EMPLOYMENT TRIBUNALS

Claimant: Mr E Itua

Respondent: GXO Logistics UK Ltd

Heard at: Leeds by video link **On: 31 January, 1 and 2 February 2022**

Before: **Employment Judge Shepherd**

Members:
Mr L Priestley
Mr D Wilks

Appearances:

For the claimant: In person
For the respondent: Mr Zovidavi, counsel

Judgment having been given to the parties on 2 February 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant represented himself and the respondent was represented by Mr Zovidavi.

2. The Tribunal heard evidence from:

Eromosele Itua, the claimant;
Andy Turner, Deputy Site Maintenance Engineer;
Sally Finnie, Senior HR Manager;
Michael Brookes, QHSE Manager.

3. The Tribunal had sight of a bundle of documents which was numbered up to page 129. The Tribunal considered those documents to which it was referred by parties.

4. The complaints and issues were identified at a Preliminary Hearing before Employment Judge Rostant on 19 August 2021(subject to some alterations for typographical errors and omissions} as follows:

The Complaints

1. The claimant is making the following complaints:

1.1 Direct race discrimination about the following:

1.1.1 Failure to appoint the claimant;

1.1.2 A policy of preventing the claimant applying for work with the respondent or its contractors

The Issues

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint may not have been brought in time.

1.2 The claimant asserts that the reason he was given for his non-appointment was the existence of a policy that prevented the respondent from employing staff employed by Cordant at their premises. He says that he discovered that this was a false reason when he discovered that two employees of Cordant (white) had indeed been appointed by the respondent. The first (Mr Boardman) he found out about in July/August 2019, the second (Nadia King) he discovered about in early November 2020. At the same time, he approached Dematic, a company contracted to XPO, to apply for a job and was told by Mr Andy Turner that XPO had told them that he could not be employed because of his employment with Cordant. He complained about this matter in November 2020.

1.3 Was the discrimination complaint made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates? The claimant relies upon the decision not to appoint him in January 2019 and the fact that he has been the victim of a discriminatory policy not to appoint him because he is black. He asserts that that policy has continued in place and has prevented him from applying for other roles.

1.3.2 If not, was there conduct extending over a period?

1.3.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.3.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.3.4.1 Why were the complaints not made to the Tribunal in time?

1.3.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Direct race discrimination (Equality Act 2010 section 13)

2.1 Did the respondent do the following things:

2.1.1 Fail to appoint the claimant

2.1.2 Maintaining a racially discriminatory policy not to appoint the claimant or to allow his appointment by contractors.

2.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

The claimant says he was treated worse than two white comparators both employees of Cordant who were subsequently appointed to jobs with the respondent. the respondent is aware of the identity of the employees in question.

2.3 If so, was it because of race?

Findings of fact

5. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings the Tribunal made from which it drew its conclusions:

5.1. The claimant was employed by Cordant Security Ltd as a Security Guard based at the respondent's premises in Barnsley from 27 November 2017.

5.2. In December 2018 the claimant applied for a position in the respondent's facilities department and an interview was arranged to take place on 4 January 2019.

5.3. On 4 January 2019, before the interview took place, the claimant's line manager saw the claimant and indicated to him that, as a security guard at Cordant Security Ltd, he was not allowed to work for the respondent. Michael Brookes, QHSE Manager was present at the time but decided to continue with the interview of the claimant together with an HR representative.

5.4. It was an essential requirement for the role that the person appointed held the 17th/18th Edition Institute of Engineering and Technology qualifications which provided an engineer with the ability to certify work carried out. It was also an essential requirement that the person appointed had previous experience in an automation role. The claimant did not have the relevant qualifications and experience and he was not appointed to the role for that reason.

5.5. On 16 January 2019 the claimant emailed Michael Brookes requesting feedback. In that email he indicated that he had the relevant skills for the job. He also stated "I admit that I do not possess a 17th 18th Edition of the IET wiring regulations but I'm ready and willing to do so"

5.6. The person who was appointed to the role was fully qualified with previous experience of the type of work required.

5.7. The claimant sent a further email to Mr Brooks on 26 February 2019 in which he indicated that the respondent were the ones actually saying that he could not be employed by XPO at Barnsley because he had been a security officer working for Cordant security on the site.

5.8. On 6 March 2019 the HR advisor wrote to the claimant indicating that, as he had previously worked for Cordant Security on site, he was unable to be employed by the respondent as he had access to confidential information. The HR advisor apologised for confusion and said that Michael Brookes and she had not been aware of this information prior to the interview. It was stated that anyone who had previously worked for Cordant Security would be unable to then work for the respondent.

5.9. The claimant raised a complaint with the respondent on 15 November 2020. He alleged that he had been unsuccessful in securing the role of facilities engineer with the respondent as a result of the policy between Cordant and the respondent which prevented the respondent from hiring Cordant employees.

5.10. He also referred to two comparators, one of which had worked for Cordant and then worked for the respondent. The other was a Security Analyst who also switched over to becoming a member of the respondent's staff.

5.11. Sally Finnie, Senior HR Manager, met with the claimant on 21 December 2020 and on 18 January 2021 the claimant wrote to the respondent's Account Director setting out that he had an interview with another sub contractor, Dematic,

for a role of Engineering Assistant. Sally Finnie had informed him that she was not aware of an agreement between the respondent and Cordant whereby the respondent refused to employ ex-Cordant employees.

5.12. On 24 December 2020 the claimant had attended an interview with Andy Turner, Deputy Site Maintenance Engineer of Dematic Ltd. The claimant was unsuccessful in that application. The claimant was not successful in his application because the other candidates had scored higher and had more skills and experience. The decision to reject the claimant's application was not because of any agreement between the respondent and Dematic prohibiting the recruitment of ex-Cordant employees.

5.13. On 29 January 2021 Sally Finnie wrote to the claimant indicating that she had undertaken additional investigations. She confirmed that there was no agreement in place prohibiting the recruitment of ex-employees. She did tell the Tribunal that she could see a potential issue as security staff would know the whereabouts of covert cameras and this could result in a conflict-of-interest if they later joined the respondent company.

5.14. In the letter she confirmed that she had looked into the claimant's application for the position of Facilities Engineer in January 2019 and that the successful candidate was qualified with the 17th/18th edition and had previous experience in a similar role which the claimant did not have at the time and the person appointed was considered the best candidate. It was indicated to the claimant that he would be given an equal opportunity to apply for roles with the respondent.

5.15. With regard to the comparators the claimant had identified, who had previously worked at Cordant and were now employed by the respondent, one had not disclosed this in his application and the respondent was unaware of this. The other comparator's role as a Security Analyst, had been taken in-house and a TUPE transfer taken place.

The Law

Direct discrimination

6. Section 13 of the Equality Act 2010 states:

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
>
> (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

Time limits

7. Section 123 of the Equality Act 2010 states:

(1).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;
(b) a failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

8. The Court of Appeal made clear in *Hendricks v Metropolitan Police Comr [2002] EWCA Civ 1686*, that *i*n cases involving a number of allegations of discriminatory acts or omissions, it is not necessary for an applicant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken'. Rather, what she has to prove, in order to establish 'an act extending over a period', is that (*a*) the incidents are linked to each other, and (*b*) that they are evidence of a 'continuing discriminatory state of affairs'. The focus of the enquiry should be on whether there was an “ongoing situation or continuing state of affairs” as oppose to “a succession of unconnected or isolated specific acts”. It will be a relevant, but not conclusive, factor whether the same or different individuals were involved in the alleged incidents of discrimination over the period. An employer may be responsible for a state of affairs that involves a number of different individuals.

9. In the case of *Humphries v Chevler Packaging Ltd EAT 0224/*06 the Employment Appeal Tribunal confirmed that a failure to act is an omission and that time begins to run when an employer decides not to make reasonable adjustment. In the case of *Kingston upon Hull City Council v Matuszowicz 2009*

ICR 1170 the Court of Appeal held that where an employer was not deliberately failing to comply with the duty and the omission was due to lack of diligence or competence, or any reason other than conscious refusal, it is to be treated as having decided upon the omission when the person does an act inconsistent with doing the omitted act or when, if the employer had been acting reasonably, it would have made the adjustments. In the recently reported Court of Appeal case of *Abertawe Bro Morgannwg University v Morgan [2018] WLR197* it was stated:

> "In the case of omissions, the approach taken is to establish a default rule that time begins to run at the end of the period in which the respondent might reasonably have been expected to comply with the relevant duty. Ascertaining when the respondent might reasonably have been expected to comply with its duty is not the same as ascertaining when the failure to comply with the duty began. Pursuant to section 20 (3) of the Equality Act, the duty to comply with the requirement relevant in this case begins as soon as the employer is able to take steps which it is reasonable for the employer to have to take to avoid the relevant disadvantage. It can readily be seen, however, that if time began to run on that date, a claimant might be unfairly prejudiced. In particular, the claimant might reasonably believe that the employer was taking steps to seek to redress the relevant disadvantage, when in fact the employer was doing nothing at all. If this situation continued for more than three months, by the time it became a should have become apparent to the claimant that the employer was in fact sitting on its hands, the primary time limit for bringing proceedings would already have expired."

10. The Tribunal has discretion to extend time if it is just and equitable to do so, the onus is on the claimant to convince the tribunal that it should do so, and *'the exercise of discretion is the exception rather than the rule*' (*Robertson v Bexley Community Centre [2003] EWCA Civ 576* per Auld LJ *at para 25)*.

11. The Tribunal's discretion to extend time under the 'just and equitable' formula is similar to that given to the civil courts by section 33 of the Limitation Act 1980 for extending time in personal injury cases (*British Coal Corpn v Keeble,* [1997] IRLR 336*).* Under section 33, a court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular:

    1. The length of and reasons for the delay;

    2. The extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or defendant is or is likely to be less cogent than if the action had been brought within the time; the conduct of the respondent after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the claimant for information or inspection for the purpose of ascertaining facts which were or might be relevant.

3. The duration of any disability of the claimant arising after the date of the accrual of the cause of action;

4. The extent to which the claimant acted promptly and reasonably once he knew of his potential cause of action. Using internal proceedings is not in itself an excuse for not issuing within time see *Robinson v The Post Office* but is a relevant factor.

5. The steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

12. Time limits are short for a good purpose- to get claims before the Tribunal when the best resolution is possible. If people come to the Tribunal promptly when they have reached a point where the employer has said it will not take a step which the claimant believes should be taken, then, if it agrees with the claimant The Tribunal can make a constructive recommendation. Left unresolved, even minor omissions by employers often have devastating consequences which it is too late to remedy in that way.

Burden of Proof

13. Section 136 of the Equality Act 2010 states:

> "(1) This Section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.
>
> (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.
>
> (5) This Section does not apply to proceedings for an offence under this Act.
>
> (6) A reference to the court includes a reference to –
>
> (a) An Employment Tribunal."

14. Guidance has been given to Tribunals in a number of cases. In *Igen v Wong [2005] IRLR 258* and approved again **in** *Madarassy v Normura International plc [2007] EWCA 33.*

15. To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against her. If the claimant does this, then the respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case

(which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment. In the case of ***Madarassy*** the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: "They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

16. In the case of *Strathclyde Regional Council v Zafar [1998] IRLR 36* the House of Lords held that mere unreasonable treatment by the employer "casts no light whatsoever" to the question of whether he has treated the employee "unfavourably".

17. In *Law Society and others v Bahl [2003] IRLR 640* the EAT agreed that mere unreasonableness is not enough. Elias J commented that

> "all unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory, and it is not shown to be so merely because the victim is either a woman or of a minority race or colour … Simply to say that the conduct was unreasonable tells nothing about the grounds for acting in that way … The significance of the fact that the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given for it than it would if the treatment were reasonable."

18. A Tribunal must also take into consideration all potentially relevant non-discriminatory factors that might realistically explain the conduct of the alleged discriminator.

Conclusions

19. The claim was presented to the Tribunal on 19 March 2021, early conciliation having taken place between 13 February 2021 and 19 March 2021. The claims brought by the claimant were substantially out of time. The alleged act of discrimination took place on 4 January 2019, over two years before.

20. The claimant had previously issued claims to the Tribunal in respect of allegations of discrimination.

21. His medical records showed that he had attended the GP's surgery on 25 September 2019 and it is stated that he was having problems at work and had a Tribunal the next day about whether his boss had discriminated against him. When the claimant gave evidence before the Tribunal, he confirmed that he had brought a claim which included a claim against his line manager at Cordant Security, and that claim had included the incident which occurred prior to the interview with Mr Brookes on 4 January 2019. He also referred to having been called racist names previously.

22 The Tribunal is satisfied that the claimant was aware that he could bring a claim with regard to allegations in respect of the interview and its outcome in January 2019. There was a substantial delay of over two years and the Human Resources representative who attended the interview had left the respondent's employment. There had been a measure of confusion which could have affected the cogency of the evidence. There was no evidence of discrimination extending over a further period. The alleged act of discrimination was in respect of 4 January 2019.

23. The Tribunal is satisfied that the claims brought by the claimant are substantially out of time and it is not just and equitable to extend time. The claimant was aware that he could bring a claim within time. The prejudice to the respondent outweighs the prejudice to the claimant.

24. The Tribunal does not accept that the claimant only became aware of any alleged discrimination when he heard about the transfer of the security analyst to the respondent. He had previously issued a claim to the Tribunal which included the incident on 4 January 2019 and had a hearing on 26 September 2019.

25. If the claim had been brought in time then the Tribunal finds that there had been a measure of confusion in relation to whether there was a policy of the respondent of not recruiting Cordant Security employees. However, if there had been such a policy, it applied to all applicants and was not a discriminatory policy.

26. If there had been such a policy or practice, it was not applied in a discriminatory manner. There was no credible evidence that there was any treatment of the claimant on the ground of his race.

27. The comparators were not in the same material circumstances as the claimant. One had been employed by Cordant from 14 June 2019 to 6 July 2019. However, He had not disclosed this in his application and the clear evidence given on behalf of the respondent was that they had been unaware of his previous employment with Cordant.

28. The claimant said that this comparator would have been issued with a security card and the respondent would have been aware that he had previously worked for Cordant.

29. Sally Finnie, HR Manager, gave evidence that any information that was contained on such a card once the employment of that employee had ended would be held by Cordant Security and, if the candidate had not revealed their previous employment, then the respondent's managers and Human Resources would not be aware.

30. This was clear and credible evidence. The Tribunal finds that it would not be within the respondent's ability to search for historic records for each applicant for employment.

31. The other identified comparator had transferred to the respondent under a transfer of undertaking when the work of loss prevention analysis was absorbed by the respondent. She was also not an appropriate comparator as her material circumstances were not the same. She had not been a candidate for employment, she

had transferred because of the operation of the Transfer of Undertaking (Protection of Employment) Regulations 2006.

32. The Tribunal is satisfied that the reason the claimant was not appointed was because of his lack of qualifications which was an essential requirement set out in the job specification, and his lack of relevant experience, which was also an essential requirement. It was not established that there were facts from which the Tribunal could conclude that the respondent had discriminated against the claimant on grounds of his protected characteristic of race. The burden did not shift to the respondent and, had it done so, the respondent has shown that there was a non-discriminatory reason for the treatment of the claimant.

33. In all the circumstances, the unanimous judgment of the Tribunal is that the claims are not well-founded and are dismissed.

Employment Judge Shepherd

Date: 21 February 2022