



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr S Brown

v Kingspan Timber Solutions Limited

OPEN PRELIMINARY HEARING

Heard at: Bury St Edmunds

On: 5 February 2018

Before: Employment Judge M Warren (sitting alone)

Appearances:

For the Claimant: In person

For the Respondents: Ms Gale, Solicitor

Purpose of Today's Hearing

- 1 I set up this open preliminary hearing at a closed preliminary hearing before me on 27 October 2017. The purpose of this hearing was: -
 - 1.1 To identify the legal and factual issues in the case.
 - 1.2 To consider whether the claimant's claims should be struck out as being out of time.
 - 1.3 To consider whether the claimant's claims should be struck out as having no reasonable prospects of success.
 - 1.4 To consider whether a deposit order should be made in respect of any of the claimant's claims, on the basis that they have little reasonable prospects of success.
 - 1.5 To make any necessary further case management orders, and
 - 1.6 To provide Judicial Assessment if appropriate.

Documents Before me Today

- 2 From Mr Brown I had:
 - 2.1 A witness statement relating to whether it is just and equitable to extend time, if his claims are out of time.
 - 2.2 The claimant's list of issues and particulars.
 - 2.3 The claimant's written submission on the strike out application.
 - 2.4 The claimant's schedule of loss.
 - 2.5 The claimant's further particulars.
- 3 From the respondent I had:
 - 3.1 Written submissions.
 - 3.2 A short bundle of documents running to page 17.
 - 3.3 Copy legal authorities.

The Issues

- 4 Drawing together the documents prepared by Mr Brown, having regard to his particulars of claim and in extensive discussion with the parties, I identified the issues in this case as set out below. In so far as is necessary, Mr Brown has leave to amend his claim so as to include the allegations as set out in the issues below. The respondent has already filed amended Grounds of Resistance.

Direct Age Discrimination

- 4.1 Has the respondent subjected the claimant to the following treatment falling within s.39 of the Equality Act 2010, namely:
 - 4.1.1 On 6 January 2016 Mr Stevenson, (Managing Director) asked the claimant to accept a junior role relating to the production of 25 houses annually, (the role of Custom Build Manager) which did not involve management of staff, coupled with a junior contract manager's role. The respondent's position is that the claimant was offered such a role but it was not a junior role.
 - 4.1.2 Mr Stevenson suggested at a meeting on 18 February 2016 that the claimant should retire and/or wind down, despite his having made it clear that he intended to continue working past the age of 65. The respondent's position is that the claimant was unhappy he had not been successful in his application for a senior role, that of Operations Director and therefore in discussion, Mr Stevenson had explored with him an alternative role (that of Custom Build Manager) which the claimant had declined and he further discussed a series of options with the claimant, including early retirement or winding down leading to retirement.

4.1.3 Excluding the claimant without consultation, from senior management meetings, (meetings attended by three directors, the Head of Accounts, the Head of Design as well as the claimant as Head of Construction). The claimant says that these meetings were intrinsic to his role and he had previously attended such meetings between September 2006 and 2015. He says that these meetings were held on a monthly basis. The respondent's position is that senior management team meetings did not take place after November 2014, that they were replaced by operational meetings on site, attended by those as appropriate, on an ad hoc basis and that the claimant attended many such meetings.

4.1.4 Arranging meetings with the claimant's team without his knowledge or involvement by Mr Ward, (Head of Operations) between January 2016 and 16 March 2017, including meetings held on:

- 6/5/2016
- 4/10/16
- 25/11/2016
- 13/1/2017
- 10/2/2017
- 27/2/2017

The claimant says that he does not currently possess the dates of all such meetings, others may be discovered upon disclosure. The respondent's position is that Mr Ward did not arrange and attend meeting with the claimant's team from which the claimant was excluded.

4.1.5 Mr Ward issuing operational instructions to the claimant's staff without his knowledge or involvement during the period January 2016 to 16 March 2017. He gives the following dates from documents in his possession, he says that other such examples may be discovered on disclosure:

- 21/7/2016
- 23/9/2016
- 7/10/2016
- 25/11/2106
- 5/12/2016
- 18/1/2017

- 12/1/2017
- 25/1/2017
- 1/2/2017
- 23/2/2017

4.1.6 The directors and Mr Loughnane excluding the claimant from major client meetings. The claimant states that he is unable to stipulate the dates of all such meetings as he does not have this information, which may become apparent on disclosure, but this allegation includes meetings relating to Carter Norwich Passivhaus project between January and April 2016; Crest Nicholson National Framework, between March and July 2016; Wates Barnet Framework on 31 May 2016, and Keepmoat Croydon Garage sites, January 2017. The respondent's position is that the meetings relating to the first three clients were pre-contract meetings to which the claimant would not ordinarily be invited and that the meeting relating to Keepmoat was a meeting to which the claimant was invited.

4.1.7 Mr Ward excluding, without consultation, the claimant from selecting and allocating new contracts to his team between July 2016 and 16 March 2017. The claimant says that this function had been exclusively within his remit prior thereto. The respondent says that Mr Ward did take control over allocation of contracts to the claimant's team because he wanted such allocation to be done in a different way, (geographically rather than chosen by the team members themselves) and that the claimant was able to change such allocation if he disagreed. The claimant gives the following examples, stating that there were many such contracts and others may become apparent on disclosure, they include contracts relating to the following clients:

- Hilson
- Forster
- Roper
- Barker
- Goddard
- Chiswick
- Gammel
- Turnball
- Beck

- 4.1.8 Excluding the claimant without consultation, from the interview and recruitment procedures, which would ordinarily have been exclusively within his remit, in relation to the appointment of an Assistant Contracts Manager on 21 November 2016. The respondent's position is that the claimant agreed to an informal appointment to that role.
- 4.1.9 Allocating the development of procedures and processes within the claimant's department, which had previously been within his remit, to a Mr Tozer, who was a younger member of the team, on 21 November 2016. The respondent's position is that the claimant agreed to the appointment of Mr Tozer, (aged 59) whom he continued to line manage.
- 4.1.10 Mr Ward and Mr Stevenson *de facto* demoted the claimant on 5 December 2016, when the Job Application Planner was issued showing that he had more contracts and customers allocated to him than any of the other contract managers within his team. The respondent says that the actual Job Allocation Planner does not support this allegation and that the allocation of work to the claimant was appropriate.
- 4.2 Mr Brown's date of birth is 13 August 1952. He was aged 64 at the date his employment came to an end on 16 March 2017. He compares himself to actual or hypothetical comparators who were not at or approaching the historically typical age of retirement, ie 60 to 65.
- 4.3 As an actual comparator, he relies upon Head of Design, Mr Barker. The respondent says that Mr Barker is aged about 50, Mr Brown believes that he is younger.
- 4.4 In the alternative, the claimant relies upon a hypothetical comparator. He makes reference to the following individuals who may not be actual comparators, but whose circumstances and treatment may assist the tribunal in constructing the hypothetical comparator:
- Mr Ward, Head of Operations, aged between 40 and 50
 - Mr Tozer, Senior Contracts Manager, aged 59
 - Ms Stanlick, Financial Controller, aged 35 to 40, and
 - Mr Walker, Commercial Manager, aged 30 to 35.
- 4.5 The question for the tribunal will be whether the respondent has treated the claimant as alleged less favourably than it treated or would have treated either the actual comparator or the hypothetical comparator.
- 4.6 If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of age?

- 4.7 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment? I have set out the respondent's explanations above.
- 4.8 And/or does the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

Unfair Constructive Dismissal

4.9 The claimant's case is that the respondent's conduct towards him amounted to a breach of the implied term requiring a party to a contract of employment to behave in such a way as to maintain mutual trust and confidence. In this respect, the claimant relies upon the following allegations:

- 4.9.1 Each of the above mentioned allegations of age discrimination, in so far as they relate to events which occurred prior to his resignation on 16 December 2016.
- 4.9.2 Increasing the claimant's workload to an oppressive and unsafe level from 2012 to the date of termination, including refusal to re-establish staffing levels in line with increase in turnover and with other departments in the business. As a consequence, the claimant was obliged to work excessive hours. The respondent's position is the levels of work were not oppressive or unsafe but were as a natural consequence of increases in levels of business in line with the natural cycle of business and that the claimant made no complaint at the time.
- 4.9.3 Ignoring the claimant's requests for assistance and support, including failing to resolve a number of concerns raised by the claimant between 4 January 2016 and November 2016 and failing to implement undertakings given during that timeframe. The respondent says that senior managers attempted to resolve issues with recruitment, which were in fact part of the claimant's responsibility. The respondent will also say that the claimant was provided with an assistant, Ms Roberts, and the recruitment of an Assistant Contract Manager.
- 4.9.4 The claimant was subjected to systematic understaffing by the respondent failing to replace a departed Senior Contracts Manager in October 2016 and by removing the Department Co-ordinator role, further increasing the claimant's workload. The respondent's position is that there was ongoing recruitment and that the claimant failed to accept the appointment of a person recruited, as a consequence of which delay, that individual found alternative employment.
- 4.9.5 Systematically marginalising the claimant from key meetings. Here the claimant refers to allegations appearing above on this topic in respect of the allegations of age discrimination.

- 4.9.6 Undermining the claimant by giving instructions that were within his area of competence to junior staff, without the claimant's knowledge and without consulting the claimant. The respondent's position is that it is unaware of any such instructions and that there were no attempts to undermine the claimant.
- 4.9.7 Removing without consultation, key functions integral to the claimant's work, namely the recruitment of staff, meetings with staff and directing staff, replacing the same with more junior functions ie those commensurate with the role of a Contracts Manager which in November 2016, the claimant was told would be a long-term change.
- 4.9.8 Offering the claimant a junior position on 6 January 2016, (which he did not take) namely that of Custom Build Manager.

Time

- 4.10 The respondent accepts that the claimant's complaint of unfair dismissal is in time. The respondent will argue that some of the claimant's allegations of discrimination are out of time and that there is no continuing course of conduct that could bring any such allegations in time.

Prospect of Success

- 5 Having spent a good deal of time identifying the issues as set out above, Ms Gale indicated that the respondent had decided, (wisely) not to proceed with its application for either a strike out or a deposit order.

Time

- 6 I have indicated above in the list of issues, the respondent accepts the unfair dismissal claim is in time. The time issue in respect of the claimant's discrimination case will be whether any of the later allegations of discrimination are upheld and if they are, whether there can be said to be a continuing course of conduct to bring them in time or whether it is just and equitable to extend time. The continuing course of conduct question ought properly to be decided by the tribunal which hears the case. I therefore declined to determine the issue as to whether or not the discrimination claim or any part of it, is out of time.
- 7 I noted and explained to Mr Brown that he had prepared a witness statement, as I had directed, relating to whether it is just and equitable to extend time but unfortunately, if I had been required to rely upon that witness statement, it would not have been helpful. The statement does not give an explanation as to why there was any delay in the issue of these proceedings such as to render it just and equitable to extend time, in the event the tribunal were to find that any of the allegations were out of time. I suggested he made sure that he dealt with that in his witness statement at the final main hearing.

Judicial Assessment

- 8 I record here simply that I proceeded to provide the parties with a judicial assessment of this case.

Case Management Orders

- 9 In discussion with and with the agreement of the parties, I made the case management orders set out below.
- 10 I record here that I explained to Mr Brown the way that a tribunal hearing is conducted, that documents relevant to the issues only should be included in the bundle, such documents must of course be disclosed in advance and that the witness statement should set out all of the evidence he wishes to put before the tribunal, relevant to the issues.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

DISCLOSURE OF DOCUMENTS

1. On or before **19 February 2018** each party shall send to the other a list of the documents in their possession or control relevant to the issues in this case.
2. If either party requests a copy of any document on the other party's list, that other party shall provide a clear photocopy within 7 days of the request.

BUNDLE OF DOCUMENTS

3. For the Hearing, the parties shall agree a bundle of documents limited to those which are relevant to the determination by the Tribunal of the issues in the case. The Respondent shall create the bundle.
4. On or before **12 March 2018** the Claimant shall notify the Respondent of the relevant documents to be included on behalf of the Claimant.
5. On or before **26 March 2018** the Respondent shall provide to the Claimant a clear, indexed, page-numbered copy of the bundle.
6. The Bundle is to be assembled in chronological order (save in respect of formal policies or procedures, which may be placed together) with each page numbered consecutively.
7. Copies may be double-sided provided they are readily legible. Copies of threads of emails are to be edited so that, as far as possible, each email is reproduced only once.
8. By 9.15 a.m. on the day, or first day, of the Hearing, the Respondent shall bring 4 copies to the Hearing (3 for the Tribunal and one for the witness table).

WITNESS STATEMENTS

9. On or before **9 April 2018** the parties shall exchange written witness statements (including one from a party who intends to give evidence). The witness

statement should set out all of the evidence of the relevant facts, set out in chronological order, which that witness intends to put before the Tribunal. The Claimant's statement should contain evidence relevant to the remedy claimed, including financial claims and losses. Such statements should consist of facts only and should not consist of argument, hypothesis or supposition.

A failure to comply with this order may result in a witness not being permitted to give evidence because it has not been disclosed in a witness statement; or in an adjournment of the hearing and an appropriate order for costs caused by such adjournment.

10. The statement should be typed if possible and should be set out in short, numbered paragraphs. If reference is made to a document, it should include the relevant page number in the agreed bundle.
11. Each party shall bring 4 copies of any such statement of each of their own witnesses to the hearing.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge Warren

Date: 13/3/2018

Sent to the parties on:

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For the Tribunal:

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