EMPLOYMENT TRIBUNALS

Claimant: **Mr M Kumi**

First Respondent: **AVI Contracts Limited**
Second Respondent: **Interaction Recruitment Plc**

Heard at: London Central Employment Tribunal

On: 6 March 2019

Before: Employment Judge Walker

Representation
Claimant: in person
First Respondent: Ms C Urquhart of Counsel
Second Respondent: Mr G Holder

JUDGMENT

The following allegations made by the Claimant are struck out:

1 the Claimant's disability discrimination allegation for failure to make reasonable adjustments;

2 the Claimant's allegation of direct discrimination when he said he complained to Nick;

3 the Claimant's allegations of wrongful dismissal;

4 all claims against the Second Respondent.

REASONS

1. This application was made by the First and Second Respondents following a Preliminary Hearing on 17 January 2019. The order of Employment Judge Russell made at that hearing recorded that the Claimant had sought leave to amend his claim to include complaints of wrongful dismissal, victimisation and disability discrimination. His submissions as to those further claims were limited to claiming that he was entitled notice pay of one week and that he was

dismissed when he complained about the fact that he had been racially abused which was alleged victimisation and that his disability, diabetes, was known to the Respondents and was exacerbated when no action was taken to stop the racial abuse, which he categorises as a failure to make a reasonable adjustment.

2. The application to amend the ET1 to include these claims was allowed but, given the lack of particulars and the substance provided in the respect of any of them, the Judge allowed the application from the First and Second Respondents to have a hearing to consider their applications for a strike out of the Claimant's claims to include his race discrimination claim to the extent it was shown that such claims have no reasonable prospect of success. There was at that time a third Respondent, but Employment Judge Russell struck out the claims against that entity.

3. The Claimant has prepared a schedule of his claims ("the Schedule") and has identified them and has also provided a transcript of tape recordings which he made, which contains a considerable amount of dialogue. The Schedule cross refers to paragraphs in the transcript.

4. In order to deal with this application, I have numbered each of the allegations in the Schedule, one through to eleven. I use that numbering to refer to the allegations in these reasons.

5. Rule 37 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, a Tribunal may strike out all or part of a claim or response on various grounds which include that it has no reasonable prospect of success.

6. The case law relating to strike out orders makes it very clear that in discrimination cases, Tribunals should be careful before any strike out. However, Claimants do not have the right to bring a claim regardless of whether it has any prospects of success, but nevertheless because those claims are particularly sensitive, Tribunals have to be careful about them.

7. With those considerations in mind I went through each of the allegations in the Schedule with the Claimant in some detail to understand what each complaint was. I later heard submissions from the First and Second Respondents' representatives once they understood the claims, having also listened in some considerable detail to the Claimant.

8. Additionally, to the extent that claims against the Second Respondent were out of time, since the ACAS arbitration certificate had been applied for one day late, in terms of the requirements for it to be three months less one day from the date of the last event of discrimination, I treated the matter as an application from the Claimant for a just and equitable extension of time and I heard evidence from the Claimant about the situation. I explained to him this was in order for me to consider whether it was appropriate to grant an extension of time on a just and equitable basis.

9. The final issue before me is whether the claims against the Second Respondent should be struck out on the basis that they have no reasonable prospect of success, if those claims were out of time and no extension of time was granted, as that would be a complete defence to them.

10. I refused the applications for a strike out in relation to allegations 1 – 4.

11. Allegation 5. This is called insults and I cannot find any reference to it in the ET1 at all. It was not a matter for which leave was given for an amendment and in those circumstance, this allegation does not form part of the claim.

12. Allegation 6, 7 and 8. I refused the application for a strike out.

13. Allegation 9. The Claimant makes a disability discrimination allegation for failure to make reasonable adjustments. He says that the Respondent failed to make reasonable adjustments on 14 May 2018 and he had complained to the Second Respondent about his diabetes and what measures were going to be put in place. The complaints that he relies upon were the problems he had around the abuse and name calling. For the purposes of this hearing only, I will assume that the Claimant is disabled.

14. A claim for reasonable adjustments falls under section 20 of the Equality Act 2010, which provides as follows:

> *Duty to make adjustments*
>
> *(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
>
> *(2) The duty comprises the following three requirements.*
>
> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

15. For s.20 of the Equality Act 2010 to apply, the Claimant would have to show first that the Respondent had a provision criterion or practice ("PCP") which it applied generally. Secondly the Claimant would have to show that this PCP put him at a substantial disadvantage in relation to a relevant matter, in comparison with others due to his disability.

16. Importantly, there can be no disability discrimination claim for reasonable adjustments when the Claimant cannot demonstrate that other people were being treated the same way.

17. The Claimant does not say that others were being treated to the same abuse. His case is the opposite. He says he was treated differently from everyone else.

18. A reasonable adjustments claim is simply not designed for the situation the Claimant is complaining about. It is totally misconceived to suggest that the Respondent's failure to take action in relation to his complaints could amount to a failure to make reasonable adjustments for him within the meaning of the Equality Act. In the circumstances that claim must fail and I strike it out.

19. Allegation 10. The Claimant said he complained to N who was the person involved at the Third Respondent. The Third Respondent has been dismissed from the claim and therefore that allegation is not something that the Tribunal can do anything about as it falls out with the Third Respondent. It is not a claim against any of the remaining Respondents and must therefore be struck out.

20. Allegation 11. This has two elements. The first is victimisation in relation to the Claimant's dismissal. He says that he was sacked by K and asked to leave the construction site and he puts that as victimisation claim. He was given leave to amend to bring this victimisation claim. He says that he was dismissed because of his complaints. This allegation must go forward.

21. The second element of the Allegation 11 is an allegation that the Claimant was wrongfully dismissed. He says in the amended claim he sought one weeks' notice and said that he should be given one week's pay for that. Today he produced a printed document which I understood to be the text of a text message that he says he received that suggested the work was going on for six months. He says that was the contract, but he accepts that he did sign a contract for services for the engagement of an agency worker between himself and Interaction Recruitment Plc, the Second Respondent. I was shown a copy of that contract and the Claimant confirmed that the signature on it was his. In relation to that it is very clear that he was only to be paid for the work that he did, and he would not have been eligible on that contract for any notice.

22. The statutory provisions for a one weeks' notice at section 86 of the Employment Rights Act 1996 set out a statutory minimum period of notice for employees who have been continuously employed for a month or more. The Claimant was not an employee of either Respondent. Accordingly, this section of the Employment Rights Act does not apply to him. In all the circumstances the allegation that the Claimant is entitled to notice pay has no prospect of success and must be struck out.

23. The Claimant's claims against the Second Respondent. The next issue I dealt with was the question of the Claimant's claims against the Second Respondent generally. In relation to the claims against the Second Respondent, the last date that any claim arose was on 14 May 2018 which was the last day the Claimant worked. The Claimant had applied for an ACAS early conciliation certificate against the Second Respondent on 14 August 2018, which was one day out of time. He got that certificate and at the hearing before Employment Judge Russell, there was some question as to the claims against each of the three Respondents who were parties at that time being out of time but subsequently the Claimant produced another early conciliation certificate dated 5 August 2018 which showed that he had applied for conciliation against the First Respondent on 5 August. That certificate meant the claims against the First Respondent were in time.

24. Since it was clear that the only conciliation certificate against the Second Respondent was one day out of time, I asked the Claimant to give evidence in order that we could consider whether to extend time on just and equitable basis.

25. The just and equitable extension is one which the Claimant has to apply for and the Court of Appeal made in clear in the case of **Robertson v Bexley**

Community Centre t/a Leisure Link 2003 IRLR 434 Court of Appeal that when Employment Tribunals consider exercising the discretion there is no presumption that they should do so unless they can justify failure to exercise the discretion - quite the reverse. The Tribunal cannot hear a complaint unless the applicant convinces them that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule. Effectively the onus is on the Claimant to convince the Tribunal that it is just and equitable to extend the time limit.

26. The EAT in **British Coal Corporation v Keeble and others 1997 IRLR 336** suggested that Employment Tribunals would be assisted by considering the factors listed in section 33 of the Limitation Act 1980. That section which applies to personal injury cases, requires the Tribunal to consider the prejudice which each party would suffer as a result of the decisions reached and to have regard to all the circumstances of the case. Factors suggested are the length of and reasons for the delay, the extent to which the evidence is likely to be affected by the delay, and the promptness with which the Claimant acted once he knew of the facts giving rise to the cause of action and the steps taken by the Claimant to obtain appropriate advice once he knew of the possibility of taking action.

27. I asked the Claimant to give evidence to explain what had happened. The Claimant said that in relation to the first early conciliation certificate he applied on-line and was unfamiliar with the process. He thought he had put in the names of all three Respondents into one form. He thought that at some point he had been told by ACAS that he had to have the registered offices of the Respondents correctly identified and he checked those and had then applied online again to make sure that he was correct in doing so and that when he did that, he was given three separate certificates. I asked him at some length to try to explain, if he could, when he had spoken to ACAS and where he had got the information from but the Claimant could not remember the sequence of events and was unable to describe it. Indeed, I would go so far as to say the Claimant's evidence on the point was evasive.

28. The early conciliation notification form provides that the Claimant should insert the employer's name and it says the field is limited to 100 characters. There is then space to enter the employer's address and the town, city, post code and telephone number. The Claimant could not explain what he entered or where. It is difficult to see how the Claimant could have put three employers' details with their names and addresses into the available space, although I note that with 100 characters for the employer name, it is perhaps possible that he could have got three names in at that point, but thereafter, it would not work.

29. Moreover, the accompanying explanation of the procedure clearly explains that ACAS would respond and they would send back a telephone number and the Claimant would be encouraged to call them to go through his claim. That the response would set out the name of the employer that they had identified from the conciliation process.

30. On that basis, the Claimant got an email back which set out only one Respondent's name, being the name on the Early Conciliation Certificate. While I understand that the Claimant might not have fully appreciated what that meant, he was not able to explain to me what happened or how he learned that he should do three applications. Indeed, he did not say he had been told he had got

this wrong by ACAS. Rather, he said that he thought he had included all three parties the first time and then had got the three separate certificate applications when ACAS told him he had to use the correct registered office following which he checked the addresses and re-entered them.

31. Had I been able to get clear information from the Claimant I would have taken full account of the fact that a delay of only one day is a short period. The evidence would not be affected by such a short delay. If there is a reasonable explanation, it would normally be just and equitable to extend time in that scenario. Additionally, in balancing the hardship between the parties, the hardship is normally such that the greater hardship would be suffered by the Claimant if he were deprived of his claim.

32. This case is not the norm. The Claimant has another Respondent against whom he still has a claim. The Second Respondent was merely an agency who found him work. It was not present at the site where the incidents occurred on a day to day basis, or as far as I am aware, at all. It did not control the site or the workforce. The First Respondent was the company which employed the carpenters and the Claimant had been sent to work with that team. Therefore, the Claimant still has a claim against the entity with the closest connection to the situation he complains about. In circumstances the hardship to the Claimant is much less than might ordinarily be the case. In contrast, the hardship to the Second Respondent of defending a claim when they had little or no involvement in the day to day events at the building site might be a greater hardship.

33. Importantly, where the Claimant simply would not explain to me what happened and where he went wrong, other than saying he thought the first conciliation certificate would have covered all three, which I cannot understand to be correct, it would not be appropriate to grant an extension.

34. The onus is on the Claimant applicant at this point. He has to convince the Tribunal that it is just and equitable to extend time. Where the Claimant was unable to explain to me what happened and how he learnt about the situation, he has not done enough to meet the onus on him. In those circumstances I am afraid that I cannot grant an extension of time and therefore the claims against the Second Respondent are out of time and must be struck out.

35. This means that the remaining allegations are all against the First Respondent.

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Employment Judge Walker
2 April 2019

JUDGMENT SENT TO THE PARTIES ON

5 April 2019

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FOR THE TRIBUNAL OFFICE