcome. He got this round about 12 May allowing for postage of that decision dated 10 May. He would still have been in time at that stage. He then sought the advice of the British Association of Social Workers (BASW). They indicated to him that they could not consider whether or not to support his claim without more information from him. It seems to me they were particularly focussing on the race issue. As to why is obvious. The Claimant couldn't bring a claim for unfair dismissal because he did not have the necessary 2 years qualifying service pursuant to the provisions of the Employment Rights Act 1996. Thus reading between the lines they were focussing in particular on the Claimant's reference to what I would describe as comparators ie black workers treated less favourably in terms of disciplinary outcomes or not being kept on as opposed to white and indeed Asian workers. But the Claimant tells me he did not

[1] For additional commentary see page 343 ITS Handbook, Employment Tribunals Practice and Procedure 2015 edition.

understand what he was supposed to do in terms of obtaining further evidence for the BASW.

17.4 I bear in mind he was not a member of the BASW so they would not have any obligation to him in that respect. He talked about it with colleague Social Workers, friends and family and then did his best to provide the BASW with more information on the foundation of his claim. It is clear to me he did not have at that stage any comparator statistics. As it is BASW evaluated, as I have already said, the claim via its panel process and decided it did not have sufficient prospects of success to meet their threshold. Hence it decided not to support him. At that stage, the Claimant went to ACAS. Hence the engagement of Inderjit Johal; and of course the ACAS early conciliation process ran through until 23 August. But of course when it started on 9 July the Claimant was already out of time. But the Claimant understood from his discussion with Inderjit that the 3 month time limit was nevertheless still suspended during the ACAS early conciliation period. That is wrong as a matter of law; but course I don't have Mr Johal to give evidence to me. I have to go on what the Claimant tells me.

17.5 ACAS early conciliation was not successful. The Claimant thought that the 3 month time limit now ran from the end of the ACAS EC period. Thus it would expire on 23 November 2018. So he spent time within the 3 month period putting together the statement apropos appendix A to the ET1 before he presented it on 16 November thinking it was in time. Logically this state of mind is reasonable given what he understood, flowing from his conversation with Inderjit at ACAS, to be from when time ran.

17.6 He has been cross examined but remained consistent: his position has not changed.

Conclusions

18. Do I find his explanation was a reasonably held belief at the material time? The answer to that is yes. I have no evidence that he was dilatory. He was labouring under a false understanding.

19. Of course the employer is prejudiced in that if I allow this Claimant to proceed him being otherwise out of time, it will have to further defend these proceedings and the expense that goes into that. But it is not otherwise prejudiced for example because such has been the delay that evidence is no longer available. In this case there is not inordinate delay and the Respondent accepts that it can properly muster its defence.

20. Do I go into assessing the strengths or otherwise of the case? How can I? At present there is no particularisation of the defence in terms of statistical analysis on this comparator point at all. So, at the present moment I could not conclude in that sense that this claim does not have any merit or is profoundly weak.

21.In all those circumstances I have therefore decided that the exercise of my discretion falls in favour of the Claimant. I will permit his claim to proceed.

22.The Claimant had brought a claim for unfair dismissal pursuant to the provisions at Section 98 of the Employment Rights Act 1996. He accepts that he has not got the necessary 2 years' qualification service and he withdraws that claim.

23.He had ticked the box for disability discrimination and made a reference to dyslexia in his statement which is before me. However, it does not seem to engage at all in the scenario because it seems that over the many years of him being a Social Worker the Claimant had coped with his dyslexia. The Claimant accepts that proposition and so he withdraws the

claim of disability discrimination. Which brings me back to that it is self-evident that his primary claim was always based upon race as to which see the letter of appeal that he wrote to Ms Colton on 18 April 2018.

The way forward

24.There are already directions for this case which is listed a long away for 2-4 March 2020 in Nottingham before a full panel. However before it can meaningfully progress the following is obvious. Thus the heart of the remaining claim is essentially that black workers (and that is a phrase that the Claimant himself has used so he does not mind me doing so) are less favourably treated within the Social Worker team and in particular as to being retained or being the subject of disciplinaries and in particular in comparison with white Social Workers. But from what the Claimant is telling me this may extend also to the Indian sub-continent working community within the division being more favourably treated than the Black team. That might potentially engage because I am well aware of the significant proportion of Indian sub-continent ethnicity people who reside in Derby as opposed to the much smaller proportion of Black people.

25. So, before the matter can proceed the Respondent first of all needs to more fully plead its defence to the remaining claim as now articulated and which of course is Section 13 less favourable treatment pursuant to the EQA. It will obviously need to look into the statistics as per its workforce. The Claimant has been able to give some assistance first of all in terms of his contention that only the black agency workers brought into the team over the last year or so before he left had their services dispensed with. Second, he has been able to give two other like comparators in terms of his less favourable treatment claim. One, Trevor Davies, is somewhat long ago being circa 2000. The other, Ms Purline Webb, is much more recent: circa 2016/17. So that gives something for the Respondent to go on.

26. Finally I am going to make the orders for directions as set out in a separate document. I make it plain that all current directions are stayed save for the schedule of loss.

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Employment Judge Britton

Date: 14 May 2019

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE