EMPLOYMENT TRIBUNALS

Open Preliminary Hearing

Claimants		***Respondents***
Ms S Tesfagiorgis	**AND**	(R1) Aspinalls Club T/A Crown London Aspinalls (R2) Mr M Branson (R3) Ms L Attrill

Heard at: London Central **On**: 19 November 2020 by CVP

Before: Employment Judge Nicolle

Representation
For the Claimant: Ms E Misra of counsel
For the Respondent: Mr A Ratan of counsel

Judgement

All claims of race and sex discrimination for acts or omissions of the Respondents before May 2011 are out of time and may not proceed albeit such matters may be referred to as background evidence at the full merits hearing.

Reasons

1. This is a decision following an Open Preliminary Hearing (OPH) at which I gave an extempore judgement but in respect of which Ms Misra requested written reasons.

Issues

2. The matters to be determined are as set out in the Case Management Order of Employment Judge Burns dated 23 September 2020 following a telephone hearing that same day. He provided that there should be an OPH to consider whether the claims in relation to acts or matters before May 2011 should be struck

out on the ground that they are out of time, that it is not just and equitable to extend time and accordingly they have no prospect of success or whether a Deposit Order should be made in relation to them on the grounds that they have little prospect of success for the same jurisdictional reasons.

3. The respective position of the parties is from the Claimant's perspective as set out in paragraph 12 of the Grounds of Claim that she has been subject to an act of discrimination a state of affairs within the meaning of the case of Hendricks extending over a period from inception of her employment in 2007 until she was medically signed off as unfit to work on 10 December 2019. The Respondent's position is set out in paragraphs 15 and 16 of the Grounds of Resistance namely that the claims prior to 2011 are out of time and time should not be extended pursuant to s.123 (3) (a) on the basis of a continuing course of conduct and nor should the Tribunal exercise its discretion to extend time on the basis that it would be just and equitable to do so.

The Hearing

4. At the hearing which took place via CVP there was a bundle of documents comprising 142 pages. The Claimant gave evidence and was briefly cross examined. Evidence was also given by three witnesses on the Claimant's behalf namely Snezana Jaksic, Selina Miebaka and Fiona Esoko none of whom were cross examined and for the purposes of the hearing their evidence was regarded as read. Michael Branson, Chief Operating Officer (Mr Branson) gave evidence on behalf of the Respondent and he was cross examined regarding various aspects of that evidence and in particular the changes of personnel and what he referred to as the change of culture in the business.

Findings of Fact

The Claimant

5. The Claimant identifies as being black British with a national ethnic origin of Eritrean. She commenced employment with the Respondent, then known as Aspinalls Club Limited, on 12 February 2007. She remained in the capacity of a dealer or inspector throughout her employment.

The Respondent

6. The Respondent is a well-known London Casino. It was first established in 1962. Since 2011 it has been part of Crown Resorts (Crown) an Australian gaming and entertainment group. The Claimant says that Crown owned 40% of the shares in Aspinalls prior to this time.

7. The claim is also against two individual Respondents namely Mr Branson who since March 2012 has been seconded from Crown Resorts in Australia to the

position of the First Respondent's Chief Operating Officer. For approximately eight years he was on assignment before finally becoming an employee of the First Respondent in March 2020. The Third Respondent has been employed since June 2015 as General Manager Human Resources.

8. Mr Branson says that part of his role on his assignment to the UK was to carry out a review of the Club's organisational structure, policies and procedures and culture. This included moving to an IT based document retention system from the previous use of paper files and introduction of new HR policies and procedures to include in respect of diversity. The Claimant contends that the Respondent merely paid lip service to the policies on diversity and respect.

The Incidents

9. The matters upon which I need to determine are set out in the Grounds of Claim and I will refer to them briefly as they are obviously pivotal to my determinations. They can broadly be broken down into the following categories.

Incidents involving a customer by the name of Mr Sabanci in 2007 and 2009.

10. The Claimant makes various complaints that she and other colleagues were subjected to wholly inappropriate remarks of a racist and sexist nature by Mr Sabanci on two separate occasions in 2007 and 2009. There is no need for me to set out those remarks. The Respondent says that Mr Sabanci was banned from the club following the second incident in 2009 and despite making an application for readmission in 2012 or 2013 this was declined based on records retained by the Respondent pertaining to the previous incidents.

Generic allegations of racism and sexism

11. Paragraph 23 of the Grounds of Claim represents a generic set of allegations without dates or specifics of the individuals involved regarding the alleged behaviour of customers towards the Claimant and others with references made to conduct of a racist and/or sexist nature. It would appear from the chronology that these events occurred in the period up to Mr Sabanci's expulsion in 2009.

12. Paragraph 27 refers to further occurrences of patrons insisting on not having a black dealer or insisting on having a white dealer, but again no particulars are provided as to dates.

13. More generally the Claimant says that there was a culture at the Club whereby unacceptable conduct towards staff from high spending patrons was tolerated. She says this included acquiescing in requests from patrons for the replacement of black dealers with white dealers.

Shift swap

14. The Grounds of Claim then jump to an incident regarding a shift swap in June 2015. There is no need for me to refer to subsequent matters in the chronology given that I am solely determining whether matters up to May 2011 are out of time.

Legal advice following the 2009 incident

15. After the second incident involving Mr Sabanci in 2009 the Claimant together with one or more of her colleagues took legal advice. She decided that she would not issue tribunal proceedings. She was cross examined on this by Mr Ratan and said that it was only a year after the birth of her first child, there were financial considerations applicable and there would be a significant burden in pursing such a complaint and indeed a burden she is now encountering.

Organisational structure and job titles

16. It is relevant to set out the position regarding the organisational structure within the Respondent's business. The parties spent some time giving evidence on this point. The Club has a managing director which up until 2016 was Mr Howard Aldridge and since 2016 Mr Ejez Dean. Next in the hierarchal structure is Mr Branson the Chief Operating Officer of Gaming and underneath him the Casino Manager or Senior Gaming Manager, Ms Tracy Tombides and beneath her what are variously described as Assistant Casino Managers or Area Managers with the Claimant saying that these titles are used interchangeably and then the position which was occupied by the Claimant of Dealer or Inspector and again those terms appear to be used interchangeably.

17. There was further evidence on the issue of roles during the cross examination of the Claimant and at paragraph 12 of her witness statement. She asserts that there was significant continuity of the management team throughout her employment and she was cross examined on this point by Mr Ratan and the position is as follows:

18. David Livermore occupied a position involving surveillance and compliance and left in May 2013. Gordon Heenan was Assistant Casino Manager, Robin Baulcolm was General Manager or possibly Assistant Casino Manager but left in 2012, Chris Turner and Steve Green Assistant Casino Managers, Mandy Codd Area Manager, Justine Hennessey, Inspector possibly Area Manager or Assistant Casino Manager and Alan Stone an Assistant Casino Manager.

19. There was also cross examination of Mr Branson regarding the respective roles of various personnel during his employment and at paragraph 17 in his witness statement. He said that Keith Rouse left in June 2012 and John Irwin, Head of Gaming in March 2013. Steve Green had been a Casino Manager prior to 2011 but was made redundant in October 2019, Alan Stone retired in 2019 and John Bronze was a Dealer in 2006 and Casino Manager in 2018.

The Law

20. The relevant statutory provision is s.123 (1) of the Equality Act 2010 (the EQA) which provides for a three-month time period for issuing tribunal

proceedings, or starting ACAS early conciliation, or at such other period as the Employment Tribunal thinks just and equitable. S.123 (3) (a) provides that conduct extending of a period is to be treated as done at the end of the period.

21. The relevant criteria to be applied in terms of whether it would be just and equitable to extend time are those set out in s.33 of the Limitation Act 1980. These criteria should not be followed slavishly but nevertheless represent a useful guide to tribunals in assessing whether an extension of time should apply. Potentially relevant factors include:

- the length and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected;
- the promptness of which the Claimant acted once she knew of the facts giving rise to the cause of action; and
- the steps taken by the Claimant to obtain appropriate professional advice once she knew of the possibility of taking legal action.

22. It is common ground between the parties that it is necessary for the Claimant to establish a reasonably arguable basis for the contention that the various complaints are so linked to be continuing acts or to constitute a continuing state of affairs as set out in various well known case law authorities to include Commissioner of the Police of the Metropolis v Hendricks [2003] ICR 530 and Aziz v FDA [2010] EWCA CIV 304.

23. I was referred to various case law by the parties to include the decision of the Court of Appeal in *Hendricks* which involved harassment over a period of 11 years. I was referred to paragraph 52 by Ms Misra which includes:

"The question is whether that is an act extending over a period as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed".

24. I was further referred to the earlier decision of the Court of Appeal in Cast v Croydon College [1998] IRLR 318 which involved an employee returning from maternity leave and making a number of requests between 26 March 1992 and 14 May 1993 to work part-time. The issue was whether there was a continuing course of conduct over that period. I was referred to page 13 within the judgment which held as follows:

"there were clearly several decisions of which the applicant was complaining as indicating the existence of a discriminatory policy. On that ground alone, I would allow the appeal and set aside the decision of both tribunals".

The Industrial Tribunal and the Employment Appeal Tribunal had both found that the complaint had been presented outside the three-month time limit.

25. I was then referred by Ms Misra to the decision of the EAT in Veolia Environmental Services v Gumbs UKEAT/0487/12 which considered whether an employment tribunal had erred in concluding that there was a continuous act of discrimination as opposed to two separate incidents, the first of which would be time barred. There was reference to the fact there was a commonality of the involvement of a Mr Kidd in the various incidents. The Employment Tribunal concluded that this was a continuing act for the purposes of s.123 because the same person was responsible for the incidents and because they both related to the status of the Claimant's work and request to drive.

26. Further, I was referred to Southern Cross Healthcare v Owolabi UKEAT/0056/11 and paragraph 7 through 12 in the judgment in which the Employment Tribunal had broken down the various alleged incidents into a series of compartmentalised matters which it labelled as the x y z incidents and then gave consideration whether they constituted a continuing course of conduct.

27. I was further referred to the *Aziz* case applying and endorsing the earlier decision in Lyfar v Brighton & Hove University Hospitals Trust [2006) EWCA Civ 1548 setting out the relevant test to be applied and specifically paragraph 35 where Hooper LJ stated that the test to be applied at the pre-hearing review was to consider whether the claimant had established a prima facie case and that the tribunal must ask itself whether the complaints were capable of being part of an act extending over a period.

28. In this respect Ms Misra asserts that the Claimant had flagged only the most serious and egregious acts only and her submission is that there was a sequence of acts beyond those actually included in the Grounds of Claim which constitute a continuing act over a period of time.

29. I was also referred by Ms Misra to the well-established principles in Anyanwu v Southbank Students' Union and South Bank University [2001] UKHL/14 in which the House of Lords advocated a cautious approach to tribunals before discrimination cases are struck out. Paragraph 24 provides:

"Discrimination cases are generally fact sensitive and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest".

Submissions

Ms Misra

30. The acts in the period prior to May 2011 were particularly egregious.

31. I should take the case at its reasonable highest referring to Robertson v Bexley Community Centre (t/a Leisure Link) [2003] EWCA Civ 576.

32. That there is a linkage from the pre-May 2011 incidents to the later incident of a similar nature in 2019.

33. That there has been little change in the Respondent's culture and significant continuity in its management team.

34. There is a common thread in that it is not the particular customer which is the issue but rather the failure by the Respondent to properly address such incidents which the Claimant describes as brutal, degrading and continuous. She says that in accordance with the Veiola and Owolabi cases it is not necessary that the same people were involved in each incident but she says the body of management is pretty static, there is a linkage in that the middle layer of management persists and that it would be artificial to salami slice the various incidents.

35. That the Claimant has a reasonably arguable basis for the contention that the complaints are in time in that they are sufficiently connected to be capable of amounting to a continuing act or of constituting an ongoing status of affairs.

36. That in the alternative that it would be appropriate for the Tribunal to exercise its discretion on the basis that it would be just and equitable to do so. She says there would be no real addition time if the earlier allegations were to be considered and that the matters were of the utmost severity.

Mr Ratan

37. That there was a significant time gap between three discreet periods in 2007, 2009 and 2015. He says there was five years and nine months between the second and third tranches of allegations.

38. That the allegations are of generic with insufficient particularity and notwithstanding the matter being canvased at the previous preliminary hearing no additional particulars have been provided.

39. He disputes that there are incidents which have been adequately particularised to be capable of constituting a continuing act. He refers in accordance with the *Aziz* principles that even if there are continuing acts that both are out of time (i.e. those in 2007 and 2009) and are not points which should be considered.

40. The Respondent would suffer prejudice if the pre-May 2011 matters were able to proceed. Whilst certain paper documents have been disclosed from the pre-May 2011 period, they would not paint a full picture. The Respondent would be prejudiced because of key members of staff from that time having left the business and in two instances having died.

41. He says that in terms of a Deposit Order that the claim has zero prospect of succeeding and it will be a sub optimal solution and his position ultimately is that paragraphs 15 – 27 are outside the Tribunal's jurisdiction and should be struck out.

Conclusions

Conduct extending over a period

42. I find that conduct did not extend over time from the first of the incidents relied on in 2007 through to and beyond May 2011. I make this finding for the following reasons.

43. There was a very significant gap between two very similar alleged incidents involving Mr Sabanci in 2007 and 2009 and the next substantive matter relied on by the Claimant which was the incident in June 2015 involving a shift swap which was an entirely different matter.

44. No particularity has been provided of any individual complaints of a similar nature in the intervening period between 2009 and 2015 but also in a situation where the next incident relied on was of a very different nature. The two earlier incidents involved a high net worth individual behaving inappropriately in the Club, and ultimately being barred from the club in 2009, and the next involved a shift swap and matters relating to that. Subsequent incidents in the Grounds of Claim are listed under the headings of failure to promote, rostering issues and then not until December 2019 a further incident of an arguably similar nature to that involving Mr Sabanci with another customer.

45. I find that the incidents are with Mr Sabanci were distinct incidents which took place in 2007 and 2009 and absent documented and particularised allegations of similar incidents in the period from 2009 until 2019 I do not consider this to represent a continuing course of conduct.

46. I accept Ms Misra's point that the complaint is not about the individual actions and behaviour of patrons but rather more generically as to the approach of the Respondent's management in dealing with such incidents. Nevertheless, I take account of the significant time which has lapsed and the significant change in the Respondent's management over that time.

47. I find it significant that whilst there may be some continuity in management personnel there are a large number of managers, particularly those involved in the 2007 and 2009 incidents, who have left the business and in two instances have died and others may well be untraceable.

48. It is also relevant that over a passage of time so substantial there will inevitably be changes in policies, procedures, culture and more generally how society perceives and deals with such issues. Whilst the Claimant says that the diversity and respect policies were not always applied, I nevertheless consider their introduction following Crown's acquisition of majority ownership in 2012 to be a factor, albeit not a major one, against there being a continuing course of conduct.

49. For all these reasons I consider that there was not a continuing course of conduct extending over the relevant period.

Just and equitable extension of time

50. I then need to consider whether it would be just and equitable for me to extend time to allow the pre-May 2011 complaints to proceed notwithstanding my finding above.

51. It is common ground that the onus is on the Claimant to establish why such discretion should be exercised in her favour. I find that she has not succeeded in in establishing reasons why and extension of time should be granted. I reach this finding based on the application of the principles set out in s.33 of the Limitation Act 1980 and approved in cases such as British Coal Corporation v Keeble and others 1997 IRLR 336, EAT and Newry v Governing Body of St Albans Girls' School [2010] ICR 473.

52. Looking specifically at the length of and reasons for delay by the Claimant it is relevant that she had the benefit of legal advice in 2009, and whilst for understandable reasons, nevertheless decided that she did not want to pursue a tribunal proceedings at that time. She would have been aware of the possibility of doing so but decided not to for the reasons previously identified.

53. I also consider that the substantial delay causes a real risk that the cogency of the evidence would be compromised. Whilst I acknowledge that the Respondent has been able to find some paper records dating back to the 2007 and 2009 incidents I do accept that there would be substantial evidential burdens and potential prejudice to the Respondent as result of an elapse of 13 and 11 years from the incidents. This includes many members of the Respondent's management team no longer employed or indeed alive. There would be obvious difficulty in tracing those who are still alive and no longer with the business. In any event the recollection of the processes followed, and approach taken would inevitably be compromised by the significant time lapse.

54. I also consider the very substantial delay in the Claimant issuing proceedings. The Claimant has left it for a period at least 11 years from the second of the incidents involving Mr Sabanci to commence proceedings. She had the benefit of legal advice in 2009 and decided not to pursue matters.

55. I have approached this determination based on an extension of time. I do appreciate that I need to balance the prejudice to the respondent of allowing the earlier complaints to be heard and that to the year claimant of an extension of time not being granted. I am aware that from the Claimant's perspective it is equivalent to a strike out of her claims in respect of the pre-May 2011 incidents. However, I am not approaching this based on a strike out based on no reasonable prospect of success as per Rule 37 (1) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

Deposit Order

56. I do not consider given my findings above that it would be appropriate for there to be a Deposit Order subject to payment of which the continuation of the earlier claims would be possible. I consider that would be inappropriate given the findings I have made.

57. So, for clarity those matters referred to in paragraphs 15-27 of the Grounds of Claim are matters which can still be referred to in the proceedings and evidence given but as background only and not matters in respect of which the Tribunal would be able to make any determinations or awards in the Claimant's favour.

58. For the avoidance of doubt all matters relied on by the Claimant subsequent to May 2011 proceed for consideration at a full merits hearing.

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Employment Judge Nicolle

Dated: **21 November 2020**

Sent to the parties on:

23/11/2020.

For the Tribunal Office