



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Y Luwoye

**Respondents:** (1) Saul D Harrison & Sons Plc  
(2) Mr Stephen Harrison

**Heard at:** East London Hearing Centre

**On:** 17 May 2021

**Before:** Employment Judge Russell

## Representation

**Claimant:** Ms C Ngo-Pondie (Consultant)  
**Respondent:** Mr Islam-Choudhury (Counsel)

## JUDGMENT

- 1. The second claim is struck out. It was presented out of time, it is not just and equitable to extend time.**
- 2. The Respondent's application to strike out the first claim is refused.**

## REASONS

1. The Claimant was employed by the Respondent as a Financial Accountant from 2 September 2019 until 29 January 2020. The circumstances of the termination of her employment form the basis of the first claim.

2. The Claimant appealed against her dismissal by an email dated 5 February 2020. There was an appeal hearing held on 19 February 2020 and, by a letter dated 26 February 2020, the Claimant was advised that her appeal had not been successful. The letter rejecting the appeal gives states that the reason for dismissal included the Claimant's management style. The letter records the Claimant's explanation that hand gestures or talking directly to people were not unusual when she worked in France and Nigeria previously, the culture of the Respondent and the Claimant's management style. The Claimant was advised that the decision was final, with no further right of appeal.

3. The Claimant engaged legal representatives who drafted the claim form presented to the Employment Tribunal on 31 July 2020. It named both First and Second Respondent and brought claims of unfair dismissal, race discrimination,

religion and belief discrimination and wrongful dismissal.

4. By a letter dated 27 August 2020, the first claim was rejected against the Second Respondent as there was no ACAS EC Certificate. The Claimant did not at that stage obtain an EC Certificate and re-present her claim. Rather, following attempts to clarify the extent and nature of the claims, the Claimant's new legal representatives applied on 15 November 2020 to amend the first claim to include further complaints of wrongful dismissal, automatically unfair dismissal, breach of the ACAS Code, race discrimination direct/indirect and harassment related to race. By this date, the ordinary unfair dismissal claim had been struck out as the Claimant did not have two years' continuous service.

5. The matter came before Employment Judge Gardiner on 20 November 2020. For reasons given orally and not recorded in writing, Judge Gardiner refused the Claimant's application to amend the first claim save for allowing a further complaint of direct race discrimination in relation to failure to respond to a reference request made on 29 January 2020.

6. On 16 November 2020, some four days earlier, the Claimant had issued a second claim against the First Respondent and the Second Respondent. The content of the particulars of the second claim were materially identical to the draft amended particulars for the first claim, save that they included a complaint against the Second Respondent which had not been accepted in the first claim.

7. The particulars of the second claim repeated the history and background from the first claim and then purported to add additional complaints at paragraphs 37 to 48 and paragraph 53. It is agreed that these relate to matters on 28 and 29 January 2020, the confirmation that the Claimant had been dismissed and a detriment said to have occurred on 4 August 2020 when the Second Respondent had said that he would no longer speak to the Claimant with regard to the matter and therefore failed to investigate her grievances.

### **The Second Claim**

8. Mr Islam-Choudhury, on behalf of both Respondents, submits that the second claim should be struck out as it is an abuse of process, aiming to circumvent the ACAS Early Conciliation procedure and the decision to reject the first claim against the Second Respondent. He submits that it is also an abuse of process as it attempts to bring the same claims rejected by Judge Gardiner in the amendment application. In the alternative, he submits that the second claim should be struck out as it was presented out of time: taking the Claimant's case at its best, the last detriment occurred on 4 August 2020 but the ACAS early conciliation period started and ended on 16 November 2020 (time having expired on 3 November 2020). Mr Islam-Choudhury submits that there is no evidence before the Tribunal to make it just and equitable to extend time.

9. Ms Ngo-Pondie resisted both strike out applications (abuse of process and time). She submitted that there was no abuse of process as the second claim was presented before the outcome of the amendment application was known. Moreover, the amendment application concerned only the claim against the First

Respondent only, whereas the second claim brings complaints against the Second Respondent. As such, she submits that they are entirely different claims albeit based on the same facts. Insofar as the claim is out of time, Ms Ngo-Pondie submits that it would be just and equitable to extend time because of the Claimant's stress, anxiety and low mood since her dismissal in January 2020. The Claimant relies upon a GP's letter dated 3 November 2020, the fact that she was signed unfit for work between 29 October 2020 and 29 November 2020 and the contents of her witness statement provided at the previous hearing which sets out the problems that she had encountered at the time.

10. I decided to deal first with the question of time. Section 123 of the Equality Act 2010 provides that no complaint may be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable. For the purposes of this section conduct extending over a period is to be treated as done at the end of that period and failure to do something is to be treated as occurring when the person in question decided on it.

11. An act will be regarded as extending over a period if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant. The concepts of 'policy, rule, practice, scheme or regime' should not be applied too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period, **Hendricks v Metropolitan Police Comr.** [2003] IRLR 96, CA at paras 51-52. Where there are numerous allegations of discriminatory acts or omissions, the complainant must prove that (a) the incidents are linked to each other, and (b) that they are evidence of a 'continuing discriminatory state of affairs'. The focus should be on the substance of the complaints to determine whether there was an ongoing situation or continuing state of affairs as distinct from a succession of unconnected or isolated specific acts.

12. If the claim is presented outside the primary limitation period (that is, after the relevant three months), the tribunal may still have jurisdiction if, in all the circumstances, it is just and equitable to extend time. This is essentially an exercise in assessing the balance of prejudice between the parties, using the following principles:

- The claimant bears the burden of persuading the tribunal that it is just and equitable to extend time. There is no presumption that time will be extended;
- The tribunal takes into account anything which it judges to be relevant and may form a fairly rough idea of whether the claim appears weak or strong. It is generally more onerous for a respondent to be put to defending a late, weak claim and less prejudicial for a claimant to be deprived of such a claim;
- This is the exercise of a wide, general discretion and may include the date from which a claimant first became aware of the right to present a complaint. The existence of other, timeously presented claims will be

relevant because it will mean, on the one hand, that the claimant is not entirely unable to assert his rights and, on the other, that the very facts upon which he seeks to rely may already fall to be determined. Consideration here is likely to include whether it is possible to have a fair trial of the issues;

- There is no requirement to go through all the matters listed in section 33(3) Limitation Act 1980, provided no significant factor has been left out of account, **British Coal Corporation v Keeble** (length of the delay, reason for the delay, effect on the cogency of evidence, cooperation of the Respondent and the steps taken once the claimant became aware that she had a cause of action).

13. I am satisfied that the second claim was presented out of time. The last detriment relied on is 4 August 2020 and ACAS Conciliation should have started on 3 November 2020. The Claimant was 13 days late going to ACAS.

14. In deciding whether it is just and equitable to extend time, I had regard to the medical evidence in the bundle and statement from the previous hearing. The medical evidence does not support any assertion that the Claimant was so unwell that she could not assert her legal rights within an appropriate time period. The Claimant was able to present her first claim in a timely manner in July 2020. She was able to instruct her first legal representatives and her new legal representative, Ms Ngo-Pondie, who came onto the record in early November 2020.

15. In balancing the prejudice between the parties, I explored with Ms Ngo-Pondie the way in which the new complaint is advanced so that I may form a rough idea of its strengths. Ms Ngo-Pondie submitted that the factual circumstances of the Claimant's dismissal indicated that race was a material factor, in particular, the Respondents' stereotyped the Claimant and/or failed to understand a different cultural style of communication. This is the background to the Second Respondent's failure on 4 August 2020 to deal with the Claimant's grievance from which discrimination because of race can be inferred. There were no other facts upon which she relied, essentially as the dismissal is tainted by race it follows that the failure to deal with the subsequent grievance is also tainted by race.

16. The Claimant's case in the second claim is on my overall assessment a weak one. Ordinarily it is difficult for a Tribunal to assess the merits of a discrimination claim at such an early stage of the proceedings. However, this is a Claimant whose employment terminated on 29 January 2020 and where the appeal process against termination ended on 26 February 2020. The grievances which were not dealt with are said to be set out in emails sent in June 2020, some four months after the employment had terminated. Even if the dismissal was tainted by race, it does not follow that the failure to deal with a grievance presented four months later is necessarily similarly tainted. Correspondence from the Second Respondent in July and August 2020 did not evidence a refusal to deal with the grievance, rather a refusal to communicate directly with the Claimant in circumstances where both parties had legal representatives

instructed. The prejudice in requiring the Respondents to defend such a late, weak claim is much greater than the limited prejudice to the Claimant in being deprived of such a claim

17. The Claimant has an existing claim against the First Respondent in respect of the circumstances surrounding her dismissal and this will be heard. As such, she is not entirely deprived of the opportunity to assert her rights. The balance of prejudice is such that it would not be just and equitable to extend time and I decline to do so. The second claim is struck out in its entirety.

### **Strike Out and/or Deposit Order on the First Claim**

18. The Respondent makes an application for strike-out and/or deposit orders for each of the six detriments relied on in the first claim. These detriments are:

- (1) The Claimant was required to leave management meetings;
- (2) Carly and Chloe made complaints about her;
- (3) Ben Naidu told her that he would never report to her;
- (4) Ben Naidu bullied and shouted at the Claimant on 29 January 2020 and told police that she did not leave the premises;
- (5) Dismissal without being given any reason on 29 January 2020; and
- (6) Failure to provide her with a reference in response to her email timed at 16:09 on 29 January 2020, addressed to Mr Rule.

19. Pragmatically, Mr Islam-Choudhury did not pursue the application to strike out any of the detriments save for the final one. He submitted that the Claimant requested a reference on 29 January 2020 and that the letter of dismissal dated 3 February 2020 expressly stated that the Respondent would provide a factual reference. Documents in the bundle show that when a request was made in October/November 2020, a reference was provided. On the face of it, I would tend to agree that is a case that looks as if it has little or no reasonable prospect of success. During the course of the hearing, Ms Ngo-Pondie clarified that a request was also made to Mr Rule and Mr Naidu by her recruitment agency at the time of her dismissal but no reference was provided. Taken the Claimant's case at its highest when considering strike out, I do not consider that I can find that this claim has *no* reasonable prospects of success as it will require testing in evidence.

**Employment Judge Russell**

**6 July 2021**