EMPLOYMENT TRIBUNALS

Claimant: Mr D Liu

Respondent: The Crown Prosecution Service

Heard at: **London South Employment Tribunal** **On: 22 November 2019**

Before: **Employment Judge Ferguson (sitting alone)**

Representation
Claimant: In person
Respondent: Mr A Line (counsel)

JUDGMENT

It is the judgment of the Tribunal that:

1. The complaints identified at paragraphs 1 (a) to (d) in the Claimant's document entitled "Draft List of Issues" dated 19 November 2019 are dismissed because the Tribunal has no jurisdiction to hear them.

2. In respect of paragraph 1 (e) of the same document, the complaints about the Respondent's alleged failure to re-employ the Claimant in July 2018 (Thames & Chiltern and Wessex) are dismissed because the Tribunal has no jurisdiction to hear them.

REASONS

BACKGROUND

1. By a claim form presented on 31 January 2019 (following a period of early conciliation from 28 November 2018 to 2 January 2019) the Claimant brought complaints of direct race discrimination against the Respondent. Although he also mentioned harassment in the claim form, he confirmed at the start of the hearing he does not pursue any complaint of harassment. This preliminary hearing was listed "to determine the preliminary issue of whether all or any of the claims were submitted in time and if not, whether the discretion to allow them to proceed should be exercised". The Respondent also argued in its response, and made submissions in a skeleton argument for this hearing, that

the claim should be struck out has having no reasonable prospect of success generally, but that application was not listed for hearing today so I could not consider it. I did, however, hear the Respondent's application for a deposit order (see separate deposit order and reasons).

2. It was agreed that the correct approach to the jurisdiction issue at a preliminary hearing, where the Claimant argues there was a continuing act, is as set out in the recent judgment of the Employment Appeal Tribunal in Caterham School Limited v Rose UKEAT/0149/19. If I am satisfied that there is a prima facie case of a continuing act, the matter should be determined at the final hearing, i.e. I cannot determine that there *was* a continuing act without hearing all the evidence. If, however, I am satisfied there is no prima facie case of a continuing act I can determine the jurisdiction issue on that basis.

3. The Claimant has now clarified the claim as follows.

   3.1. The Claimant is British Chinese and is a solicitor. He was employed by the Respondent as a Crown Prosecutor in the Kent office from 13 March 2017 to 1 September 2017. He alleges that during his employment he was excluded from group meetings and he was required to repeat the first part of his probation such that he was unable to complete his probation. He says, in respect of both matters, that this was direct race discrimination by his manager, Kevin Molony. He has named actual comparators and also relies on a hypothetical comparator, namely a white person in the same circumstances.

   3.2. The Claimant was dismissed on 1 September 2017, ostensibly on performance grounds. He says this was a further act of direct race discrimination by the decision-maker, Nigel Pilkington. He also believes Mr Molony influenced the decision. He relies on a hypothetical comparator, namely a white person in the same circumstances. The Claimant says that Mr Pilkington and/or Mr Molony further discriminated against him, on racial grounds, by creating an "active dismissal record", by which he means it was recorded in his file that he had been dismissed.

   3.3. From June 2018 onwards the Claimant made four applications for crown prosecutor or senior crown prosecutor positions in the CPS in four different regions of the UK. He says that the "active dismissal record" had the effect of blocking or prejudicing those applications. His applications were refused on the following dates:

   - 17 July 2018 (Thames and Chiltern)
   - 24 July 2018 (Wessex)
   - 9 October 2018 (London South)
   - 25 October or 2 Nov 2018 (West Midlands)

   The Claimant says that each of these unsuccessful applications amounted to an act of direct race discrimination. He relies on a hypothetical comparator.

   3.4. Finally, in October 2018 the Claimant was offered employment with Ian Henery Solicitors. They requested a reference from the Respondent, which

was provided on 22 October 2018. The only information given was the dates of employment, the Claimant's job title and the reason for leaving, namely "dismissal". It resulted in the Claimant's employment with Ian Henery Solicitors being terminated. The Claimant says the provision of the reference was a further act of direct race discrimination and relies on a hypothetical comparator.

4. The Claimant's position on the continuing act point has been somewhat unclear. In a skeleton argument produced for this hearing he said:

> "The Claimant will be relying on the case of *Hendricks v Commissioner of Police for the Metropolis (2002)*, that the dismissal [by the Respondent] was motivated by racial discrimination from CPS Southeast (Kent) and was an act extending over a period in the form of an 'active' dismissal record, as distinct from a succession of isolated or specific act for which time would begin to run from the date when each act was committed; and that is linked by the same employer pursuant to *Veolia Environmental Service Ltd v Gumbs (UKEAT/0487/12/BA)*. Additionally, each unsuccessful application affects the subsequent application."

5. In the hearing, however, he argued that all of the acts complained of, including those that took place during his employment with the Respondent, were part of a continuing act. He appeared to resile from that position when giving evidence, but he later confirmed that he maintains everything from March 2017 onwards was part of a continuing act.

6. As the Claimant contacted ACAS on 28 November 2018, any act before 29 August 2018 is in principle out of time.

7. Issues to be determined are:

   7.1. Whether the Claimant has established a prima facie case that any or all of the acts before 29 August 2018 were part of a continuing act that ended after that date.

   7.2. In respect of any acts that took place (or continuing acts that ended) before 29 August 2018, whether it is just an equitable to extend the time limit.

8. I heard evidence from the Claimant. He said after his dismissal from the Respondent he left the UK on 20 September 2017 to visit his father in Hong Kong because his father was unwell. He stayed there until 4 April 2018 and during that time it was "not reasonably practicable" for him to submit a claim against the Respondent as he did not know "if or when" he would return to the UK. When asked to clarify what he meant by this the Claimant said he was "very confused" at the time. He accepted that he knew a claim to the Employment Tribunal would be subject to a time limit and that he could have found out about it. He also accepted he had access to the internet in Hong Kong so could have submitted a claim online. He said that within about a month of his return to the UK, i.e. by early May 2018, he realised that he was out of time to bring a claim in respect of his dismissal so he did not do so. It was only in November 2018 that he "looked into the matter more deeply", and discovered

that time ran, so he understood, from the "last act".

THE LAW

9. Section 123 of the Equality Act 2010 provides, so far as relevant:

> **123 Time limits**
>
> (1) Subject to sections 140A and section 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.
>
> …
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> …

10. It is well established that there is a difference between a continuing act for the purposes of s.123(3) and an act that has continuing consequences. A decision, such as a decision not to promote someone, may have continuing consequences but it will not constitute a continuing act unless the Claimant can show the existence of a discriminatory policy, rule or practice. In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 the Court of Appeal made it clear, however, that Tribunals should not take too literal an approach to this issue and where (as in that case) there are allegations of numerous discriminatory acts over a long period, the Claimant may be able to establish that there an ongoing situation or continuing state of affairs which constituted a continuing act. Ultimately, the Tribunal should look at the substance of the complaints in question and determine whether they can be said to be part of one continuing act by the employer (Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548).

11. The Tribunal has a broad discretion in deciding whether it is just and equitable to extend time under s.123 (Southwark London Borough v Alfolabi [2003] IRLR 220). Factors that may be considered include the relative prejudice to the parties, the length of the delay, the reasons for the delay and the extent to which professional advice was sought and relied upon. The onus is on the claimant to show that it is just and equitable to extend the time limit.

CONCLUSIONS

12. Dealing first with the complaints during the period when the Claimant was employed by the Respondent, I do not accept that the Claimant has established a prima facie case that these formed part of a continuing act that ended after

29 August 2018. The only acts that took place after 29 August 2018 were the latter two rejections of his applications to the CPS and the provision of the reference. The Claimant does not allege that Mr Molony, the alleged discriminator during his employment, was involved in any of those decisions or acts, other than being partly responsible for the "dismissal record" that he says had the effect of blocking his applications. That could not be a sufficient basis to find that they were part of the same continuing act.

13. The same applies to the dismissal itself. The Claimant does not allege that either Mr Molony or Mr Pilkington were involved in the later recruitment decisions or the reference, only that they decided to dismiss him and made a record of that fact. That was an act that occurred on or around 1 September 2017. The fact that it may have had continuing consequences does not mean that the act itself continued beyond that date. The Claimant has not claimed the existence of a discriminatory policy, rule or practice, and nor does he allege a continuing state of affairs of the kind alleged in Hendricks.

14. As for the four unsuccessful applications, the Claimant relies entirely on the fact that there was, in his words, an "active dismissal record". He does not allege that any of the same people were involved in the decision-making. The fact of the Claimant's dismissal, and it potentially impacting on all four applications, is not sufficient to establish that there was a continuing act. The dismissal was a one-off act that may have had continuing consequences, but that cannot, on its own, provide a basis to find that four separate decisions, many months later, to refuse employment by four different offices were part of a continuing act. The Claimant has not established a prima facie case that the first two applications were part of a continuing act that extended beyond 29 August 2018.

15. On the issue of whether it is just and equitable to extend the time limit, I am not persuaded that I should do so in respect of any of the complaints that are out of time. The complaints relating to the Claimant's employment and dismissal are substantially out of time and he has provided no good reason for the delay. As a qualified solicitor he was easily able to find out about the time limits and there was nothing preventing him from submitting a claim from Hong Kong. The Claimant made an active decision when he returned not to submit a claim because he was out of time. Having then made the unsuccessful applications, and following his dismissal from Ian Henery solicitors because of the reference, he decided to pursue a claim going right back to his employment with the Respondent. That is not a good reason for the delay in bringing a claim about this dismissal and the matters that preceded it.

16. An extension of time under s.123 is the exception not the rule and it is for the Claimant to show that it is just and equitable. The delay is sufficiently long, at least in respect of the dismissal and matters before that date, to cause prejudice to the Respondent in defending the claim. In the absence of any good reason for the delay, I am not persuaded that it is appropriate to exercise my discretion to extend time.

17. As for the first two unsuccessful applications to the CPS in 2018, the Claimant has not put forward any reason why he could not have brought a claim in time. There is no reason why he should be entitled to keep making applications and then submit a claim within three months of the last rejection, when, as I have

found, they were not part of a continuing act. He could have brought a claim in time and there is no reason to extend the deadline.

Employment Judge **Ferguson**

Date: 27 November 2019