Case No: 2204606/19

EMPLOYMENT TRIBUNALS

Claimant: **Mr. F. Mbanefo**
Respondent: **Ocado Central Services Ltd**

London Central remote video hearing **On: 23 October 2020**
Before: **Employment Judge Goodman**

Representation
Claimant: **in person**
Respondent: **Mr. Stephen Butler, counsel**

PRELIMINARY HEARING
RESERVED JUDGMENT

1. The claim is amended by inclusion of the claimant's statement of 8 March 2020.
2. It is just and equitable to extend time to present the claim.
3. The claim as amended has no reasonable prospect of success and is struck out under Rule 37.

REASONS

1. This hearing was listed to decide whether the age discrimination claim should be struck out, either because not presented in time, or because it discloses no reasonable prospect of success.

2. For this hearing I had a bundle of documents, and I heard submissions from each party. I had also read the tribunal's (paper) case file in preparing, and I outlined the chronology I took from that for the benefit of the respondent, which was otherwise not aware of what had occurred before the claim was served on them.

Factual Outline

3. The claimant was an agency worker assigned to work for the respondent in food distribution depot. After about 6 weeks, his assignment was ended by the respondent on 3 April 2019. The claimant approached ACAS (day A) for early conciliation on 23 April 2019. He was issued with a reconciliation certificate (day B) on 23 May 2019. He downloaded form ET1, completed it, and then sent it by email to the employment tribunal on 8 June 2019. When he heard no more, and on 23 September 2019 he sent a chasing email. Next

day, a judge was asked to review this, and she directed that the claim was not accepted because it had been presented by email. Unfortunately, the administration on 30 September sent a standard letter telling the claimant his claim was rejected because he had not obtained an early conciliation certificate, with no mention of the presentation problem. Reading this, on 5 October 2019 the claimant applied for reconsideration of the rejection, on the basis that he had obtained an early conciliation certificate, whose number had been given on the claim form. This was reviewed by a judge, who directed that the administration send the correct letter, saying his claim that the rejected because it was presented by email. That letter was sent on 23 October 2019, and then on 27 October 2019 claimant filed his claim online.

4. The claim was now accepted and the claim form was served on the respondent, which applied on 19 December 2019 for an extension to get further information about the claim, and on 16 January 2020 filed a brief response, whose principal focus was on the claim being out of time. The respondent had not been sent the ACAS certificate, and so did not know precisely when the claim should have been filed.

5. On 25 February 2020 there was a preliminary hearing before Employment Judge Pearl. At that hearing the claimant withdrew his claims of unfair dismissal, unlawful deductions from wages, breach of contract and holiday pay; I understand this was on the basis that the respondent was not his employer. That left an age discrimination claim. The claimant was ordered to file a witness statement by 10 March 2020, and an application to amend which included the text of the proposed amendment by 24 March. The Respondent was then to prepare a hearing bundle for 7 April, and there was to be an open preliminary hearing on 22 May 2020 to decide whether the amendment should be allowed, whether the claim was out of time and should be dismissed, or whether it should be dismissed as disclosing no reasonable prospect of success.

6. On the claim form, the claimant ticked the boxes claiming unfair dismissal dismissal and age discrimination. In box 8.2, which asks claimants for “details of your claim”, which “should include the date(s) when the event(s) you are complaining about happened. Please use the blank sheet of the end of the form if needed”, the claimant gave a short account of the dismissal at the end of the night shift on 3 April by telephone, “without a hint of any justification whatsoever, other than I didn’t fit Ocado Zoom’s plans for whatever reason”. He queried it with the agency, but got no more information, and says the respondent “subsequently claimed that I was dismissed because of incompetence at work”. He had tried to engage with them through ACAS without success. Other than filling in his date of birth in the box at the start of the form (December 1964), there is no mention of age.

7. In a witness statement prepared pursuant to order, dated 8 March 2020, the claimant said: “as I had initially indicated on my ET 1 form, I was dismissed by Ocado Zoom based on what I perceived to be case of age discrimination. I say perceived because I was never actually told that my dismissal was directed because of my advancing years compared to my much younger colleagues, even though I do have some subtle evidence of such to back my claim”. He went on to mention that he had challenged the shift manager about a sudden cancellation of free food in the staff canteen, and when he volunteered for a technical task, even though he had not had much training on it, that same shift manager, he recalled “saying sarcastically: “you?!”. Younger colleagues were routinely given the opportunity to work overtime, and he was only offered it if others refused it. As for the dismissal, he had no idea of the reason. He had only ever made one mistake (a temporarily misplaced tote). When he pushed for a reason, all he was told was that he

did not fit into Ocado's plans. There are no names or dates. There were no references, open or by implication, to any features suggesting age stereotyping.

8. Today I asked the claimant if he wanted to expand on why he thought age was the reason for his treatment, and whether (given the respondent's need to investigate the claim) he could identify the supervisors and managers concerned, or name the colleagues, or when events occurred other than the termination of his assignment. He could not give names or dates, but said that Ocado could find out by checking their shift rotas and handover notes, and it would not be difficult because there were only 2 night shift supervisors. As for age, he said he had first considered whether it was colour (he is black) but there were other black employees, so "the only thing that makes sense to me was it was because of my age".

Amendment of Claim

9. The application to amend stated that the claimant had not intended to be unhelpful, but did not realise that he had to give so much detail at an early stage.

10. The respondent objected that the purported amendment did not give a text as ordered, and still did not identify any age-related facts, any dates or names, nor was it clear whether the complaint was just about dismissal, or other detriments, such as not working overtime.

11. As outlined in **Chandok v Tirkey**, the claim form is not something to set the ball rolling but must state the essential features of the case, so that the respondent knows what it has to meet. Nevertheless, claimants, especially unrepresented claimants, often have to be ordered to give further information before a respondent can investigate. In deciding whether to allow an amendment, and having regard to the factors in **Selkent Bus Company v Moore**, the tribunal must consider whether an amendment is to relabel existing facts, or adds wholly new material, the effect of amendment on any time limits, and the nature and timing of the application, and then consider the balance of prejudice and whether it is still possible to have a fair trial.

12. As the claimant is not represented, and as employment tribunals are enjoined to avoid formality, I will overlook that there is no precise text of the amendment, and allow that the short witness statement stands in its place. It is in the nature of further information, rather than adding a new claim. As for timing, the claimant has acted promptly when ordered. As for time limits, there was already an issue on time, still to be decided. The additional material does not take the case much forward, so arguably the respondent is no more prejudiced now than it was before the amendment. The amendment clarifying the facts is allowed.

Time Limits

13. By section 123(1) of the Equality Act 2010, a claim must be presented within three months of the act complained of, but the tribunal has a discretion to hear a claim if it is just and equitable. The burden of proof is on the claimant. In exercising discretion the tribunal must consider the factors set out in the guidance in **Keeble v British Coal Corporation**, namely, the reason for the delay, whether any concealment by the other party led to delay, the effect of the delay on the cogency of the evidence, and then review the balance of prejudice between the parties in that light.

14. But for the mistake in presenting his claim by email, the claimant would have

been in time. Rule 8 of the employment tribunal procedure rules states a claim shall be started by presenting a completed claim form using a prescribed form in accordance with any practice direction made under rule 11. The relevant practice direction states that a claim form can be presented *either* by online submission, *or* by post to the central office of employment tribunals in Leicester, *or* by hand to one of the regional offices. On the government website, which sets out much material about how to make a claim in an employment tribunal, a short executive summary says claims can be filed online, or sent to Leicester, and a postal address in given. The full 28 page booklet repeats this, with the full list of addresses for delivery in person to a regional office. There is no mention of sending a claim by email, although equally there is no note that service by email is not accepted, and email addresses are not given, though they do appear in a list at the end of the booklet. The claimant argues that so much is done by email these days that he was not to know this was not acceptable presentation.

15. This was the claimant's only mistake. In other respects he has acted promptly. He went to ACAS as required. He sent his claim within time, although by the wrong method. When told his claim was rejected, though for the wrong reason, and he should apply to reconsider, he did so very promptly. When then told that his claim was rejected for the right reason he filed online very promptly. The respondent objects that he left it three months after the first email to follow up his claim to ask what was happening. The claimant says he telephoned the tribunal on one or two occasions and was told he would get a receipt. There is no way to check this, because employment tribunal staff are directed by HMCTS that they need not make notes of telephone calls, and in practice calls are not noted anywhere. In any case, given that from time to time employment tribunals are slow to respond to claims because of staff shortage and backlogs, waiting 3 months to follow up is not wholly unreasonable.

16. Had the tribunal rejected the claim when received in June, rather than when he followed it up in September, there is every reason to think the claimant would have filed it properly and promptly, because he acted promptly twice when the claim was rejected. He had until 2 August 2019 (3 months, plus the one month standstill for early conciliation) to be in time. Had he done so, it is likely he would have been told to give more information much earlier (though by the time there had been a preliminary hearing and he had given it he would have been out of time).

17. The delay has affected the strength of the evidence. There is no reason to suppose that staff then employed are still in employment 12 months (dating this from when it was sent, not today) later, particularly if there were many short-term agency staff. Even if they are still there, expecting witnesses to remember brief conversations so long after the event is a tall order. It is not helpful that the claimant is not able to name either names or dates. He suggests the respondent can look at the documentary records of who was working when to identify who to ask, but as he cannot say when he is talking about, the respondent will not be able to decide who was there at the time, and may have to interview many people who may or may not remember the claimant, who was only there 6 weeks. This is a substantial prejudice to the respondent.

18. The prejudice to the claimant is not having his claim heard through little fault of his own - though I add that the rules about presentation are available on public websites, and had the test been "not reasonably practicable", as in the claims under the employment rights act, these facts I would have found it was reasonably practicable to find time.

19. Balancing the prejudice, while bearing in mind that several weeks of delay was caused by the tribunal's administrative errors, I hold that it is just and equitable to allow this claim to proceed.

No reasonable prospect of success

20. By rule 37(1),

> "at any stage of the proceedings the tribunal may strike out all the claim or response on grounds (a) that it is scandalous or vexatious has no reasonable prospect of success or (b) that the manner in which the proceedings have been conducted… has been… unreasonable".

21. Tribunals have been warned that they should be especially cautious when striking out Equality Act claims, which may be fact sensitive, and are important to ensure a democratic society, before evidence has been heard, unless it is clear, taking the claimant's case at its highest, or by reference to documents, that it has no reasonable prospects of success. If there is reason for doubt, a deposit order is the better option.

22. Today, evidence has not formally been called. I have the claim form, the witness statement the claimant prepared after the case management hearing before Judge Pearl, and his own amplification today in answer to my questions. So far, this evidence is not challenged by the respondent. If I assume that the claimant can establish the facts of which he speaks at a full tribunal, what are his prospects of success?

23. This is a very bare age discrimination claim. There is the apparent difference in treatment in the allocation of overtime, and the fact that his assignment was terminated without a reason. It is suggested that younger colleagues got more overtime. There is no information about how long other assignments lasted. Nothing was said about the claimant's age, and nothing was said which might suggest managers had a stereotype in mind – for example, there is no suggestion that the claimant was too slow, or could not learn new methods. The claimant has been very frank, that in the absence of a reason, he considered what the reason might be, and started with his colour, rejected that because some of his colleagues were black, so decided it must be his age. In these times, most employers are careful not to give discriminatory reasons, even if the real reasons are discriminatory, and sometimes employers do not even recognise that they are discriminating. For that reason the Equality Act provides a reverse burden of proof in section 136, which in summary, requires a tribunal to consider what facts the claimant has proved and whether it can be inferred from those facts that discrimination occurred, before turning to the respondent for an explanation demonstrating that discrimination was in no way involved in the decision.

24. In decided cases it has been made explicit that just because an employer acts unfairly does not mean that any protected characteristic of the claimant was the reason for the unfairness. An employer can be unfair to a diverse range of employees. There must be something more than the bare fact of the claimant having a protected characteristic and the employer acting unfairly from which a tribunal could infer that the protected characteristic was the reason for the unfair treatment.

25. In this claim, despite the claimant having now had two opportunities to amplify his case, he has not identified anything other than the fact that he was older than his colleagues to suggest that age was the reason. It is

possible that overtime was allocated randomly. It is possible overtime was given to those who had served longest. It is possible that the manager took against the claimant because he had complained about the loss of free food, or because he blamed him for the time taken to find the misplaced tote. Some of these would be good reasons, some bad reasons, but there was nothing to suggest a discriminatory reason. It is not for tribunal to speculate on an employer's reasons; the burden is on the claimant to show facts from which the tribunal can infer a discriminatory reason in the absence of explanation.

26. On the claim as now particularised, there are no facts shown from which a tribunal could infer a discriminatory reason. On the facts set out by the claimant, this claim has no reasonable prospects of success, and it is therefore dismissed under order 37.

Employment Judge - Goodman

Date : 23rd Oct 2020

JUDGMENT SENT TO THE PARTIES ON

26/10/2020

FOR THE TRIBUNAL OFFICE