IN THE INDUSTRIAL TRIBUNAL FOR GIBRALTAR

CASE NO. IND TRI 8/2015

BETWEEN :

IONUT BRANDUSOIU

Complaint

- And -

GALA INTERACTIVE (GIBRALTAR) LIMITED

Respondent

MR I BRANDUSOIU – In person
MR C ROCCA instructed by Isolas – For the Respondent

1) The Complainant filed an Application with this Tribunal claiming unfair dismissal dated 19th March 2015 ("the Application").

   The Application being:-

   "The Employer failed to follow correct Company disciplinary procedures resulting in repudiatory breach of Contract rendering the subsequent resignation of the Complainant unfair pursuant to Section 59 of The Employment Act".

2) The principal reason for the dismissal stated in the Application was:-

   "The Complainant alleges dismissal as a result of the Respondent's failure to:-

   (A) Follow a correct disciplinary process threatening dismissal on grounds of conduct.

   (B) Employ measures already put in place by way of agreement dated 26th November 2014 relating to conduct. The Complainant denies that his conduct merited punitive measures".

3) Grounds of Resistance (a Defence) to the Application were issued by the Respondent dated 8th April 2015.

4) Additional grounds were then filed by Amber Law (acting for the Complainant) dated 23rd July 2015 expanding the Application to include inter alia a disregard for disciplinary procedures and repudiatory breach amounting to unfair dismissal.

5) Tribunal Chair Penny Garcia on 5th May 2015 gave directions based on the Application and Additional Grounds filed by both parties.

6) At a further hearing on 9th November 2015 further directions were made by Tribunal Chair Penny Garcia.

7) On 15th April 2016 the Complainant, now representing himself (having previously been legally represented by Amber Law), sought leave to amend the Application to include additional racial discrimination grounds. Directions for hearing this new application were made by Tribunal Chair Penny Garcia.

8) Mrs Garcia retired from the case for personal reasons and following my appointment, I gave fresh Directions on 8th December 2016.

9) This application, for leave to extend time to include racial discrimination as an additional ground, was heard on 18th January 2017 and live evidence was given by the Complainant and his former Lawyer Fiona Young, the latter having waived legal privilege.

THE LEGAL TEST

10) The Tribunal was referred to Section 68 of The Equal Opportunities Act as giving the Tribunal the power to allow late applications.

Section 68 (1) states:-

"The Tribunal shall not consider a complaint –

> (a) under Section 69 (Jurisdiction of the Tribunal) unless the complaint is presented to the Tribunal within the period of three months beginning when the Act complained of is alleged to have been done".

Section 68 (3) allows an extension to be made if in the circumstances of the case it considers it just and equitable to do so:-

> "The Supreme Court or the Tribunal may nevertheless consider 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".

11) **FACTUAL CONTEXT**

(a) The Complainant stated that had he known what racial discrimination meant he would have considered the inclusion of such a ground in his application. The Complainant initially said that his former lawyer Ms Young who worked for Amber Law had failed to advise him on this point. However, the Complainant later accepted that he had not given a "full picture to Ms Young at the time because I didn't understand".

(b) The Complainant also said that it was only in the first months of 2016 that he realised that these grounds existed (Ms Young ceased acting for him in January 2016). He said that he advised the Tribunal of his wish to add new grounds in March or April 2016.

(c) In cross-examination he accepted that racial discrimination was not the main element that led to his resignation, but said that it contributed to his decision.

(d) The Complainant later accepted that he had discussed racial discrimination with Ms Young who had advised him not to proceed with these grounds. The Complainant went on to say "I didn't say [I blamed Ms Young for not making the claim] I do "say maybe she omitted it. I think the circumstances were I didn't say it properly" [my insertion].

(e) The Complainant advanced an argument that had he been aware that he could have claimed racial discrimination at the time, he would have done so. However, the evidence given by the Complainant often seemed contradictory and leaves the tribunal in some doubt as to (a) what the complainant's actual position was, as well as (b) what his and his lawyer's knowledge of this ground actually was at the time.

(f) When Ms Young was cross-examined she confirmed that she had considered discrimination, given that there was "an atmosphere" as she put it in the Respondent entity.

(g) When asked whether Ms Young had thought that her client had considered himself to have been "racially discriminated" she replied "at that stage, no".

(h) On re-examination Ms Young went on to say that "I don't recall you ever discussing racial discrimination at those meetings" [before the IT1 was filed].

(i) When asked whether racial discrimination was discussed in May 2016 (after she had withdrawn), Ms Young answered in the affirmative. However, in my view she was no longer the Complainant's lawyer at that time, therefore whatever discussion they had would have been based on a verbal explanation and not an evidentially based one.

(j) Ms Young in her Witness Statement dated 15th November 2016 and which was adopted by her when examined, made clear at paragraph 12:-

"It is note-worthy that as a solicitor my duty is to provide competent advice based on the information provided to me by my client. Discrimination cases require specific evidence and information. I am not in the habit of immediately assuming discrimination has occurred in the event that a client walks into my office showing characteristics of a potential discrimination .... This does not mean that discrimination has not occurred. It simply means that I have not asked about it and the client has not presented information that prompts me to investigate further".

This statement tends to contradict the evidence given by her before the Tribunal.

(k) She then stated at paragraph 17 of her Witness Statement:-

"It is note-worthy that at the time I came off the record [January 2016], witness statements had not been prepared as I had tried to keep the focus on settling the matter and keeping costs down. It is likely that had I remained on the record at the time of review of witness evidence, given the contents of Ionuit's statement, I would have made a similar application to introduce race discrimination on Ionuit's behalf".

Further that:-

"With limitation a pressing concern I was instructed to issue proceedings to protect Ionuit's position in respect of his constructive dismissal case, on which we had exceptionally strong evidence.

I was not instructed to include a race discrimination claim. Ionuit did of course have the opportunity to review the IT1 before it was filed and therefore the IT1 is reflective of my instructions at the time".

(l) The Respondent argued that the fact that the Complainant had been legally represented at the time and could have [even should have] included racial discrimination as grounds at the time, is enough for the tribunal to reject the new ground. In Orchard -v- Southeastern Electricity Board [1987] 1QB 565 (Sir John Donaldson MR at 572E said] "It must never be forgotten that it is not for solicitors or counsel to impose a pre-trial screen through which a litigant must pass before he can put his complaint or defence before the Court". It is this Tribunal's view Ms Young considered the Complainant's case on the basis of instructions then before her, and she decided to keep the claim in simple form. This does not mean that, as she put it later during her examination, she would not have made this precise application to amend or extend the claim to racial discrimination. However, the Tribunal is sure that that if she had taken such a decision it would have been dealt

more promptly than this. It is wrong in my view to restrict a party to an argument, simply because legal advice may have been given to the contrary. However, any application to amend or add grounds needs to be brought within a reasonable period of time.

(m) A summary of some of the reasons given by the Complainant for not bringing the new ground timeously include:

(i) a lack of knowledge on the Complainant's part;

(ii) possible difficulty in expressing himself clearly to his lawyer;

(iii) (possible) deficient instructions taken by his solicitor, or given by the Complainant possibly due to (b), although the tribunal did not find the Complainant lacking in communication skills;

(iv) either, late appreciation of racial discrimination as a viable ground until he did his own research;

(v) or, an appreciation by his solicitor of the difficulties that would be faced in proving the same which led to an active decision by the Complainant's solicitor, not to advance the same, or

(vi) his solicitor's wish to focus on unfair dismissal and a possible negotiated settlement at that stage, rather than putting in all the possible grounds of claim.

n) The Complainant has also argued that this new racial discrimination ground can be viewed as being additional to, and overlapping the existing constructive dismissal complaint, which has not yet been heard.

o) The Respondent has argued inter alia:-

i) that this involves a "massive and substantial" amendment with new factual allegations, which do not currently form part of the existing IT1 Claim;

ii) no explanations have been given as to why they were not pleaded previously;

iii) there is still an existing claim;

iv) costs will increase;

v) this would require new witnesses, a few of which no longer resided in Gibraltar with consequential costs and inconvenience;

vi) it is being placed in a position of massive prejudice, with one or, more grounds, witnesses, increased costs and a lengthier trial;

vii) that the Claimant was legally advised and represented at the time the initial claim was made and for some time thereafter, and that neither Complainant nor his lawyer then considered racial discrimination to merit inclusion;

viii) that even if it did merit inclusion it (the alleged racial discrimination) did not operate on his mind, such as to be considered a cause of the dismissal;

12) The tribunal considers that:-

a) where a party is legally represented it would be wrong to advance an argument that he had a lack of knowledge. It is for his solicitor to advise, which it is clear Ms Young did, albeit that her view may then have been "reflective of [her] instructions at the time".

b) whilst the Tribunal is sympathetic with the Complainant's alleged difficulties at communication with Ms Young, this is not an argument the Tribunal can accept.

c) this case has, regardless of fault, been active since March 2015 when the IT1 was first filed. Further, that this racial discrimination ground was first raised by the Complainant at a Case Management hearing in September 2016. This, therefore, means that the delay in raising the matter before the tribunal was, approximately 13 months from the filing of the unfair dismissal application. The question, therefore being whether the reasons given by the Complainant are sufficient to make it just and equitable to allow this new ground of racial discrimination to be made after a 13 month or more delay.

d) Further, there seems to be a 13 month or more delay from the time of the discriminatory act, or from the to time the discriminatory act caused the end of the employment, up to the point when an application was made for it to be added as a new or additional ground. This is far in excess of the 3 month window given for discrimination applications under Section 68 (1) unless it is in all the circumstances just and equitable to extend this period under subsection (3).

13) JUST AND EQUITABLE DISCRETION

a) The Tribunal has considered all of the arguments raised the Complaint for his 12-16 month delay and also noted that Judge Clark in Rathakrishnan -v- Pizza Express (Restaurants) Ltd 2016 IRLR 278 EAT, said that he could not accept that a failure to provide a good excuse for the delay in bringing the relevant claim will inevitably result in an extension of time being refused.

Judge Clark held that the authorities indicated a wide discretion as to what was just and equitable to grant an extension which involved "a multi-factorial approach" and no single factor was determinative. On the facts of Rathakrishnan, it was held that the balance and prejudice and the potential merits of the claim (as to which the tribunal had heard evidence) were relevant factors to take into account and he remitted the case to the same tribunal to reconsider the application in the light of them.

b) Robertson -v- Bexley Community Centre [2003] EWCA Civ 576 likewise held that "An employment tribunal has a very wide discretion in determining whether or not it is just and equitable to extend time. It is entitled to consider anything that it considers relevant. However, time limits are exercised strictly in employment cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds, there is no presumption that they should do so unless they can justify failure to exercise the discretion. On the contrary, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. The exercise of discretion is thus the exception rather than the rule".

14) the Tribunal also notes per Southwark London Borough -v- Afolabi [2003] EWCA CIV 15 that an extension was granted to a Claimant who did not discover the evidence which led to his race discrimination claim (concerning the failure to appoint him to a particular grade) until 9 years after expiry of the time limit. Factors involved were:-

a) he had no reason to discover the evidence early;
b) he presented his complaint within 3 months of discovering it; and
c) that the 9 year delay would be equally prejudicial to both parties.

15) Whilst each case revolves around its own facts there is no overwhelming argument to allow this new ground.

(a) the Complainant submitted that he only understood that he might have such a claim after he took over his own case and his former lawyer has acknowledged that she would have made a similar application on the basis of the more recent statements made by the Complainant; however, his former lawyer has also acknowledged that she had advised him of the difficulty and burden of proving such an application. Furthermore, this ground could have been included and even discarded at a later stage, had the Complainant and his lawyer decided to do so.

(b) the Complainant presented his application to add the ground a few months after he realised that his dismissal might have been racially discriminatory, but this was his own view, rather than done following previous legal advice; and

(c) there is a 13 to 16 month delay in making this application from the date of the discriminating act.

(d) it is also pertinent to note that the Tribunal recognises that the main (original) case has not yet been heard either.

16) The Tribunal has noted the inconsistent submissions made by Mr Brandusoiu on his own behalf, with regards to whether or not (a) he discussed racial discrimination with his lawyer, (b) whether she [his lawyer Ms Young] advised him thereon, (c) why racial discrimination was not included as a ground. After having heard Ms Young it seems clear that she had taken some instructions, such as to discount it as an actual ground at the time. The Tribunal could put the inconsistencies in Mr Brandusoiu's evidence and prior submissions made before me and Tribunal Chair Mrs Penny Garcia, to his being a lay person arguing his own case. However, it does seem on hearing his explanations and contrasting these with Ms Young's evidence, that he is trying to add grounds to boost his case and doing so 13 to 16 months after the event.

17) The Tribunal accepts that, if it allows this ground additional costs will be incurred by Gala. Costs are currently not an issue for the Complainant, who now represents himself. However whilst recognising that this would have been the case (in any event), to a lesser or greater degree, had the ground been included in the Application, 13 months ago, it is regrettable that this application was not made sooner. The Tribunal is also conscious of the need of maintaining a level playing field.

18) Mr Rocca submitted that this new ground would involve six or seven new witnesses on Gala's side, some of whom would have to be brought to Gibraltar, as they no longer resided here. I believe Mr Rocca may have also mentioned that they (some, or all) no longer worked for his client. The Complainant on the other hand, advised that he intended to bring at least two new witnesses to argue his case, also from overseas. The difficulties and costs faced by both parties are noted. However, these difficulties,

would have existed regardless of whether the claim had been included 13 months ago, as this case has been running for some time. The initial Application has still not been fully heard and there would be no reason in the first instance as to why evidence should not be adduced to support or defend this new ground. The prejudice seems to be balanced, as both parties have evidential and other issues to surmount. But this does not of itself mean that the Tribunal should grant the application as that prejudice may in reality, be fatal or impossible to overcome by one or both parties after such a long delay.

19) A delay of 13 to 16 months by the Complainant in advancing this argument seems unfair on the Respondent, as some certainty as to what claim to defend is required by any Respondent. This does not mean that all applications will fail, however, it is my view that the Complainant has acted too late and is seeking to add grounds which he, or his legal representatives, seem to have discounted earlier. The Tribunal accepts Ms Young's initial comment that, had she thought this ground had merit she would have advised her client to advance such an argument much sooner. However, the fact of the matter is that Ms Young took instructions and a decision was taken not to advance such a ground. She did not do so, and this seems to be an attempt by her former client at having a second bite at the cherry. The Tribunal does not accept that Ms Young did not consider all of the grounds available to her client at the time. Just because something is available does not make it advisable to advance such an argument.

20) Mr Rocca's submission that racial discrimination did not, of itself, cause the termination is noted. However, submissions that it did not operate on the mind at the time of the termination, whilst of interest, are not sufficient of themselves to automatically prevent an argument to amend being brought or from being successful. Each case is fact specific.

21) The Tribunal accepts that the Complainant is no longer legally represented and this means that the Tribunal has to not only assist him but also allow him some latitude in such an application. However, a delay of 13 to 16 months for an application of this nature, with consequential cost implications, possible prejudice, difficulties in advancing evidence, as well the inevitable delay that this will entail mitigates against granting the application.

22) Mr Brandusoiu also argued that the amendment was not entirely based on new factual allegations. He said that the new ground referred to exactly the same cause of action. However, with 9 new Gala witnesses as well as his 2 new witnesses, and no real idea of what he expects his two witnesses to say, this is pure conjecture on his part.

23) Further Mr Brandusoiu's skeleton argued that "the facts stated in the Originating Application are apt to cover or anticipate a claim of the nature proposed in this

amendment. The racial discrimination actually leads to constructive unfair dismissal". This is noted, however, the Complainant has not provided the Tribunal with enough evidence to judge whether this statement is accurate or not. Just saying that it is, does not make it so and more evidence as to what was going to be said by each witness may have allowed the Tribunal to move it out of the field of conjecture.

24) Whilst in Rathakrishnan the EAT seems to have heard the evidence regarding racial discrimination, this Tribunal has not had that opportunity. Therefore, the Tribunal can only base itself on the difficulties alleged by the Respondent and the submissions made by the Complainant that his new ground will be a simple evidential addition to the Application. The Tribunal does not agree, on the basis of evidence submitted, that this will be a simple evidential addition.

25) On the basis of the submissions made, the Tribunal does not consider it in all the circumstances of the case, to be just and equitable to extend the time to allow this new ground. Per Robertson -v- Bexley Community Centre (supra) the exercise of the discretion is the "exception rather than the rule" as time limits "are exercised strictly in employment cases". The application is dismissed.

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Chairman
9th March 2017