



EMPLOYMENT TRIBUNALS

Claimant: Mr. R. Odetayo

Respondent: Abellio London Limited

Heard at: London South, Croydon

On: 7 September 2017

Before: Employment Judge Sage

Representation

Claimant: Mr J. Neckles Solicitor

Respondent: Mrs. H. Lunni Solicitor

JUDGMENT having been sent to the parties on **29 September 2017** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Requested by the Claimant

1. This is the Respondent's application to strike out the Claimant's claims on the grounds that they are out of time, under sections 48(3), section 111(2) of the Employment Rights Act and section 123(1) of the Equality Act. The effective date of termination was the 22 June 2016 but the ET1 was presented on the 12 June 2017.

Findings of Fact

2. The Claimant was dismissed on 22 June 2016; he told the tribunal that he spoke to the Citizens Advice at that time about his claim for unfair dismissal but was informed he could not pursue a claim because he did not have two years continuous service. He therefore did not pursue his claim within the primary limitation period.
3. The Claimant confirmed in cross examination that he did not discuss his potential claims for race discrimination and automatic unfair dismissal (whistle blowing and on the grounds of asserting a statutory right) with Citizens Advice and did not present a claim within the primary time limitation period despite the fact that these claims did not require two

years' service there appeared to be no impediment to proceeding with the claims at that time. It was noted that at the relevant time he had the benefit of advice from Mr Neckles his union representative who assisted him with his appeal. The Tribunal noted that his appeal was dated the 24 July 2016 seen at pages 123-128 and referred to a potential claim for direct discrimination and dismissal in breach of Section 103A as well as unfair dismissal and breach of contract. Mr Neckles also produced an appeal submission dated the 9 August 2016 see at pages 129-136 which specifically referred to the concealment of 'contractual documents' as well as the other causes of action identified in the first appeal document. There appeared to be no impediment to proceedings with these claims in 2016 and during the primary time limitation period he was aware of his right to pursue those claims and of the argument that the Respondent had failed to disclose evidence that they were contractually entitled to require the Claimant to sign the DVLA form. The Claimant confirmed to the tribunal that he had assistance from his trade union up to a couple of months after the termination of his employment, this evidence was corroborated by the dates of the appeal submissions prepared by Mr Neckles.

4. The Claimant's evidence to the tribunal was that he decided to pursue a claim in 2017 after he ran in to a former work colleague from the Respondent organisation and this is referred to in paragraph 6 of his witness statement. He told the tribunal that he discussed his dismissal with this colleague and he was told that "there is a contractual procedure regarding license checks, which does not require me to complete and sign a D796 driving license mandate form" and he would provide him with a copy of that document. The Claimant now seeks to rely on this document that appears in the bundle at pages 26-29 "the Disputed Document" which he claimed was a contractual procedure. He relies upon receipt of this document as a reason why it was not reasonably practicable to pursue his claims in time and claims that the respondent deliberately concealed this document from him.
5. The Disputed Document was headed Licence Checks and required all employees to present their driving Licence for inspection. This document appeared to be a 5 page document (only 4 of the 5 pages being produced in the bundle) which was described as a 'work procedure'. This procedure was a health and safety provision which was reviewed annually and provided advice to managers on how to carry out driving licence checks for driving and non-driving staff. Although the document was undated, it made reference to requirements that applied after the 10 September 2013. There was no evidence that this was a collectively bargained document and no evidence this this document had contractual status.
6. The Respondent's case set out in their ET3 was that the Claimant's employment contract required him to hold a PCV license. The Respondent referred to a document in their bundle at page 20 dated the 27 July 2015 confirming that the procedure for checking driving licenses was being changed and 'each driver' would be required to sign the D796 and a company called the Lloyd Morgan Group would carry out the checks automatically. The form D796 was seen at page 71-2 of the bundle which authorised the Respondent company to receive direct from the DVLA confirmation of the employee's entitlement to drive. The reason for the

change in procedure was explained to the Claimant in the outcome of his appeal dated the 24 August 2017 (page 27-9 of the Respondent's bundle), where they stated that "Abellio London Limited have a duty to check driving licenses throughout the course of a driver's employment at least twice annually in order to remain compliant with its obligation under its Operator License". The reason for outsourcing the task was because they employed 2,400 drivers and to check all documents manually was "time consuming and costly". It was confirmed in this letter that all drivers had to complete the mandate. It was also confirmed that "no such contractual document exists" in relation to the obligation to sign the D796.

7. The Claimant refused to sign this form and as a result he was dismissed on the grounds of failing to comply with a reasonable instruction and failing his probationary period. He was paid in lieu of notice.
8. **The Respondent submissions.** The Claimant was dismissed in June 2016 and he contacted ACAS at the time when he still had a union assisting him; he only left at membership of the trade union after the date of his dismissal. The Claimant suggested that he didn't submit a claim in time and was told this by Citizens Advice about the two-year service restriction but some of the claims he now pursues were not caught by that restriction.
9. The Claimant suggested that there was concealment of a document up to 2017 and this is the document referred to pages 26 to 29 of the bundle. The Respondent states that this is not a contractual document. It is a policy that applied at some point in time, but it is not dated and it refers to paper licences and how the procedure operated in 2013. It must therefore predate 2013. The Respondent changed its policy on around July 2015 when the paper part of the licence was no longer valid and all employees would be required to sign the form D796; which is the process that led to the Claimant's dismissal (because he refused to sign this document). The Respondent disputes this document was deliberately concealed and would not change the decision; we state that it is irrelevant. The Respondent's case was that it was reasonably practicable to present a claim within the primary time limit and no information has been disclosed about the race and whistleblowing part of the Claimant's claim; the fact still remains that there was no reason that the Claimant could not have pursued his claim in time.
10. The **Claimant submissions** were that he should be allowed to present his claim out of time because it was not reasonably practicable to present his claim until 12 June 2017; he relied upon the provisions of the Limitation Act 1980 section 32. He stated that there was direct and deliberate concealment of a contractual procedure and he referred the tribunal at page 26 of the bundle which entitled the Respondent to check the driver's licences and paragraph 4 of the Claimant's statement where he makes reference to seeking this document throughout the whole of the disciplinary process. The evidence supports this and it is in relation to the charges raised. He raised this five times and the Respondent didn't reply. The union representative also raised this on page 96 bundle but no response was received.

11. The basis for the Claimant's application is that they contend that this process was contractual and was recognised by Unite the union. It was also stated that the process was contractual because the terms were mandatory and requires employees to comply, no employee can opt out of the process. There was no requirement for the Claimant to sign the mandate at pages 71 to 72 of the bundle. There was no process whereby the Claimant could opt out and could not refuse to comply; if he refused he would be suspended without pay and dismissed which is what occurred.
12. We say it is not merely a policy. It was agreed with unions and deliberately concealed; they did not want the Claimant to realise it was not a contractual requirement. My Learned Friend says the policy was changed in July 2015 due to the paper licence no longer being valid, if that contention is to be believed, the question is why didn't they give it to the Claimant when he asked for it and why is this document, which is highly relevant, not before the tribunal today?
13. We say there is no such document if it did exist. The Respondents are represented by competent lawyers. The document was concealed, the document was given to the Claimant on 12 June 2017. He does have claims which could not have been pursued before that date. He got the document from a person who worked in management, which is the procedure in place. Therefore, we say it was not reasonably practicable for him to pursue his claim in time. The Claimant relied on the case of Machine Tools Industry Research Association v Simpson, 1988 IRLR Court of Appeal which falls squarely on the matters.
14. My Learned Friend is seeking to persuade you in document 25 which is the ACAS certificate dated the 12 June 2017 that dismissal took place on the 22 June, he did not know he was dismissed, he could not communicate dismissal of which he had no notice of, there is a reason why this notice exists.
15. We contend that the information does satisfy the ratio in Simpson, it does equally satisfy when the Claimant contacted ACAS it was ordinary unfair dismissal, not in relation to any other aspect of the claim. He could not respond to automatic unfair dismissal because on the 12 June 2017 after evidence from me, having seen a copy of the document and asking for the document conclude that there has been a deliberate concealment and as a result claims are being brought out of time.

The Law

Section 111 Employment Rights Act 1996

- (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.

Section 48(3) Employment Rights Act 1996

An [employment tribunal] shall not consider a complaint under this section unless it is presented--

- (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, 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.

Section 123 Equality Act 2010

(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.

Decision

- 16. The Claimant was dismissed on 22 June 2016 for failing to comply with a reasonable management instruction and for failing his probationary period. The ET1 included the claims of unfair dismissal, race discrimination, whistleblowing dismissal for asserting a statutory right and breach of contract and was presented on 12 June 2017. It is therefore substantially out of time.
- 17. The issue for the tribunal, is whether it was reasonably practicable for the claims of ordinary and automatic dismissal and breach of contract to be presented in time and if not whether it was presented within such further period as was reasonable. The Tribunal also must decide whether the complaint of discrimination was presented within three months of the date of the act complained of and if not, whether it is just and equitable to extend time.
- 18. The submissions on behalf of the Claimant referred to the Limitation Act 1980 and the case of Machine Tool Industry Research Association case (see above). The ratio in that case held that ignorance of a fact which is either crucial or fundamental to a claim will in principle be a circumstance,

rendering it impracticable for the Claimant to present a claim in time. The issue is whether the failure to produce the Disputed Document is crucial or fundamental to the Claimant's state of mind to change it from generally believing that he had no grounds for complaint to believing that he had a viable complaint, and if that ignorance is reasonable and whether the change of belief in the light of that knowledge is also reasonable. I have to consider whether knowledge of the Disputed Document (the existence and the contents) had genuinely and reasonably produced the change in belief and this must apply to each head of claim on which the complaint is founded.

19. I conclude on the facts before me that the Disputed Document only impacted on the claim for unfair dismissal, it cannot and did not provide any additional crucial relevant or fundamental evidence in relation to the Claimant's claim for race discrimination, whistleblowing or dismissal for asserting statutory right. The Claimant was able to pursue those claims in time and was not prevented from so doing by two-year limitation period but failed to take any steps at the time to present his claim.
20. I also took into account that at the time the Claimant was assisted by and had the considerable knowledge and wealth of experience of Mr Neckles. Mr Neckles made reference to these claims in his appeal documents produced after the dismissal and during the primary limitation period, the Claimant therefore had knowledge of these causes of action and had sufficient evidence to pursue those claims in time. Even though these claims had been referred to in documentation relied upon by the Claimant in his appeal, he did not pursue these claims at the time nor did he discuss them with Citizens Advice.
21. There was no evidence that the failure to produce the Disputed Document was crucial or fundamental to his knowledge of the viability of the claims of discrimination and automatic unfair dismissal. The Claimant provided no evidence as to why this document had made it not reasonably practicable to present his claim in time. The Claimant had put the Respondent on notice in the appeal document of the potential right to claim direct discrimination and that the dismissal was automatically unfair and contrary to Section 103A; even though these had been flagged up as potential claims, they were not pursued. The fact that these claims were referred to in the appeal corroborated the Claimant's knowledge and understanding of his right to pursue these claims but he chose not to do so.
22. The claim of direct race discrimination is out of time. No evidence was presented by the Claimant to suggest that it would be just and equitable to extend time in respect of this claim. I conclude therefore that the claim for race discrimination is out of time and is dismissed.
23. I also conclude that the claims of automatic unfair dismissal on the grounds of protected disclosure and dismissal for asserting statutory right are out of time and it was reasonably practicable for the Claimant to present the claim within three months of the effective date of termination. These claims had been within the contemplation of the Claimant at the time of dismissal being claims that were identified by him at the date of his

appeal, he chose not to pursue those claims, they are out of time and are dismissed.

24. The claims for ordinary unfair dismissal and breach of contract are potentially impacted by the discovery of the Disputed Document. I conclude however there was no evidence before the tribunal that this document had been deliberately concealed or had been withheld by an act of fraud or concealment.
25. There was no evidence to suggest that the Disputed Document was the product of collectively bargained negotiations with Unite or that this was a document of contractual status as I have found as a fact above, it was a works procedure. There was also no evidence to suggest that the procedure referred to in the Disputed Document was in force at the date of termination, the consistent case put forward by the Respondent was that this had been superseded by the D796 procedure. The Respondent also confirmed in the appeal outcome that there was no contractual document in force at the date of dismissal that regulated this procedure, this was consistent on the evidence before the Tribunal.
26. The evidence in the bundle confirmed that the rules for checking driving licences of employees changed in 2015 and this evidence is referred to above at paragraph 6. The Respondent explained the reason for the change in the process for checking licenses and also informed the Claimant that no contractual document was in force in relation to the procedure. The reason the Disputed Document was not provided during the dismissal process in response to repeated requests made by the Claimant and his representative was because this document had been superseded by the new procedure and was no longer in force
27. The Claimant was aware in 2016 of his right to claim unfair dismissal and breach of contract and of all the circumstances that led to his dismissal; he was also aware that it was alleged on his behalf that the Respondent had concealed or failed to disclose what was described as a 'contractual document' (see above at paragraph 3); he chose at the time, not pursue this claim. The Claimant confirmed that he was aware of his right to claim unfair dismissal and sought advice from the Citizens Advice and decided not to pursue it at the time because he did not have two-year service.
28. The Claimant produced no evidence to show how the contents of the Disputed Document was crucial or fundamental to his understanding of his right to claim for unfair dismissal and breach of contract and why he felt that this document now made the claim for unfair dismissal a viable claim when it was not so in 2016. There was no evidence before the Tribunal that the Claimant underwent a crucial or fundamental change of mind on being handed the Disputed Document. There was no evidence that he decided not to proceed with his claim in 2016 because the Respondent failed to disclose an alleged policy/contractual document relating to checking drivers' licenses or that subsequent possession of the Disputed Document provided evidence of a cause of action which he could not have previously been aware.

29. The Claimant's statement referred to his belief that his refusal to sign the D796 was 'reasonable' and his dismissal was unfair. This was an argument that he was able to advance at the time by presenting his claim to the Employment Tribunal after his dismissal in 2016, but he chose not to do so.
30. Having concluded that there was no evidence of fraud or concealment perpetrated by the Respondent and that the Claimant was in possession of all the facts relevant to his claims for unfair dismissal and breach of contract to pursue his claim before the Tribunal, I conclude that it was reasonably practicable for the Claimant to pursue these claims within the primary time period. The Claimant's claims are out of time and are dismissed.

Employment Judge Sage

23 November 2017