



EMPLOYMENT TRIBUNALS

Claimant: Mr E Stewart

Respondents: (1) Asda Stores Ltd
(2) Kapila Sharmapaine
(3) Bupa Patel
(4) Ali Syed
(5) Tim Jones

HEARD AT: HUNTINGDON ET

ON: 10th August 2017

BEFORE: Employment Judge K J Palmer

REPRESENTATION

For the Claimant: In Person

For the Respondents: Miss C Lord (Counsel)

JUDGMENT PURSUANT TO A PRELIMINARY HEARING

1. This matter came before me today as a Preliminary Hearing to determine the issue of whether the Claimant's claim should be struck out, this was pursuant to an application put on behalf of the Respondents essentially outlined in the Respondents' ET3.
2. That application was that this Tribunal has no jurisdiction to hear the Claimant's claims or any of them against the Respondents on the basis that the claims were submitted out of time and did not comply with Section 123 of the Equality Act 2010 in that they were not submitted within the appropriate 3 month time period of the act complained of.
3. Further the application contained an application to strike out the Claimant's claims under the Employment Tribunal Rules of Procedure 2013 under Rule 37 in that the Claimant's pleadings demonstrated no reasonable prospect of

success. I heard submissions from Miss Lord on behalf of the Respondents and from the Claimant himself on his behalf.

The Out of Time Application

4. The time line is as follows. The claim was first presented to the Tribunal on the 17th February 2017 pursuant to the dismissal of the Claimant on the 18th November 2016. It is common ground and not disputed that the dismissal took place on the 18th November 2016 when the Claimant's probationary period was not extended and he was informed in a meeting that he was dismissed. That dismissal was later confirmed in letter dated the 25th November 2016 and the Claimant then pursued an appeal process and was informed of the outcome of the appeal process in January 2017.
5. On the face of it therefore the Claimant's ET1 claim form was presented just in time on the final day of the 3 month period set out in Section 123 of the Equality Act 2010. It is common ground that all of the claims the Claimant is advancing occurred in the period up to his dismissal on the 18th November 2016, thus a 3 month calculation would take the time limit to the 17th February 2017 on the face of it the claim was therefore presented in time.
6. However, the Tribunal immediately noticed that the Claim Form did not include an ACAS Early Conciliation Certificate Number and rejected the claim. The claim was then re-submitted on 20th March 2017 in a slightly different form with some other allegations attached in hand written form but also giving an ACAS Early Conciliation Number and including and attaching an additional four Respondents. So the second ET1 contained allegations and claims against five Respondents but also attached an ACAS Early Conciliation Number. The claim was therefore accepted and has proceeded to this application today. The application was originally set down for the 22nd June 2017 but on the application of the Claimant that was postponed and it was re-listed before me today.
7. I had in front of me a bundle provided by the Respondents and as I have indicated I have heard submissions from both the Respondents' Counsel, Miss Lord and from the Claimant himself. In the bundle I have the ACAS Early Conciliation Certificate which reveals that the Claimant first approached ACAS and initiated the conciliation on the 16th March 2017 and the conciliation was terminated with a conciliation certificate being issued the following day on the 17th March 2017.
8. Therefore, it is clear from the timeline that I have set out above that the Claimant's claim was not submitted in proper form pursuant to ACAS Early Conciliation until the 20th March 2017, and therefore it is out of time. The Claimant would have been able to take advantage of the extension of time afforded had he have approached ACAS prior to the original 3 month expiry of the time limit that is on or before the 17th February 2017, and he would have

received at least a 1 month time limit extension at that time but he did not do so and in fact did not approach ACAS to commence the early conciliation procedure until 16th March 2017 which was nearly 1 month out of time. So therefore on any analysis the claim is out of time and I therefore must consider in the circumstances under Section 123 whether to exercise my discretion to extend time to validate the claim. The principle of time limits is a jurisdictional one and so therefore on the face of it if a claim is out of time as is this one, the Tribunal has no jurisdiction to proceed with the claim and to hear the claim. The exception in discrimination claims to that is put under Section 123(1)(b) of the Equality Act 2010 which states that the Tribunal may permit presentation beyond the 3 months where it considers it just and equitable to do so.

9. That just and equitable test applies in the case of claims in discrimination, in claims for unfair dismissal the test is different and the Tribunal has to conclude that it was not reasonably practicable for the Claimant to have presented his claim in time. The hurdle and the test in unfair dismissal claims is higher and more difficult to cross than is the hurdle in discrimination claims. In this case the Claimant's claims both the original claim and the subsequent claim cite claims for unfair dismissal and discrimination on the grounds of race and religious discrimination, and in the second claim also added a further claim of age discrimination.

Unfair Dismissal Claim

10. Dealing with the unfair dismissal claim first, it is clear on the face of the Claimant's claim and it is common ground that the Claimant was not employed for a period sufficient to enable him to pursue a claim for unfair dismissal under Section 111 of the Employment Rights Act 1996 in that he does not have the requisite 2 years continuity to pursue a claim under S108 and therefore on any analysis his unfair dismissal claim cannot proceed. He was employed only for just over a month by the Respondents. Therefore it is not necessary for me to consider the fact that his unfair dismissal claim is out of time, and whether to apply my discretion to validate it because the Tribunal has no jurisdiction to hear such a claim.

Claims in Discrimination

11. Dealing with the Claimant's claims in discrimination, initially set out as race and religious discrimination but increased to include age discrimination in the second ET1 they are all claims which can be pursued by an employee who has been employed only for a short period of time as is the case of the Claimant. Therefore, I must consider the issue of those claims being out of time as they are and whether in the circumstances I propose to apply my discretion and validate them on the just and equitable principle.

12. Having heard from Miss Lord and the Claimant I am guided by a number of authorities in the exercise of that discretion. The Court of Appeal in **Robertson and Bexley Community Centre (trading as Leisure Link) 2003 IRLR 434CA** made it clear that there is no presumption that time should be extended to validate an out of time claim unless the Claimant can justify the failure to issue the claim in time. The Tribunal cannot hear a claim unless the Claimant convinces the Tribunal that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.
13. The onus is therefore on the Claimant to convince the Tribunal that it is just and equitable to extend the time limit. There have been a number of authorities concerning this and it was for that reason that I sought submissions from the Claimant on the reasons for his lateness. The Claimant explained that when he first contemplated bringing his claim he had no knowledge that it was necessary for a Claimant to initiate the process of early conciliation before any such claim presented to a Tribunal could be validated. He sought some assistance from the Trade Union Representative who had helped him with his appeal pursuant to his dismissal, but that seemed simply to constitute the Trade Union Representative telling him to look the process up online. The Claimant said that he did that and was able to access online an ET1 form which he was able to complete, print off and send to the Tribunal. Essentially at that time he had no knowledge that he needed to initiate Early Conciliation before he could bring a claim before the Tribunal.
14. Therefore, he was ignorant of the process, clearly he had not received any legal advice or any advice at all as to how to proceed and it was only when the Tribunal rejected his claim in a letter dated 13th March 2017 that he looked further into the matter and initiated the Early conciliation on the 16th March 2017 which of course was too late.
15. I have to consider whether I decide to apply my discretion to extend time. I must consider whether the actions of the Claimant in not submitting the claim properly in time were reasonable. Having heard the Claimant I do consider that he could have properly researched the matter and been able to access online facilities to ascertain that it was necessary in the circumstances to pursue ACAS Early Conciliation before he could proceed to issue a claim in the Tribunal. Therefore in the circumstances bearing in mind the authorities that I have to take due notice of I cannot see that this is a case where the Claimant's failure could be said to be reasonable.
16. One factor which I am also permitted to take into account is the merits or otherwise of the Claimant's claims. On the face of the Claimant's ET1s no proper claims in discrimination are made out. I'm bound to say that on the documentation that I have seen there does not appear to be any reasonable prospect of the Claimant's claims succeeding, even in his second ET1 the Claimant talks in terms of conspiracy by a number of individuals but does not

put forward any factual allegations of any conduct which could support claims in discrimination on the grounds he is alleging. In hearing from the Claimant, there were a number of aspects which he articulated orally which might have put forward, at a stretch, factual allegations which might have indicated that he could make out at least in his pleading an argument that he had been discriminated against but there was nothing in the ET1s to support that. The fact that the Claimant is of different race, religion and age does not of itself mean that treatment of him amounts to discrimination, and there was nothing in the ET1 which supported any such claims. Therefore on the face of the documentation I conclude that there was no reasonable prospect of any success in the Claimant's claims and I've taken this into account when exercising my discretion.

17. In the circumstances therefore I cannot come to any other conclusion that the Claimant's claims are out of time and that it is not appropriate to exercise an extension of time to validate them and that all of the Claimant's claims are forthwith struck out.

Employment Judge K J Palmer, Huntingdon.
16 August 2017
ORDER SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS