IN THE INDUSTRIAL TRIBUNAL OF GIBRALTAR

I/T No. 31 OF 2008

BETWEEN:

TERENCE ORCIEL

Claimant

and

CAMMELL LAIRD (GIBRALTAR) LTD

Respondent

RULING

---

1. Firstly, I would like to say that I am grateful to counsel on both sides for the obvious hard effort they have put in, in preparing the submissions, skeleton arguments and assistance rendered to this tribunal in coming to a decision in relation to this application.

2. Also by way of introductory comment, this Tribunal cannot help feeling, in some measure, sadness, from the impression gained, at the series of mishaps that have surrounded the claimant's dismissal from his employment.

3. With that and for the avoidance of any doubt or that my words may be potentially misconstrued, I attach no fault essentially because that is not a matter for this Tribunal to do. It has been said before by this Tribunal, and it is to be repeated in this case so that it is borne in mind by everyone, that this Tribunal is solely concerned in with dealing with matters of employment law and nothing else.

Introduction

4. The claimant is a local man, a Gibraltarian of 46 years of age who was employed by the Respondent as a Pipe Fitter. His employment began on 11th March 1998 and was told to leave on 8th October 2007. An internal appeal hearing, held by the Respondent on 31st October 2007, confirmed that decision for allegedly repudiating his contract of employment by not complying with the Respondent's instructions to undertake TIG welding duties.

5. It seems that, and it was certainly my impression, the claimant's 9 years of employment service at the Shipyard was free from complaints relating to his work

performance and standard of work. Likewise, he seems to have been a good Pipe Fitter and Welder.

The Application

6. The application before me is for this Tribunal to allow the claimant to bring a claim for discrimination, under the Equal Opportunities Act, out of the 3 month time limit.

7. It is important, and I remind practitioners that it is a requirement, to establish the effective date of termination in most cases for two reasons: (1) it requires that the notice period given, under either the contract of employment or the Employment Act, is properly established and, it follows, if the employee is to be paid in lieu of notice that he should be paid the proper amount and (2) when disputes arise as to whether (i) the Originating Application has been filed within the 3 months limitation period or (ii) an extension of time is being requested, it allows the tribunal to determine exactly, or with a certain degree of exactitude, whether in either case it falls within or outwith the boundary and, if the latter, by how long.

8. In this case it seems common ground that the Originating Application was out by approximately nine months. There is a dispute as to the effective date of termination which has not been resolved to my satisfaction. The acts of alleged discrimination date variously to 24th April 2007 and 28th August 2007 (when the claimant was suspended from work); to when dismissed on 8th October 2007; and, finally in relation to his appeal hearing on 31st October 2007. And it is alleged that this was a course of conduct by the employer pursued against the claimant, as a Gibraltarian, in order to get rid of him in favour of Eastern European workers. Some press reports dating back to the latter part 2006 were produced by the applicant as context material.

The Law

9. Parliament has indeed given Tribunals a discretion, to be exercised judicially and, hopefully, wisely, to permit claims to proceed after the 3 month limitation period. The wording in the Employment Act[1] in comparison to the wording in the Equal Opportunities Act[2] is slightly different, and it may be argued that Parliament has been more generous in allowing the discretion to be exercised in cases of alleged discrimination. But ultimately this Tribunal is always tasked by Parliament to do justice and fairness and, ultimately, the test ought to be similar although the roads to get to it might be slightly different.

10. It is for the applicant to persuade this Tribunal, on balance, that I should exercise the discretion in the claimant's favour. I have not heard the applicant's substantive case nor is there any evidence of it other than allegations of

[1] Sections 70 (4) as read in conjunction with 64 (5)
[2] Section 68 (1) (a)

discriminatory conduct that, in my view, do not give me a great deal of confidence they have great prospects of success. It does not seem, from what I have read and seen, to be a strong case.

Findings

11. The surprising and unanswerable question, if it was such an obvious and patent case of discrimination against Gibraltarian workers vis-a-vis Eastern European workers, this appears not to have been raised by the Union with its legal advisers (totalling three) or with the claimant. But more fundamentally, from today's point of view and this application, it appears that the claimant himself did not do so with these advisers.

12. I am not satisfied on the evidence that he did and I therefore find that the claimant was solely concerned with unfair dismissal proceedings prior to Mr Caetano's letter of 27th April 2008 and nothing else, as his own letter of 9th October 2007 to Mr Loverage amply demonstrates.

13. I am entirely satisfied of that point and that he received legal advice and support, if any, from the Union and Mr Caetano even if he did not like that advice or even if that advice was mistaken or negligent. I make clear again for a second time that I make absolutely no judgement or express any opinion on where fault, if any, may lie and whether civil liability could arise from that. That would not be a matter for this Tribunal to decide.

14. Again for a second time, what is highly surprising and unanswerable is that if the claimant's refusal to undertake TIG welding duties was based on the fact that he was not receiving his hours in lieu, as he said he was over the last maybe 5 or 6 years and subsequently confirmed by counsel for the Respondent that such an arrangement had indeed existed although no particular dates were given by either side as to when this arrangement started or when it ended, that the claimant made no reference of that to the legal advisers, but more so there is absolutely no reference made in any of the correspondence that was flying between the parties at that time.

13. Why that did not happen I am not here to determine, but it would seem to me that if the claimant ever had a claim for unfair dismissal, it would have been a fundamental piece of information in his defence and one which would not have been lost somewhere in the route taken by this case. I have not seen in any of the documents filed with the Tribunal any reference to what might, on the face of it, appear to be an extremely important issue which may have put a very different complexion on the approach taken by the employer and, certainly, in relation to the time limit factor.

14. I am not here, as I made clear, to change anyone's course of action for another. No application has been made for the purposes of extending the limitation period

in respect of any unfair dismissal claim and I was advised that it was felt that such an application would not have had any merit on the facts of this case[3].

15. I formed the impression that if the claimant, as I said before, had the basis for any claim it would have been one for unfair dismissal and any claim for discrimination would have formed part of any such claim and not the other way round as I have been advised it should be seen as.

Conclusions

16. I have taken into account both sets of skeleton arguments and the principles that counsel have urged upon me. I do not believe it would serve any useful purpose for me to recite them all in full. Each case has to be decided on its own facts and merits and the principles there are established by higher courts in the UK. This case has parallels with Hunwicks v. Royal Mail Group Plc 2007 WL 1425695 ("**Hunwicks**"), although I cannot say it is entirely the same, but one that I do bear in mind in coming to the decision that I do and in refusing the application to extend.

17. The limitation period in respect of the discrimination claim had elapsed by the time, as I have found on the evidence before me, the issue of undertaking such a claim was alluded to and not before. That brings, on that particular point, this case very closely to the **Hunwicks** case. The causal connection which this authority, or the causative effect that this authority, refers to is simply not present in respect of the claimant's claim. Whether the claimant has a civil claim against his Union or his legal adviser is a matter for the claimant to consider carefully with his advisers and for the Supreme Court and not this Tribunal. I make it clear so that the claimant understands that this Tribunal is solely concerned with employment matters. Those are my reasons. Thank you.

(Extempore 19th March 2009 – Approved by the Tribunal on 26th March 2009)

S.R. Bossino

Stephen Bossino
Chairman

[3] Counsel for the claimant referred me to Dedman v British Building & Engineering Appliances Ltd [1974] I.C.R. 53 (C.A.)

Counsel
Ms S Golt for the claimant
Mr D Bossino with Ms Gabrielle O'Hagan for the respondent

Solicitors
Messrs Gold Law for the claimant
Messrs Triay Stagnetto Neish for the respondent

Hearing date: 19th March 2009