Case No. 3201192/2017

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
Ms A M Moreira	Travelodge Hotels Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT London East **ON** 29 March 2018

EMPLOYMENT JUDGE PSL Housego

Representation

For the Claimant: In person
For the Respondent: Ms C Urquhart of Counsel, instructed by Brabners LLP

JUDGMENT at Preliminary Hearing under Rule 53

The judgment of the tribunal is that:

1. **The race discrimination claim was lodged in time.**

2. **If any part of the claim of race discrimination was out of time it is just and equitable to extend time.**

3. **There was no claim for public interest disclosure in the original claim and leave is required to amend to include such a claim.**

4. **I refuse leave to amend to include a claim for public interest disclosure.**

5. **The claims have no reasonable prospect of success and they are struck out under Rule 37**

REASONS

1. This hearing was convened by EJ Gilbert as the claims of the claimant were not clear. The claimant had not received that order as it was sent to the representative of the claimant, who is no longer advising her, and the claimant had not received it from that representative. Nevertheless the claimant had acted on what Judge Gilbert had said at the hearing on 12 February 2018 and on 05 March 2018 submitted a note of what her claim was about. On 15 March 2018 the respondent filed a note in reply.

2. The claimant is unrepresented and understandably does not understand the law, although she has had some help from a representative in the past. She has a sense of grievance about her dismissal which she believes to be unfair both procedurally and substantively: she does not accept that she was guilty of the matter given as the reason for her dismissal. She also knows and accepts that she cannot bring a claim for unfair dismissal as she was not employed by the respondent for a 2 year period.

3. In the hearing I went through the matters about which the claimant is unhappy and made a careful typed note of the hearing, which can be read if necessary. Through a series of open questions I elicited what the claimant was unhappy about, and why. I then took submissions from Counsel for the respondent and asked the claimant to have the last word in response.

Out of time submission

4. The first issue to be dealt with is the respondent's contention that some or all of the claim is out of time. It is accepted that the claim was first submitted in time, but it was rejected and was not accepted until 31 October 2017. The effective date of termination was 07 June 2017. With the 1 month Acas early conciliation period extending the time to 4 months this was still after the time limit.

5. The claim was submitted in time, and the acceptance was later. It is the submission that must be within the time limit and it was. If I am wrong about this point then I decided that it is just and equitable to extend time, as is necessary for a discrimination claim to be allowed to proceed if submitted late. This is because the substance of the claim was known to the respondent and the claimant had sent in a claim form (even if it was not very clear) in time.

Public interest disclosure

6. The claimant seeks to assert that dismissal was automatically unfair under S103A by reason of a public interest disclosure. I decided that the claim form did not give any indication of a claim under S103A, and nor did later iterations of the claim. Not until the most recent statement of claim was this raised. The principles in Selkent Bus Co Ltd (t/a Stagecoach Selkent) v Moore [1996] UKEAT 151_96_0205 apply. This is not a *"relabelling"* but a whole new allegation and claim. For the reasons that I give later had I permitted the amendment I would have dismissed a public interest disclosure claim as having no reasonable prospect of success, under Rule 37.

Dismissal

7. The claimant asserts that her dismissal was an act of race discrimination a against her, by reason of her ethnicity (she identifies as a black west African woman). The claimant was entirely candid and (in my estimation for there are no findings of fact) truthful in her exposition of her case. The claimant said that she accepted that those who took the dismissal and appeal hearings had a genuine belief that she was guilty of the gross misconduct of theft from the company. That theft consisted of her colleague taking payment in cash for a *"walk in"* guest, leaving the cash on the desk for a while and then going to the kitchen with it and there (the employer believed) sharing it with the claimant. The claimant thought the belief of Sofia Costa, the person who dismissed her, was wrong, and unfair, was not based on sufficient evidence and that the procedure was unfair in a variety of ways, such as not permitting her to view the cctv images. However she accepted that this was Sofia Costa's genuine belief. The person who dismissed her appeal she considered similarly to so believe.

8. That being so, the detriment of dismissal has no casual link with the protected characteristic of the claimant, and the race discrimination claim cannot succeed for that reason. I observe also that unless the procedure was demonstrated to be unfair and that *Polkey* did not apply, Monie v Coral Racing Ltd [1981] I.C.R. 109, approved in Orr v Milton Keynes Council [2011] EWCA Civ 62 a claim for unfair dismissal would be unlikely to be successful. Theft from an employer is always gross misconduct and summary dismissal is within the range of reasonable responses of an employer.

Requirement to cook breakfast

9. The next claim to detriment was that the assistant manager, Akik Akhtar, imposed a requirement to cook breakfast which was not within the job

description. This was imposed also on another member of the night staff, Toby. Toby is a white male. The claimant asserted that she was made to attend a meeting about this, and that Mr Akhtar was intending to enforce this change, but had not required Toby to attend such a meeting. However on further enquiry as to whether this could be race discrimination it emerged that the case of the claimant was that Toby had left because of this. Accordingly the claimant's own case was that the same change was being imposed on her white comparator. Whether the change was fair or lawful is not germane given that this is a race discrimination claim.

Allegation relating to £8:50

10. The claimant's next allegation again related to the deputy manager, Mr Akhtar. He had raised with the claimant an issue of a possible shortage in the till of £8.50, with the implication that it might be improper. I enquired of the claimant what detriment she said had happened to her. The claimant said that the matter had been *"left hanging"*. Nothing bad had happened to her as a result of this suspicion. The claimant had accepted that the deputy manager was not a decision maker, and so it would not have relevance to the detriment of dismissal.

Photograph of black patron who was barred being displayed

11. The claimant said that Mr Akhtar put up with a photograph of a black customer who was not to be permitted to stay by reason of poor behaviour. It was this that was said to be a public interest disclosure. The claimant only ever raised this with Mr Aktar, who was the person who had put up the photograph. A disclosure involves telling someone something they do not already know. To complain to someone about what they have done is not a public interest disclosure.

12. It would have been possible for this to have founded a race discrimination claim if Mr Akhtar had taken action against the claimant by reason of her objecting to a racist action of her manager. However the claimant's case does not include Mr Aktar doing anything detrimental to her, because she accepted that those taking the dismissal and appeal hearings were other people, who genuinely believed that she was guilty of gross misconduct.

13. Even if Mr Akhtar had a grudge against the appellant by reason of the actions she complains about, she accepted that he was not a decision maker. As was made clear in Royal Mail Ltd v Jhuti [2017] EWCA Civ 1632 that would not give rise to any liability in the employer. The dismissal was not tainted by race discrimination on the claimant's own

case. Even if Mr Aktar was had discriminatory motivation, Ms Costa was not affected by the same taint of discrimination.

Automatically unfair dismissal for asserting a statutory right

14. This claim is that the claimant's request for a copy of her contract was ignored repeatedly. This cannot survive the fact that the claimant accepted that Ms Costa genuinely, if in the mind of the claimant wrongly, believed the claimant to be guilty of misconduct. Accordingly it was not the claimant asking for a contract that was the *"sole or principal reason"* for her dismissal as is required by S104. If it was a reason at all (which seems doubtful as the claimant does not say that she ever raised this with Ms Costa) it was a minor reason and not the principal reason - which as the claimant accepts was their belief that she was guilty of misconduct.

Summary

15. As with everybody else who has worked for less than two years and who feels that they have been dismissed unfairly there is nothing that an Employment Tribunal can do to determine such a claim, as there is no jurisdiction to do so. The claimant has to have to have a chance of persuading a tribunal of three people that she was dismissed (or suffered some other detriment) by reason of her race. That the claimant was dismissed and that she has a protected characteristic is not sufficient. The claimant has to show some link between the protected characteristic and the detriment of dismissal, or other detriment. While the claimant plainly has a sense of grievance, and may have good reason for that (I make no finding of fact) what assertions are put forward but the claimant do not go to show that there could be any such causal connection.

16. This is a preliminary hearing under Rule 53. This means that the powers under Rule 37 are available. For the reasons set out, these claims have no reasonable prospect of success. I dismiss them for that reason, fully appreciating that to strike out a race discrimination claim is not a usual course of action for reasons of public policy.

17. While I have the power to make a deposit order if I were to do that the combination of the sense of unfairness the claimant feels and her inability to comprehend the points of legal principle involved (by which I make no criticism: the claimant is not a lawyer) to fail to make the order which I decide is the right order would be an abdication of responsibility with potentially very bad consequences for the claimant. A deposit order followed by a 3 day unsuccessful hearing would mean that the claimant

would probably be greatly exposed to the risk of costs being awarded against her when she lost (as assuredly she would) her case.

18. I add that the claimant cites *"victimisation"* as a head of claim, but there is nothing in her claim form that indicates any claim other than those identified above, and no protected act such as could bring the claimant within S27 of the Equality Act 2010.

19. In essence this is an unfair dismissal claim presented as a claim under the Equality Act 2010 because there is no right to bring a claim for unfair dismissal by reason of the claimant having less than 2 years service.

Employment Judge Housego

29 March 2018