EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Mr M Haque **Luton Borough Council**

PRELIMINARY HEARING

Heard at: Watford **On: 12 January 2017**

Before: Employment Judge Bedeau

Appearances:

For the Claimant: Mr A Malik, Counsel
For the Respondents: Mr M Caiden, Counsel

JUDGMENT

1. The claimant's claims were presented in time.

2. The case is listed for a final hearing from 2 to 12 October 2017 before a full tribunal.

REASONS

1. In a claim form presented to the tribunal on 18 October 2016, the claimant made claims of: unfair dismissal; direct race discrimination; indirect race discrimination; direct religion or belief discrimination; indirect religion or belief discrimination; and wrongful dismissal. In the response, presented to the tribunal on 9 December 2016, the respondent has denied the claims and asserts that they were presented out of time having regard to the ACAS conciliation provisions. The claimant was dismissed for either misconduct or for some other substantial reason, namely that the respondent reasonably believed that he was associated with a proscribed organisation, namely Al-Muhajiroun and he had failed to inform it that his brother in law had been convicted for being a member of that organisation.

2. The tribunal gave notice to the parties on 22 December 2016, that the issue of whether the claims were presented out of time would be considered at this preliminary hearing.

The issue

3. Having regard to the extension of time limits, as a result of the parties being engaged in ACAS conciliation, were the claims presented in time and if not should time be extended to allow the claims to proceed to a final hearing on the basis that either it was not reasonably practicable to have in time or it is just and equitable to do so?

Submissions

4. I did not hear any evidence as the facts are relatively straightforward. The claimant commenced employment on 8 January 2007. His job title at the date of his dismissal was housing allocation officer. It is the respondent's case that on or around 23 November 2015, it was contacted by the police and informed that the claimant was an associate of Al-Muhajiroun, a proscribed terrorist organisation since 2006 under the Terrorism Act 2000.

5. Al-Muhajiroun since 1986 has been based in Britain and seeks to establish an Islamic Caliphate ruled by Sharia Law.

6. On 4 December 2015, the claimant was informed by the respondent that he was under precautionary suspension as it was believed that he was associated with a proscribed organisation linked to international terrorism, homophobia and anti-Semitism. He attended an investigatory interview on 13 January 2016 after which he was informed that there was no case to answer. Accordingly, the respondent informed the police that it was closing its internal investigation as there did not appear to be any evidence of an association with Al-Muhajiroun or with any terrorist group.

7. The police responded by informing the respondent that it was aware that the claimant's brother in law, who lived at the same address as the claimant, had been charged with and had pleaded guilty to terrorism offences.

8. This information set in motion a further investigation which led to a disciplinary hearing on 16 June 2016. On 20 June 2016, the claimant was informed by telephone that he had been summarily dismissed because the respondent believed that he was an associate of a proscribed organisation; that he was living at the same address as his brother in law who was convicted of terrorism offences in 2013; and that the claimant had knowledge of individuals who were involved in and had been convicted of terrorism offences. The claimant did not appeal his summary dismissal as he had no trust and confidence in the respondent to treat him fairly.

9. In his claim form, he alleged that the manner of the questioning by the respondent and his treatment were discriminatory based on his race, being a Bangladeshi Asian and religion, being a Muslim. Further, that he had been unfairly dismissed in that a fair procedure had not been followed as the respondent was anxious to build a case against him. He also claimed that he was wrongfully dismissed and that he was not given notice or payment in lieu of notice.

10. The effective date of termination was 20 June 2016. The claimant went to ACAS on 22 July 2016 which was the date of notification. The early conciliation certificate was issued on 22 August 2016. There is no dispute that the three months' statutory time limit expired on 19 September 2016. The period of conciliation was 31 days. The claim form was presented, as stated earlier, on 18 October 2016.

11. The issue in the case is whether the tribunal should apply a particular sub-section when considering whether to extend time following ACAS conciliation? The statutory provisions are sections 123 and 104B Equality Act 2010; sections 111 and 207B Employment Rights Act 1996 and articles 7 and 8B Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

12. The Equality Act provisions cover the claimant's discrimination claims. In relation to his unfair dismissal claim, the provisions are s.111 and 207B. As regards a breach of contract or wrongful dismissal claim, it is articles 7 and 8B of the Order.

13. Section 123, Equality Act 2010 provides:

> "(1) Subject to sections 140A and 140B 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.
>
> (2) Proceedings may not be brought in reliance on section 121(1) after the of –
>
> (a) the period of 6 months starting with the date of the act to which the proceedings relate, 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) 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, 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.
>
> ….."

14. Section 104B, Equality Act on extension of time limits to facilitate conciliation before institution of proceedings, states:

"(1) This section does apply where a time limit is set by section 123(1)(a) or 129(3) or (4). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 140A.

(2) In this section –

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by that subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section."

15. Section 111 Employment Rights Act 1996, provides:

"(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal –

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(2A) Section 207A(3) (extension because of mediation in certain European cross-border disputes) and section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2)(a).

……."

16. Section 207B ERA provides for the extension of time limits in order to facilitate conciliation before proceedings are instituted. It states:

"(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant position").

But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A.

(2) In this section –

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of relations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and end with Day B is not to be counted.

(4) If a time limit set up a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limited expires instead at the end of that period.

(5) Where an employment tribunal has power under this act to extend a time limit set b a relevant provision, the power is exercisable in relation to the time limit as extended by this section."

17. In respect of the time limits in breach of contract cases, Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides:

"Subject to articles 8A and 8B, an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented –

(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or

(b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has been terminated, or

(ba) where the period within which a complaint must be presented in accordance with paragraph (a) r (b) is extended by regulation 15 of the Employment Act 2002 (Dispute Resolution) Regulations 2004, the period within which the complaint must be presented shall be the extended period rather than the period in paragraph (a) or (b).

(c) Where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.

(d)

….."

18. Article 8B is the extension of time limit to facilitate conciliation before institution of proceedings and states:

"(1) This article applies where this Order provides for it to apply for the purposes of a provision of this Order ("a relevant provision").

(2) In this article –

(a) Day A is the day on which the worker concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the worker concerned received or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when the time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If the time limit set by a relevant provision would (if not extended by this paragraph) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) Where an employment tribunal has power under this Order to extend the time limit set by a relevant provision, the power is exercisable in relation to that time limit as extended by this regulation."

Submissions

19. As regards the arguments, in relation to s.104B, 207B and article 8B the respondent's position is that sub-paragraph 4 applies. The claimant's position is that sub-paragraph 3 is the applicable provision.

20. Mr Caiden, counsel on behalf of the respondent, submitted that the issue is one of pure statutory construction. There is no binding precedent. The starting point is the wording of the statute. The natural reading of the statute posits two different potential limitation dates, namely that sub-paragraph 3 states:

> "The period beginning with the day after day A and ending with day B is not to be counted".

21. Applying the ordinary time limit when 31 days is added to the 19 September 2016 the extended expiry date is 20 October 2016.

22. Alternatively, he submitted, that sub-paragraph 4 states:

> "If a time limit set by a relevant provision would (if not extended by this sub-section) expire during the period beginning with day A and ending one month, day B, the time expires instead at the end of that period."

23. Applying that sub-paragraph, as the usual time limit expired on 19 September, one month is applied after day B. Day B is 22 August 2016, therefore, one month after that date is 22 September 2016 which is the expiry date.

24. In applying the two different approaches, in relation to sub-paragraph 3 the claim is in time? Conversely, applying sub-paragraph 4, the claim is out of time? I

have referred to sub-sections 3 and 4 for the sake of convenience as they are the same wording in sections 270B, 140B and Article 8B.

25. Mr Caiden further submitted that there cannot be two different time limits as one must have to take precedence. Sub-section 4, he argued, must be preferred over sub-section 3 as sub-section 3 is of a general nature whereas sub-section 4 is specific and mandatory as it states when the time limit would expire. As a matter of statutory construction, clear specific provisions, override general ones. He further submitted that sub-section 4 was the later provision and where there is conflict between the two statutory provisions, there is a principle that the later provision prevails (Wood v Riley). In other words, sub-section 4 should be preferred.

26. Mr Caiden submitted that advice is already being given to claimants to adopt the more restricted interpretation in sub-paragraph 4 and present their claim in time thereby not falling foul of the claim being time barred. He submitted that time limits are comparatively short before the employment tribunal to avoid memories fading and potential witnesses leaving the respondent. Having a month after the end of early conciliation is ample time to complete the claim form. The claimant is not prejudiced as he or she is still getting an extension of time over and above the normal statutory time limit. That extended period of time is sufficient to engage in negotiations with a view to settlement and if that fails to present a claim. The early conciliation process is intended to last one calendar month, it being envisaged that that would be an adequate amount of time for early conciliation prior to presenting the claim.

27. Mr Caiden distinguished the first instance judgment in Booth v Pasta King UK Ltd Leeds ET 15.10.14 which found for a cumulative approach enabling the claimant to get a stop the clock new time limit then get a further extra month after day B. He submitted that such an approach is not only overly complicated but that the reasoning is not consistent with the statute. He gives four reasons for taking such a view. Firstly, paragraph 4.7 of the judgment relies upon the wording "relevant provision" as having several different meanings, when ordinarily a phrase used in the statute has the same meaning.

28. Secondly, paragraph 4.10 in the judgment appears to read down the statutory language, but there is no justification for doing so. It is sufficient for there to be the addition of a month to the usual time limit.

29. Thirdly, this interpretation makes little sense for cases where day A or indeed reconciliation, is before time starts to run as the claimant is getting an addition to a clock that has not started and then getting a further addition of a month after day B.

30. Finally, the judgment ignores the basic rules of construction that the specific provision overrides the general.

31. Accordingly, Mr Caiden submitted that the claim form was presented out of time by 26 days and the claimant has not provided an explanation why it was presented out of time.

18. Mr Malik, counsel on behalf of the claimant, submitted that sub-sections 3 and 4 provide for two scenarios. He relied on the case of Booth v Pasta King UK Ltd submitting that the same argument was made in that case by the respondent, namely that sub-section 4 should trump sub-section 3 but that argument was rejected.

19. Mr Malik submitted that the extension provisions allow for two scenarios: the first provides for the period of conciliation which in this case was 31 days, not be counted, sub-section 3; the second, provides that if time is set by a relevant provision would if not extended by the sub-section, expire during the beginning of day A and one month after day B, the time limit expires at the end of that period, that is one month after day B, sub-section 4. As there is no authority as to which sub-section takes precedence, there is nothing prohibiting the claimant from relying on sub-section 3.

20. Having regard to the wording in sub-section 4, he submitted that if the deadline for submission of a claim falls within the period that ACAS is dealing with the claim plus one month, the claimant gets an automatic extension of one month from the date at which the early conciliation certificate was issued, sub-section 4. It was further submitted that the applicable provisions for calculating the time limit for submitting his claim is sub-section 3 and not sub-section 4. The point at which the claimant submitted his request for early conciliation and during the period ACAS was dealing with early conciliation, the deadline for submitting his claim did not fall within the early conciliation period. He illustrated his submission stating:

> "Effective date of termination 20 June 2016
> Ordinary three months' time limit expiry (OTL) 19 September 2016
> Day A under s.207B(2)(a) 22 July 2016
> Day B under s.207B(2)(b) 22 August 2016
> One month after expiration of the OTL under s.207B(3) 19 October 2016
> Date stamped on form 18 October 2016"

The law

21. I have already referred to s.140B Equality Act 2010, s.207B Employment Rights Act 1996 and Article 8B Extension of Jurisdiction Order 1994.

22. In the first instance employment tribunal case of Booth v Pasta King UK Ltd Leeds, case no. 1401231/2014, the claimant's effective date of termination was 2 April 2014. He contacted ACAS on 21 May 2014, day A for purposes of conciliation and received an early conciliation certificate on 21 June 2014, day B. He presented his employment tribunal claim on 24 July 2014. The issue to be determined was whether or not the claim form was presented in time, s.207B(3) or s.207B(4)? The ordinary expiry date was 1 July 2014. It was submitted in that case by counsel for the respondent that sub-section 4 had precedence over sub-section 3. It was an issue of statutory construction. That argument was rejected by Employment Judge Davies who held the following:

> "4.10 Not only do I take the view that this is correct as a matter of construction, it is also consistent with what I consider Parliament must have intended. I am not persuaded

that subsection (4) was intended to detract from or reduce the extension of time conferred by subsection (3). Rather, Parliament must have intended subsection (4) to provide a catch-all to ensure that there was always at least one month from the end of the conciliation period in which a prospective claimant could put in their claim. Why should a prospective claimant who would otherwise have had, say, six weeks' extra time, be deprived of that if subsection (4) happened to apply? Mr Warren-Jones was not able to advance a rationale as to why Parliament should have intended a prospective claimant not to have the benefit of subsection (3) if subsection (4) was applicable.

4.11 In support of his contention, Mr Warren-Jones submitted that no commentator in the legal field has raised any doubt about the proper approach to these subsections. I put to him in the course of his submissions that that could be because the point has not yet arisen, or because of commentators have assumed that the construction I have outlined is correct, rather than because of an assumption that the contrary approach is correct.

4.12 During the adjournment I have taken the opportunity to look at the very helpful recent IDS Employment Law Handbook on Employment Tribunal Practice and Procedure (2014). The authors deal expressly with this point at paragraphs 3.28 and 3.29. I draw some support from the fact that what is said in that book is consistent with the construction I consider to be the correct one. The authors of the Handbook suggest that the second basis for the extension of normal time limits was specifically aimed at prospective claimants who enter the early conciliation process close to the end of the primary limitation period. They draw attention to the fact that during public consultation on the early conciliation proposal, the Government acknowledged that prospect claimants might be reluctant to settle a claim close to the end of the period because they might not be guaranteed to receive payment of the settlement sum before the limitation period for making the claim ran out. For this reason the authors say the Government added another extension of the time limit provision to ensure that claimants have at least one month from when they first receive the early conciliation certificate to submit their claim. I did not in the time available seek to confirm what is reported in the Handbook."

23. In the case of Tanveer v East London Bus and Coach Co Ltd UK EAT/0022/16 (Unreported) the Employment Appeal Tribunal held that in calculating the period ending "one month after day B" the correct approach is to adopt the "corresponding date" rule, as approved by the House of Lords in Dodds v Walker [1981] 1WLR 1027 Lord Diplock at page 1029. This rule provides that when the relevant period is a month, the start date and the expiry date would be the same, for example, 6 June would be the start of the month ending 6 July.

24. In the context of early conciliation, if day B is the 6 June, one month expires on the same date in the following month, namely 6 July.

25. I have been referred to a number of articles on the subject of extension of time following early conciliation; Bennion on statutory interpretation, 6th edition, pages 1034, 1037 and 1038 submitted in support of Mr Caiden's contentions; and an extract from Harvey's on Industrial Relations and Employment Law, Division P1 Practice and Procedure on early conciliation at paragraphs 290-290.02.

Conclusions

26. Having regard to s.207B(3), s.140B(3) and Article 8B(3) I do find that those are the applicable provisions in this case and adopt the approach taken by Employment Judge Davies in the Booth v Pasta case. I also do take into account the example given in paragraph 290.01 Harveys on Industrial Relations in which it is stated in respect of s.207B(3):

> "For the purpose of working out the expiry date of the relevant limitation period, the period beginning with the day after day A and ending with day B is not to be counted. Thus if, for example, a three month limitation period would ordinarily have expired on 31 March, and day A was 16 January and day B was 6 February, the period that would not be counted would be 21 days, that is from 17 January to 6 February inclusive, so that the revised expiry date would be 21 April."

27. In this case the effective date of termination was 20 June 2016, day A was 22 July 2016, day B was 22 August 2016, the ordinary time limit of three months expired on 19 September 2016. I do take into account the 31 days spent in conciliation and I have added that time to the ordinary time limit expiry date, namely 19 September 2016. The extended period was to 20 October 2016. As the claim form was presented on 18 October 2016, in my judgment all of the claims were presented in time. Accordingly, the claimant will be allowed to pursue his claims in the final hearing.

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Employment Judge Bedeau

Sent to the parties on:
15 April 2017

For the Tribunal:
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