



EMPLOYMENT TRIBUNALS

Claimant
Mr. S. Amara

Respondent
The Co-operative Group Ltd

v

Heard at: Watford

On: 26 January 2018

Before: Employment Judge Heal

Appearances

For the Claimant: in person
For the Respondent: Ms. S. Bowen, counsel

JUDGMENT

The complaints of unfair dismissal, race and age discrimination are dismissed because the claims were presented out of time.

REASONS

1. Written reasons provided at the request of the claimant.
2. By a claim form presented on 4 October 2017 the claimant makes complaints of unfair dismissal, race and age discrimination. He has ticked the box for 'other payments' on his claim form but he confirmed this morning that this related to losses arising in consequence of his 'dismissal'.
3. The claimant told me that his working relationship with the respondent began on 14 August 2016 and ended on 19 August 2016. He contacted ACAS with a view to beginning early conciliation on 19 September 2017 and a certificate was issued on the same day. On that basis, the three-month period within which the claim should have been presented under the old regime and the claimant should have contacted ACAS under the new regime expired on 18 November 2016.
4. I do not have before me a preliminary hearing to strike out the complaint of unfair dismissal on the ground that the claimant does not have 2 years' qualifying service. Although it appears on the face of it that he does not bring

a complaint of automatically unfair dismissal I assume for the time being that there is an extant unfair dismissal claim before me. So I approach the question of whether the claim was presented in time applying both the test of reasonable practicability and test of whether the claim was presented within such period as was just and equitable.

5. I have heard evidence from the claimant, Mr Sylvester Amara, who was ordained as a Methodist priest in 1988.
6. The claimant did not have a witness statement (he had not been ordered to produce one, so this is not a criticism) and therefore I asked him questions about the timeline and why he had not brought his complaints to the tribunal earlier. Ms Bowen then cross-examined the claimant and he was given an opportunity for 're-examination' at the end.
7. The respondent has not called any evidence on this point.
8. I have had the benefit of 2 separate bundles of documents, one produced by the claimant and one by the respondent. I have also been referred to a separate Home Office code of practice for employers on avoiding unlawful discrimination while preventing illegal working dated May 2014.
9. I make the following findings of fact for the purposes of this hearing.
10. There is a dispute about whether the claimant was an employee or a worker at all. (I have not resolved that because of my findings about time). However characterised, the claimant's working relationship came to an end on 19 August 2016. The work stopped because the respondent perceived a problem with the papers needed to demonstrate the claimant's right to work. On 21 August 2016 the claimant's store manager stopped him and told him that he had sent the claimant's papers and that the relationship could continue once the respondent had heard from the Home Office.
11. So, from that point the claimant knew there was a problem with his work relationship, that it had ended, and that it would not start again unless the respondent received a positive outcome from the Home Office about the documents the claimant had produced.
12. The claimant waited for 2 months and, sometime towards the end of October, approached the store manager again. The manager told him that the papers he produced showed that he was not eligible to work. The claimant was very upset because he believed he was eligible to work and that the papers produced showed that.
13. The claimant is a member of the East Barnet Baptist Church. He had shared his difficulties with his church and they took the view that they should avoid taking people to court. This is why the claimant did not go down a legal route at this stage.

14. The claimant attempted therefore to resolve matters in an amicable fashion with the respondent. This produced no positive result and in or about early January 2017 the claimant sought the assistance of his Member of Parliament.
15. The MP told the claimant that she was not in the position to give legal advice but she did write a letter dated 10 January to the respondent on the claimant's behalf. The respondent accordingly investigated and communicated with the MP on the subject. I do not need to explore the detail of that correspondence at this stage.
16. Thereafter the claimant went to see the respondent to try to resolve the dispute as a community matter, together with a lady called Ellen. This attempt met with no success.
17. Subsequently the claimant went to see the respondent together with a lady called Janice. The claimant is not aware of the dates of these 2 meetings.
18. On the last occasion the claimant visited the respondent with a lady called Sheila and she took a careful note of meeting, which I have been shown. This meeting was dated 10 April 2017.
19. The claimant first went to a solicitor on about 20 or 25 April 2017.
20. He had in the meantime been visiting the CAB about unconnected matters.
21. The claimant suffered from 2 major bereavements at this stage in his life. His cousin, who was in Methodist ministry in Croydon, died on 11th May and his mother who had suffered from both malarial typhoid and Ebola died on 18 June. The claimant says that his memories are dreadful and that he found this period extremely stressful. Indeed, he became upset during the course of this hearing for reasons that are wholly understandable.
22. (It emerged that the claimant has suffered further traumatic bereavements since. He has lost his uncle and his three sons as well to a mudslide. He describes a catastrophic loss. He went to Sierra Leone on 22 November 2017 and has returned only in the last few days.)
23. In the circumstances it is perhaps unsurprising that he finds it difficult to put his memories in order. I have to do the best I can however on the information before me.
24. The Claimant began new employment on 30 May 2017.
25. The claimant's solicitors made a help with fees application online, apparently in about June 2017. Remission was refused however and an appeal was lodged on 16 June 2017. An appeal was refused by letter dated 18 July.
26. As is well known, on 26 July 2017 the Supreme Court decided that the fee system in the employment tribunals was unlawful and thereafter fees were no

longer required. The claimant's solicitors would (or should) certainly have known about this.

27. The claimant was unable to give an explanation for the delay between 26 July and his first contact with ACAS on 19 September.

Analysis

28. I deal with reasonable practicability first.

29. To start with, I have to identify the impediment which prevented the claimant from bringing his claim in time. He knew that his work had stopped, he knew the respondent had taken that action because of concern about the immigration documents he had produced, and he knew there was a real likelihood that unless that concern was resolved his working relationship with the respondent not going to re-start.

30. That there is evidence that the claimant's church took the view that one should avoid legal action, demonstrates that the possibility of legal action was at least one of which he was aware during this initial period. The reason he did not take legal action or start taking steps to find legal advice at this stage was because the approach of his church was against it. He therefore took the line of trying to resolve matters amicably. On one view that is laudable, however it does not amount to an impediment, or make it not reasonably practicable for the claimant to present his claim in time. Put another way, the claimant could have contacted ACAS and presented his claim to protect his position, while still pursuing friendly discussions with the respondent.

31. The claimant has shown that he can seek help from the CAB and from a solicitor when he takes the decision to do so and it appears to me that there was nothing except for the view taken by his church that stopped him from taking such legal advice and taking action.

32. Therefore, I do find that it was reasonably practicable for the claimant to present his complaint of unfair dismissal in time.

33. I turn therefore to the discrimination claims and the question of whether the claims were presented within such period as was just and equitable. This is a different legal test and one which gives me more leeway.

34. The discretion to grant an extension of time under the 'just and equitable' formula has been held to be as wide as that given to the civil courts by section 33 of the Limitation Act 1980 to determine whether to extend time in personal injury actions (*British Coal Corpn v Keeble* [1997] IRLR 336).

35. Under that section the court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular:

- (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 had co-operated with any requests for information;
- (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and
- (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action (see *British Coal Corporation v Keeble*, at para 8).

36. Without regarding them as a checklist, I find the principles in *British Coal Corporation v Keeble* a helpful guide in analysing this case.

37. The length of the delay is considerable: day A is nearly 10 months late.

38. The claimant has not said, and I have not found that the reason he did not approach ACAS during the initial period of 3 months, was because of lack of funds or any difficulty with fee remission.

39. The reason is, as I have already set out, a laudable one of avoiding litigation and seeking to resolve matters amicably. However, Parliament provides short time limits for discrimination claims for a reason. It intends parties to such claims to get on with matters within a short timescale. There is for example no rule that time will be extended for an employee who has been pursuing an internal appeal or grievance procedure. One may still attempt to resolve the matter amicably, or pursue an internal procedure, having contacted ACAS and/or presented a claim so as to protect the legal position.

40. I have heard little about the extent to which the cogency of the evidence is likely to be influenced by any delay. A large part of the evidence in this case will be based on the documents which the claimant provided and whether they give the respondent its statutory excuse. I doubt that such evidence will be greatly damaged by the delay. However, if it turns out that the respondent does not have a statutory excuse, it will nonetheless have to explain itself and to explain why, if it did, it treated or would have treated the claimant differently to the way treated other people in his position. A delay of 10 months is highly likely to have some damaging effect on the memories of those people having to give such an explanation. This likely damage after a very substantial delay appears to me to weigh the balance of hardship in favour of the respondent.

41. There is no suggestion that the respondent has not cooperated with a request for information by the claimant.

42. The claimant has unfortunately not acted promptly once he knew that his working relationship with the respondent had come to an end and he took some 8 months to instruct solicitors for the first time.

43. Although I have heard great deal of evidence about the claimant's bereavements - which have been distressing for him - and also about whether or not he had difficulty in paying tribunal fees, I do not consider that these are matters which prevented the claimant from presenting his claim within the primary limitation period. They may have slowed things down at the latter end of the period and I think inevitably must have done so, although I do note that the claimant was able to find work during this period. I suspect that their real effect has been one of slowing rather than preventing the claimant from presenting his claim. However, his claim was already substantially out of time before this stage and I do not consider that there was anything of this nature preventing him from pushing matters forward from August to November, and then November 2016 to April 2017.
44. For those reasons therefore, I find that the claims are out of time and I do not extend time on a just and equitable basis.

Employment Judge Heal

Date: 2 February 2018

Sent to the parties on: 13 February 2018

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For the Tribunal Office