



EMPLOYMENT TRIBUNALS

OPEN PRELIMINARY HEARING

Claimant

Mr M Patel

Respondents

AND

DSG Retail Limited (R1)
Nuconnect Retail Limited
(in voluntary liquidation) (R2)
Jason Smith (R3)
Sascha Kolb (R4)
Nicholas Reed (R5)

Heard at: London Central via CVP

On: 27 October 2020

Before: Employment Judge Nicolle

Representation

For the Claimant: Mr A Philpott, of Counsel

For the Respondents: Mr S Butler, of Counsel for R1, R4 and R5
Mr N Jones, Solicitor for R3

RESERVED JUDGMENT

1. In respect of the First, Fourth and Fifth Respondents all claims are out of time and are dismissed.
2. In respect of the Second Respondent the claims for unfair dismissal and alleged disability discrimination after 1 April 2019 are in time and can proceed but all other claims are out of time and are dismissed.
3. In relation to the Third Respondent all claims are out of time and are dismissed save that any claims relating to alleged disability discrimination in the period from 1 April 2019 to 18 April 2019 are in time and may proceed.

REASONS

The Hearing

1. The hearing took place via CVP and lasted from 10am until 4:45pm. The Claimant gave witness evidence and was cross examined by Mr Butler and Mr Jones.
2. There was an agreed bundle comprising 242 pages. Written skeleton arguments were produced by Mr Philpott and Mr Butler and all parties made oral submissions.

The position of the Second Respondent

3. The Second Respondent is in liquidation by way of a creditors' voluntary winding up. Mr Jones confirmed that his firm was no longer instructed on behalf of the Second Respondent but that he continued to act for the Third Respondent. Mr Philpott confirmed that all relevant documents had been served on the joint liquidator for the Third Respondent. It was agreed that with a creditors' voluntary winding up there is no moratorium on the continuation of the proceedings against the Second Respondent.
4. The insolvency of the Second Respondent has relevance to the claims pursued by the Claimant as it provides him with an additional incentive to pursue claims against the individual Respondents and in particular the Third Respondent.

Protected disclosure detriment claims

5. A preliminary issue arose as to whether the claim form dated 4 September 2019 included a claim for detriments on account of the Claimant having made a protected disclosure in respect of his contention that the Second Respondent was intending to breach its obligations under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) in relation to the provision of company sick pay. I gave an oral ruling that the pleaded claim did not include a claim for detriment on account of a protected disclosure.

Amended particulars of claim

6. The bundle included a very substantial mark up of the original particulars of claim. I determined that it would not be appropriate to decide an application to amend the original claim until I had decided which of the claims as originally pleaded were in time.

The Issues

7. I had previously conducted closed preliminary hearings on 7 January 2020 and 1 May 2020. The case management orders provided that the issues to be determined at the open preliminary hearing are as follows:

- (1) Whether the claims have been brought in time against the First, Fourth & Fifth Respondents (and in so far as any liability for those claims would transfer to the Second Respondent under TUPE).
- (2) In relation to the First Respondent whether any allegations that pre-date 5 May 2019, being the period of 3 months plus 1 month for early conciliation prior to receipt of the Claim Form, are out of time.
- (3) Whether the events that the Claimant refers to in his Claim Form – insofar as they relate to the First, Fourth and Fifth Respondents which predate 5 May 2019 (and in fact 1 April 2019 when the transfer took place) are out of time.
- (4) Whether the following claims against the Second and Third Respondents are out of time, as they relate to any act or omission occurring more than 3 months (plus time added for ACAS early conciliation) prior to submission of the ET1 on 4 September 2019:
 - failure to inform and consult;
 - election of employee representatives;
 - disability discrimination (direct/indirect); and
 - detriment for making a protected disclosure.
- (5) By email dated 20/12/19 the Claimant has withdrawn claims against the individual Respondents for unfair dismissal, failure to inform & consult, and election of representatives.
- (6) He intends to pursue claims against the individual Respondents for protected disclosure (dismissal) and injury to feelings because of discrimination.

Findings of Fact

- (7) The Claimant was employed by the First Respondent, latterly as People Assistant Manager, from 1 November 2009 until his dismissal by the Second Respondent on the grounds of redundancy on 18 April 2019. The Claimant says that he suffers from anxiety and that this constitutes a disability. The Second and Third Respondents accept that the Claimant was disabled at the material times, but no admission has been made as to the existence of knowledge of the disability. The First Respondent has made no concession on disability.

8. The Claimant alleges that he has suffered discrimination on account of his disability from early 2018 onwards. His claim form refers to a series of actions by the Respondents which he contends constitute direct disability discrimination to include:

- (a) Insisting upon his attendance at work between September and November 2018 and harassing him to return to work despite a medical sick note.
- (b) Changes to his role in March 2018 and July 2018.
- (c) Subjecting him to a performance capability process between March and June 2018.
- (d) Increasing his working hours in September 2018 because he had taken time off and denying him the opportunity to care for his disabled mother (associative disability discrimination).
- (e) Absence capability meetings between October and December 2018 following prolonged absences.
- (f) Failing to inform him about retention bonus entitlement between October and December 2018.
- (g) Informing him that he would not be paid a retention bonus because of sickness absence.
- (h) Continuing to employ Labuba Shah after the TUPE transfer.

9. The Claimant pursues claims of indirect disability discrimination in respect of:

- (a) Requiring him to work long hours and return to work between September and November 2018.
- (b) The selection procedure for redundancy after the TUPE transfer on 1 April 2019.

10. He also pursues claims for disability related harassment in respect of:

- (a) Requiring him to attend work and make up his time between September and December 2018.
- (b) Inadequate search for alternative employment in April 2019 after the TUPE transfer.
- (c) Continuing to employ Labuba Shah after the TUPE transfer.

TUPE Transfer

11. The Claimant's contract of employment with the First Respondent transferred to the Second Respondent on 1 April 2019. It is agreed that the transfer of the Claimant's contract of employment was pursuant to a relevant transfer under TUPE.

ACAS early conciliation certificates

12. The position is complicated as the Claimant commenced early conciliation on different dates against the Respondents with the dates being as follows:

First Respondent:	3 July 2019 until 3 August 2019
Second Respondent:	10 July 2019 until 10 August 2019
Third Respondent:	10 July 2019 until 10 August 2019
Fourth Respondent:	11 July 2019 until 11 August 2019
Fifth Respondent:	16 July 2019 until 16 August 2019

The claim form was issued on 4 September 2019.

Grievances

13. The Claimant had raised a first grievance on 20 March 2019. This included reference to his not initially being included for the retention bonus. He also alleged that he had been discriminated against due to his ill health.

14. The Claimant raised a second grievance on 31 March 2019.

15. Responsibility for the grievances transferred to the Second Respondent under TUPE. It was not until 30 May 2019 that the Claimant was sent an outcome letter by Martine Samuel-Maher, Group People Operations Manager. She did not uphold any element of the Claimant's grievances.

Events from the termination of the Claimant's employment on 18 April 2019 and the claim form being issued on 4 September 2019

Legal Advice

16. The Claimant spoke with Mark Selleck of Tom Street & Co Solicitors and Advocates on 2 April 2019. No ongoing retainer arose.

17. On 25 April 2019, the Claimant received a client care letter from Lyons Davidson Solicitors, appointed by his insurer. The Claimant says that he was given incorrect advice about filing ACAS early conciliation forms. He subsequently raised a complaint in this respect with the Legal Ombudsman.

18. The Claimant phoned Martin Searle Solicitors on 6 June 2019. He had previously instructed them in November 2018 regarding issues with the First Respondent. He was advised that he should first obtain advice from Lyon Davidson as it was being funded by his insurance company.

19. On 11 June 2019, the Claimant instructed Thomas Mansfield solicitors, but this did not proceed because of his concerns regarding their cost estimates.

20. On 28 June 2019, the Claimant visited McMillan Williams solicitors and on 1 July 2019 Katherine Hodge (Ms Hodge) was assigned as his solicitor. It was not until 2 September 2019 that Ms Hodge provided him with a full assessment of his claims. The Claimant says that this was because of Ms Hodges' personal circumstances. The Claimant says that she informed him that he should file the ET1 claim form by 3 September 2019.

21. The Claimant says that he was unfamiliar with the employment tribunal process. He says that he was unaware of the applicable time limit.

22. The Claimant said that after the merits assessment from Ms Hodge he spent twelve hours overnight, when he was in India, completing the claim form and filing it on 4 September 2019.

Claimant's health from 18 April 2019 until 4 September 2019

23. Pamela Akemu, Cognitive Behavioural Therapist of Croydon Talking Therapies, in a letter to the Claimant dated 18 June 2019 recorded as follows:

You reported experiencing symptoms of depression and anxiety. Your score on the PHQ-9 (standard measure of depression) was 16/27 indicating the symptoms are currently moderately severe. On the GAD-7 (standard measure of anxiety) you scored 15/21 which indicates severe symptoms. The Claimant was given the contact details for the Samaritans.

24. Doctor W Jasper of the Farley Road Medical Practice in a letter to whom it may concern dated 21 January 2020 referred to the Claimant having visited him on 24 September 2018 complaining of anxiety relating to personal issues and difficulties he was having at work. Doctor Jasper referred to the Claimant attending a further appointment on 19 August 2019 when he was still very anxious and in a distressed state. He concluded by stating:

"I hope his mental state can be taken into account in his legal action because he was clearly not able to function normally during this time".

The Law

TUPE

25. A claim for breach of Regulation 13 of TUPE must be presented within three months (plus the EC period) of the date on which the relevant transfer is completed (Regulation 15 (12)(a)), or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of three months. The claimant bears the burden of proving that it was not reasonably

practicable to present the claim on time, see Porter v Bandridge Ltd [1978] ICR 943, per Waller LJ at P.948 D-E:

“The onus of proving that it was not reasonably practicable to present the complaint with a period of three months was upon the employee. That imposes a duty upon him to show precisely why it was that he did not present his complaint”.

26. The onus of proving that presentation in time was not reasonably practicable rests on the claimant.

27. The judgment of Lord Denning in R J Dedman v British Building and Engineering Appliances Ltd [1973] IRLR 379 includes the following:

“If a man engages skilled advisers to act for him – and they mistake the time limit and present it too late – he is out. His remedy is against them”.

He went on to state:

“If he was at fault, or if his advisers were at fault, he must take the consequences. By exercising reasonable diligence, the complaint could and should have been presented in time”.

28. The prevailing test is that set out by Brandon LJ in Wall’s Meat Co Ltd v Khan [1979] ICR 52, 60-61. This looks to the objective state of mind of the claimant: is there some impediment which reasonably prevents, or interferes with, or inhibits, presenting the claim on time? Brandon LJ refers to mental impediments as being the state of mind of the claimant “in the form of ignorance of, or mistaken belief with regard to, essential matters.” The ignorance or mistaken belief must itself be reasonable, and it will not be reasonable if it arises from “the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him.”

29. The Court of Appeal affirmed the Dedman principle in Marks and Spencer plc v Williams-Ryan 2005 ICR 1293, CA. Conducting a thorough review of the relevant authorities, Lord Phillips (then Master of the Rolls) concluded that Dedman remained good law. In his view, the correct proposition of law derived from Dedman is that where the employee has retained a solicitor to act for him or her and fails to meet the time limit because of the solicitor’s negligence, the solicitor’s fault will defeat any attempt to argue that it was not reasonably practicable to make a timely complaint to the tribunal.

Extension of time for the discrimination claim

30. The Claimant bears the burden of persuading the Tribunal to exercise its discretion to extend time, see Chief Constable of Lincolnshire Police v Natasha Caston [2009] EWCA Civ 1298.

31. It is clear from the case law that an employment tribunal's discretion to extend time in discrimination cases is wider than the discretion available in unfair dismissal cases. Therefore, whereas incorrect advice by a solicitor is unlikely to save a late tribunal claim in an unfair dismissal case, the same is not necessarily true when the claim is one of discrimination — Hawkins v Ball and anor 1996 IRLR 258, EAT and British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT.

32. The case law on the just and equitable test makes clear that a claimant "cannot be held responsible for the failings of his solicitors": Viridi v Commissioner of Police for the Metropolis [2007] IRLR 24.

33. The checklist of factors in s.33 of the Limitation Act 1980 is a useful guide of factors likely to be relevant, but a tribunal will not make an error of law by failing to consider the matters listed in s.33 provided that no materially relevant consideration is left out of account: Neary v Governing Body of St Albans Girls' School [2010] ICR 473. Section 33 requires the court to take into account all the circumstances of the case, and in particular the factors set out at s.33 (3). Those factors which are relevant to the Claim are:

- a) the length of, and reasons for, the delay by the Claimant;
- b) the extent to which the cogency of the evidence is likely to be affected by the delay;
- c) the promptness with which the Claimant acted once he knew of the facts giving rise to the cause of action; and
- d) the steps taken by the Claimant to obtain appropriate professional advice once he knew of the possibility of taking action.

34. The Court of Appeal in Southwark London Borough Council v Afolabi 2003 ICR 800, CA, confirmed that, while the checklist in S.33 of the Limitation Act 1980 provides a useful guide for tribunals, it need not be adhered to slavishly.

Submissions of the Parties

35. I consider it helpful to summarise the submissions of the parties in relation to the question of jurisdiction.

Mr Philpott

36. Mr Philpott claims that the disability discrimination claims constituted continuing acts extending over a period of time or alternatively that it would be just and equitable to extend time under s.123 of EQA. He says that the Claimant took strenuous efforts to obtain legal advice and representation and that together with the effects of his disability it was not reasonably practicable to present his claim in time.

37. He refers to the Claimant attending redundancy consultation meetings with the Third Respondent on 1 April 2019 and 11 April 2019 and that time started to run for his disability discrimination claims against the Third Respondent from 11

April 2019 and therefore with an early conciliation date of 10 August 2019 this claim is in time.

38. That by virtue of s.108 of the EQA the Claimant seeks to rely on post termination acts of discrimination and in particular the grievance outcome letter dated 31 May 2020 as being the last act of discrimination.

Mr Butler

39. Mr Butler argues that all claims which relate to alleged acts or omissions prior to 5 May 2019 are out of time.

40. He says that the alleged acts and omissions do not amount to an act continuing over a period of time or a continuing course of conduct.

41. He says that the balance of prejudice is in favour of upholding the three-month time limit.

42. He says that notwithstanding the Claimant's acknowledged mental health issues that he was still capable of doing things and cites his grievances, instruction of various solicitors and complaint to the Legal Ombudsman as evidence for this.

43. He refers to the case of Lyfar v Brighton and Sussex University Hospital Trust [2006] EWC Civ 1548 at paragraph 17 to the effect that the question is whether an act is extending over a period as opposed to a series of single or isolated acts. He says that the claim does not even involve the same sort of claims and that it would be wrong to group them together.

Mr Jones

44. He argues that any acts prior to 11 April 2019 are out of time. He accepts that any claims for direct, indirect or arising from disability discrimination in relation to seeking alternative positions of employment are within time in that they continued to 18 April 2019. He says that claims of disability discrimination in respect of the Claimant's redundancy and the TUPE process are out of time. He says that there was no continuing series of acts extending over a period of time. He says that it would not be just and equitable to extend time.

Conclusions

The First Respondent

45. Given that the last date of the Claimant's employment with the First Respondent was 1 April 2019 it is self evident that he was outside the permitted time limits when he commenced ACAS early conciliation on 3 July 2019.

46. Given that liability for the acts or omissions of the First Respondent automatically transferred to the Second Respondent under TUPE the question of

whether claims for disability discrimination against it are out of time arguably have a greater significance in respect of the transference of claims to the Second Respondent rather than the ability of the Claimant to pursue such claims against the First Respondent. Given this it is not necessary for me to consider whether it would be just and equitable to extend time for the Claimant's disability discrimination claims against the First Respondent under s.123 EQA.

47. In respect of those claims arising as a result of alleged failures by the First Respondent to inform and consult under Regulation 13 and 14 of TUPE I find that it was reasonably practicable for early conciliation to be commenced within three months of the TUPE transfer on 1 April 2019. I reach this finding for the following reasons:

- (a) The Claimant had interacted with and/or engaged several solicitors in the period up to 30 June 2019. I consider that it would have been extremely surprising if none of these professional advisers had provided advice to the Claimant regarding applicable time limits.
- (b) I do not consider that the Claimant's acknowledged mental health issues were of an extent to make it not reasonably practicable for him to comply with the time limit. It is apparent that the Claimant was able to undertake some steps to include writing grievance letters, instructing a number of different solicitors, making a complaint to the Legal Ombudsman and ultimately filing a detailed claim form on 4 September 2019. Therefore, whilst the Claimant may have been hampered in his ability to undertake necessary steps, he was not prevented from doing so.

The Fourth and Fifth Respondent

48. The Fourth Respondent was employed by the First Respondent until the termination of his employment on 15 April 2019. The Fifth Respondent was employed by the First Respondent until 31 March 2019, at which point his employment transferred to the Second Respondent pursuant to TUPE.

49. It was not until 11 July 2019 that the Claimant commenced early conciliation in respect of the Fourth Respondent and 16 July 2019 in respect of the Fifth Respondent. The Claimant does not rely on any acts or omissions of the Fourth and Fifth Respondents after the TUPE transfer on 1 April 2019, and arguably any acts or omissions were substantially earlier than this date, and these claims were therefore initiated outside the applicable three-month time limit.

50. I need to consider whether the conduct relied on by the Claimant prior to 1 April 2019 constituted acts continuing over a period of time or a continuing course of conduct. I find that they did not for the reasons set out in paragraph 51 below.

51. I find that the various events relied on by the Claimant from March 2018 whilst largely relating to his alleged disability comprised a series of individual

incidents as opposed to a continuing course of conduct. For example, whilst the Claimant was placed on a performance review process from 20 April 2018 no further action was taken after June 2018. The Claimant then referred to associative disability discrimination in relation to his mother in September 2018 which represented an entirely separate issue. On 4 October 2018 the Claimant sent an email to the Fourth Respondent regarding the harassment he alleged he had suffered and the insistence that he should return to work despite being signed off by his GP for ill health. The Claimant informed the Fourth Respondent at review meetings on 26 October and 26 November 2018 that he considered that he was trying to manage him out of the business. The Claimant then focussed on issues relating to the impending TUPE process and his entitlement to a retention bonus. I consider that the above represent a series of disparate matters rather than a continuing course of conduct.

52. I therefore do not consider that the various potential claims against the Fourth and Fifth Respondents were extant at 1 April 2019 and therefore relevant delay in commencing the early conciliation process was much greater than the period of three months from 1 April 2019.

53. Given that the claims against the Fourth and Fifth Respondents concern disability discrimination I need to consider whether it would be just and equitable to extend time. I do not consider that it would be. I make this finding for the following reasons:

- a) The Claimant has not satisfied the onus on him to establish reasons as to why time should be extended.
- b) There would be significant prejudice to the Fourth and Fifth Respondents if the Tribunal exercised its discretion to extend time.
- c) Given the delay from when the various alleged acts took place there would be a significant risk that the cogency of the evidence would be compromised. Further, there would almost certainly be significant difficulties for the Fourth and Fifth Respondents in defending such claims given the passage of time and the transfer of the Claimant's employment from the First to the Second Respondent.

The Second Respondent

54. ACAS early conciliation commenced on 10 July 2019. The Claimant's claim for unfair dismissal is therefore in time and proceeds. Claims under Regulations 13 and 14 of TUPE are out of time and on the same basis as set out above in relation to the First Respondent it would in my opinion have been reasonably practicable the Claimant to commence such claims within the three month time period.

55. In relation to claims of disability discrimination for the reasons set out above all claims transferring to the Second Respondent pursuant to TUPE in respect of potential liabilities of the First Respondent are out of time. The Claimant is, however, in time to pursue any claims of disability discrimination relating to the

redundancy process carried out by the Second Respondent which culminated in his dismissal on the grounds of redundancy on 18 April 2019. This would include any failure to make appropriate efforts to consider alternative positions of employment, albeit this would arguably fall within the claim of unfair dismissal.

56. If there were any arguable claims of disability discrimination during the Claimant's employment with the Respondent in the period from 1 April 2019 until 11 April 2019 any such acts would almost certainly formed part of a continuing course of conduct to the extent to which they contributed to the Claimant's selection for redundancy.

The Third Respondent

57. The Third Respondent was employed by the Second Respondent as Managing Director until it entered a creditors' voluntary liquidation.

58. I find that the Tribunal, regardless of time limit, would not have had jurisdiction to consider the Claimant's claims against the Third Respondent for unfair dismissal, failure to inform and consult and election of employee representatives under TUPE. It is only therefore necessary for me to consider whether the Tribunal has jurisdiction to consider claims of disability discrimination against the Third Respondent.

59. Given that the Third Respondent was employed by the Second Respondent (and at no time the First Respondent) I do not consider he can be liable in a personal capacity for acts or omissions prior to the date of the TUPE transfer on 1 April 2019. Whilst the Claimant says that the Third Respondent was notified of issues, he was having in his employment with the First Respondent as part of the TUPE consultation process this would not be sufficient to give rise to potential liability.

60. The Third Respondent would potentially be liable for any acts of alleged disability discrimination during individual consultation meetings he held with the Claimant on 1, 4 and 12 April 2019. I find that whilst the Third Respondent could not be liable for any acts of omissions prior to the TUPE transfer he could potentially be liable for acts or omissions subsequent to it where his approach to the Claimant was in any way predicated on information provided as part of the TUPE consultation process regarding the Claimant's disability. The Claimant contends that the Third Respondent was aware of his condition following a meeting on 15 March 2019.

61. As set out above I find that all claims predating the TUPE transfer on 1 April 2019 are out of time. Mr Jones has acknowledged that potential liability would exist against the Third Respondent in respect of any claims of disability discrimination relating to attempts to find suitable terms of employment continuing to 18 April 2019. Any claims in this respect are therefore in time.

Employment Judge Nicolle

Dated: **17 November 2020**

Judgment and Reasons sent to the parties on:

17/11/2020

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For the Tribunal Office