IN THE INDUSTRIAL TRIBUNAL

Case No. Ind Tri 13/2015

BETWEEN:

DANIEL PERERA

Complainant

-AND-

GIBRALTAR PORT AUTHORITY

Respondent

DECISION

Fiona Young, Amber Law, for the Complainant
Penny Garcia, Verralls, for the Respondent

1. The Complainant has been employed by the Respondent as a Bunkering Superintendent since August 2013. He has presented a complaint to the Industrial Tribunal pursuant to the provisions of Section 8 of the Employment (Bullying at Work) Act 2014 ("**the Act**"), received by the Tribunal on 23 April 2015. The Complainant's complaint of bullying is based upon the refusal of his employer, the Respondent, to allow him to wear a uniform at work.

2. A Notice of Appearance of the Respondent was received by the Tribunal on 6 May 2015 defending the complaint in its entirety.

3. A preliminary hearing took place on 21 May 2015 and an Order made with the agreement of the parties, including that the following questions be heard as a preliminary issue:

   (a) whether the Complainant's complaint is time-barred under Section 8(2) of the Act; and

   (b) if the Tribunal were to find that it should not consider the complaint as a result of it being presented out of time, whether it should nevertheless consider the complaint under section 8(3) of the Act.

4. At the hearing on 21 May 2015, the Tribunal on its own initiative also requested the parties to consider as part of or in addition to the above-described questions the question of whether the Tribunal has jurisdiction to consider the complaint(s) in the light of the commencement date of the Act (18 September 2014).

5. This is the Tribunal's Decision on the above-described 3 questions ("**the Preliminary Issues**").

6. I have considered both parties' skeleton arguments and supporting bundles of authorities and documents and heard oral submissions from Counsel at a hearing on 17 September 2015, for all of which I am grateful.

Does the Tribunal have jurisdiction to consider the complaint(s) in the light of the commencement date of the Act (18 September 2014)?

7. Under Section 6(1) of the Act: "*An employer (A) must not, in relation to employment by A, subject an employee (B) to bullying.*"

8. Under Section 8 of the Act, "***Jurisdiction of the Industrial Tribunal***":

   8.(1) Without prejudice to his right to remedies for breach of contract and any other right of action, a complaint by an employee ("the complainant") that another person ("the respondent") ***has contravened this Act*** *may be presented to the Tribunal*" (emphasis added).

9. Many of the alleged facts set out in the Complainant's Originating Application pre-dated 18 September 2014, when the Act came into force.

10. Counsel for the Respondent made submissions on this issue in her Skeleton Arguments, in particular that the Act does not have retrospective application, and she referred me to a number of authorities.

11. Counsel for the Complainant made limited submissions on this issue in her Skeleton Arguments. During the hearing on 17 September 2015, she expressly conceded that the Act does not have retrospective application. I gave her the opportunity to confirm this on consideration, which she did. That is the basis upon which, therefore, I proceed.

12. Accordingly, I find that the Act does not have retrospective application. It follows from this that the Complainant in this case cannot present complaints to the Tribunal under the Act based upon acts or omissions which pre-dated 18 September 2014.

Is the Complainant's complaint time-barred under the Act?

13. Under Section 8(2) of the Act:

"*The Tribunal shall not consider a complaint ... unless it is presented to the Tribunal within the period of three months beginning when the act complained of is alleged to have been done*";

and under Section 8(4):

"*For the purposes of this section any act extending over a period or any persistent or recurrent contravention of sections 6 or 7 shall be treated as done at the end of that period or at the date of the last such act.*"

14. I have carefully reviewed the authorities provided by both parties in relation to the application of Section 8 of the Act, which are all based upon English discrimination cases because English anti-discrimination legislation has included similar wording to Section 8 of the Act.

15. As I expressly advised the parties at the hearing on 17 September 2015, I was loath to allow consideration of the Preliminary Issues to expand into a consideration of the substantive issues arising from the Complainant's complaint, in particular, whether the Complainant had been bullied for the purposes of the Act. Following *Hutchinson-v-Westward Television Limited* [1977] IRLR 69, this and any other substantive matters are for any substantive Hearing of the complaint. For the purposes of consideration of the Preliminary Issues, the facts of the matter are limited to those relevant to the Preliminary Issues. (On the other hand, inevitably, any consideration of the substantive complaint may have bearing on the Preliminary Issues.)

16. The Respondent referred me, *inter alia*, to *Okoro and Another-v-Taylor Woodrow Construction Limited and Others* [2012] EWCA Civ 1590. In this case, by reference to Section 68 of the English Race Relations Act 1976 (subsection (7) provides that: "*Any act extending over a period shall be treated as done at the end of that period*"), Lord Justice Pill referred (paragraph 18) to the following helpful *"categorisation of His Honour Judge McMullen QC in Coutts & Co Plc and Anr v Cure & Anr [2005] ICR 1098, at paragraph 28:*

"The factual circumstances in which discrimination occurs have been illustrated in the authorities as falling into one of the following categories:

(1) A one-off act of discrimination, such as a refusal to promote, which has continuing consequences for the disappointed candidate.

(2) An act extending over a period of time, constituting a rule or policy, by reference to which decisions are made from time to time.

(3) A series of discriminatory acts, whether or not set against a background of a discriminatory policy.

A complaint in respect of category (1) must be made within three months of the act or, where specific statutory provision is made for a deliberate omission to act, within three months from the date when the relevant less favourable treatment was 'decided on'. Time runs for a category (2) complaint when the discriminatory rule is abrogated; and it will also run in the case of the specific application of the rule to any given employee, eg in refusing promotion, from the date of that application. Time runs in a category (3) complaint where there is specific statutory provision for this, from the last in the series of acts."

17. The Complainant's submissions on this issue had a number of alternative limbs. First, she submitted that there was a series of acts complained of culminating in tan advertisement, on 1 April 2015, of an additional Bunkering Superintendent role - expressly on a non-uniformed basis. Following her concession that the Act does not have retrospective application, Counsel for the Complainant identified in her oral submissions a meeting held on 4 November 2014 as falling within this series of acts complained of.

18. The authorities are clear that, where there is no policy relied upon, a decision may only be an act complained of within a series (a persistent or recurrent contravention) where "*...it results from a further consideration of the matter, and is not merely a reference back to an earlier decision*" or a confirmation of that earlier decision (*Cast-v-Croydon College* [1998] EWCA Civ 498, at 511, to which both parties referred me). The Originating Application in this case was presented on 23 April 2015. It follows that the earliest last "act complained of" in the alleged series, not being a mere reference to or confirmation of an earlier decision, must have been done on or after 23 January 2015.

19. I find on this issue that no such further consideration after 23 January 2015 of the Complainant's request that his role be uniformed, as opposed to the Respondent referring the Complainant back to its original decision, has been made out on the case put forward by the Complainant and, in particular, this is not established by the 1 April 2015 job advertisement.

20. Alternatively, the Complainant submitted that there is a specific policy aimed at the Complainant that his role should be non-uniformed, that the Complainant himself and through his advisers has repeatedly complained about this, and that there has been a persistent and repeated refusal by the Respondent to enter into any dialogue with the Complainant on the subject. Together, the Complainant submits, "*these are facts that establish a prima facie case of a policy or procedure amounting to a continuing act*". On this reasoning, the act complained of, the rule or policy by reference to which decisions are made from time to time, is still in existence, which means that time is still running for presentation of the Originating Application.

21. Both parties referred me to a number of authorities on this issue. In *Cast* (at 515), the act complained of was described as an "*established and firm stance*" applicable to the post in question. In *Hendricks-v-Commissioner of Police for the Metropolis* [2002] EWCA Civ 1686 (paragraph 50), it was

described as "*an ongoing situation or a continuing state of affairs. ... The question is whether there is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts*". In *Amies-v-Inner London Education Authority* [1977] 1 CMLR 336, Bristow J. described the relevant facts of that case as follows: "So, *if the employers operated a rule that the position of head of department was open to men only, for as long as the rule was in operation there would be a continuing discrimination and anyone considering herself to have been discriminated against because of the rule would have three months from the time when the rule was abrogated within which to bring the complaint.*" In *Okoro*, Lord Justice Pill held (paragraph 14): "*a decision to behave in a certain way, now and in the future, towards a person or category of persons creates a continuing state of affairs and constitutes a continuing regime. Subsequent behaviour pursuant to that decision will be an expression of it and would not be distinct from it*". Reference is made in that judgment to the House of Lords judgment in *Barclays Bank-v-Kapur* [1991] 2 AC 355, a racial discrimination claim, in which Lord Griffiths stated: "*The matter can be further tested by taking the case of an employer who before the Act was passed paid lower wages to his [non-white] employees than to his white employees. Once the Act came into force the employer would be guilty of racial discrimination if he did not pay the same wages to both ... If he continued to pay lower wages to the [non-white] employees it would be a continuing act lasting throughout the period of a [non-white] employee's employment*".

22. I do not consider that the cases of *Amies* or *Sougrin-v-Haringey Health Authority* [1992] IRLR 416, referred to by the Respondent in relation to this issue greatly assist the Respondent in circumstances where the Complainant is relying upon an act extending over a period (a continuing rule or policy), rather than the continuing consequences of a non-continuing act.

23. With the above-described principles and examples in mind, I consider that the Respondent's classification of the role of Bunkering Superintendent as non-uniformed and insistence on the same may constitute a continuing principle or set of principles on which to base decisions or a course of conduct, in other words, a rule or policy (by reference to which decisions are made from time to time) capable of constituting an act complained of extending over a period, for the purposes of Section 8(4) of the Act. The fact that the later additional role of Bunkering Superintendent was also designated as non-uniformed support this finding. I have also taken into account paragraph 13 of the Respondent's Notice of Appearance:

    "*Under the Collective Agreement, the issue of uniforms is a matter of policy for the Respondent and up to the discretion of management*".

24. I therefore find that the act complained of in this case as alleged by the Complainant as being in contravention of the Act, namely the designation of the post of Bunkering Superintendent as non-uniformed, which of course still needs to be proved, may be an act (or a series of acts) complained of extending from the commencement date of the Act until the present day (rather than referrals back to an original decision), so that the Complainant's

complaint is not time-barred under the Act. I repeat that it will be a matter for the substantive Hearing as to whether such an act complained of constitutes bullying under the Act.

If the Tribunal were to find that it should not consider the complaint as a result of it being presented out of time, should it nevertheless consider the complaint under section 8(3) of the Act?

25. Given my finding that the complaint is not time-barred, this issue could be left unaddressed. However, if I were wrong about that, I now turn to assess whether the complaint could in any event fall to be considered under Section 8(3) of the Act.

26. In identical terms to Section 68(3) of the Equal Opportunities Act 2004 and equivalent provisions in English anti-discrimination legislation, under Section 8(3) of the Act: *The Tribunal may nevertheless consider any such complaint or claim which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so*". There is much authority on this issue, including that each case will be decided on its facts. The principal points which can be drawn are that time limits are exercised strictly in employment cases and that exercise of the discretion to extend time is the exception rather than the rule (*Robertson-v-Bexley Community Centre* [2003] IRLR 437, CA). The burden rests with the Complainant to show a reason directly responsible for causing the time limit to be missed.

27. As per *British Coal Corporation-v-Keeble and Others* [1997] IRLR 336, consideration should be given by the Tribunal to the factors set out in Section 33 of the English Limitation Act 1980, "*Discretionary exclusion of time limit for actions in respect of personal injuries or death*". As described in *Keeble* (paragraph 8), this Section: "*requires the Court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to—*

(a) the length of and reasons for the delay;

(b) the extent to which the cogency of the evidence is likely to be affected by the delay;

(c) the extent to which the party sued has co-operated with any requests for information;

(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;

(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action."

28. Without at least a hypothetical date, to use as a reference point, on which time could be regarded as starting to run for the purposes of Section 8(2) of the Act, an analysis of the parties' cases on this issue is awkward. In this case, the earliest hypothetical date on which a cause of action could have arisen under the Act was its commencement date, 18 September 2014, giving a limitation period of 18 December 2014. The Originating Application was presented just over 4 months later on 23 April 2015.

29. Against this hypothetical chronology, as to factor (b) set out above, I do not consider that, even on the earliest date hypothesis, the cogency of the evidence relevant to the complaint is likely to be affected by such a short period of time elapsing.

30. As to factors (a) (and also (d)), the length of and the reasons for the delay (and also the date of knowledge, if relevant), the Complainant submits primarily that there was no delay at all, since the alleged policy complained of is still extant; or alternatively, that if the 1 April 2015 job advertisement were the act (or the last in a series of acts) complained of for the purposes of starting the 3 months time limit, the Originating Application was in time. When I asked Counsel for the Complainant why no application in relation to limitation had been made at the time of the presentation of the Originating Application, as is customary when parties have limitation problems, she confirmed that this was because the Complainant thought that he was in time. Although Counsel for the Complainant made no submissions on this subject, I also cannot avoid the conclusion that if this was the advice being given to the Complainant, but was incorrect, then the Complainant would be able to rely upon this in relation to factor (a) and the need to establish a reason directly responsible for causing the time limit to be missed (*Hawkins-v-Ball and Barclays Bank Plc* [1996] IRLR 258, *Chohan-v-Derby Law Centre* [2004] IRLR 685).

31. I do not recollect that submissions were made by either party in respect of factor (c). However, the Complainant submitted that the Respondent's own conduct has contributed to any alleged delay because, until the 1 April 2015 job advertisement, the Complainant believed on the basis of the communications between the parties that resolution of his grievance was still possible. To the extent that conduct by the Respondent was viewed by the Complainant as forming part of a grievance (or appeal) procedure, I agree with the Respondent that this would not stop time running for the presentation of the complaint to the Tribunal (*Apelogun-Gabriels-v-London Borough of Lambeth and Another* [2002] IRLR 116). However, the communications between the parties may be of relevance to factor (a): the length of and the reasons for the delay. But I do not consider that the Complainant's submissions on this point are borne out by the copy correspondence provided by the Complainant, at least not to extend time so far as to 1 April 2015. The letter from the Complainant's Solicitors to the Minister responsible for the Port dated 18 December 2014 is the last communication on behalf of the Complainant provided which refers to grievance proceedings. Further, Counsel for the Complainant commented in her oral submissions that there

was no relevant correspondence between the parties from December 2014 until the 1 April 2015 job advertisement.

32. In relation to factor (e), it does not appear to be in dispute that the Complainant obtained union representation, including union-funded legal advice, from very early on in his dispute with the Respondent.

33. On the overriding question of prejudice, both parties focussed on the alleged prejudice resulting from, on the part of the Complainant, not being able to pursue the complaint and, on the part of the Respondent, having to defend the complaint. But these are the consequences of all cases where time has expired. The issue which should have been addressed was rather the alleged prejudice arising from the delay itself. Counsel for the Respondent did submit in oral submissions that the ongoing case has caused a little "unrest" amongst the Complainant's colleagues. But, apart from this, neither party made any relevant submissions on this point, for example, that witnesses or documents would be unavailable or witnesses would have difficulties in recalling the events in question. I can only therefore find on this issue that any alleged delay would be equally (if at all) prejudicial to both parties.

34. Overall, I am satisfied that the reason for any alleged delay, which even on the earliest date hypothesis is short, was a result of the Complainant and his representatives not believing (rightly or wrongly) that time had started running for presentation of the complaint.

35. Having weighed up and balanced this and all of the other relevant factors and circumstances as described above, I therefore find that if I had found that the Complainant was out of time for presenting his Originating Application, it would nevertheless be just and equitable for the Tribunal to consider his complaint.

Summary decision

I find that:

1. the Complainant's complaint is not time-barred under Section 8(2) of the Act;

2. if the complaint were time-barred, the Tribunal should consider the complaint under section 8(3) of the Act; and

3. the Tribunal has jurisdiction over the complaint, but the Act does not have retrospective application.

Gabrielle O'Hagan

Gabrielle O'Hagan, Chairperson **14 October 2015**