Case No: 2301908/2017

Reserved judgment

THE EMPLOYMENT TRIBUNALS

Between:

Claimant: **Mr S Haskok**

Respondent: **Doosan Power Systems SA**

Hearing at London South on 22 January 2018 before Employment Judge Baron

Appearances

For Claimant: **The Claimant was present in person**

For Respondent: **Andrew Munro**

JUDGMENT AT A PRELIMINARY HEARING

It is the judgment of the Tribunal that the claim be dismissed.

REASONS

1 The Claimant was employed by the Respondent from 16 May 2014 until 7 February 2017. He presented a claim form to the Tribunal on 24 July 2017. In section 8 of the claim form he indicated that he was making a claim of unfair dismissal, for notice pay and also for discrimination based upon the protected characteristics of age and race. He also said as follows:

> I claim Equal Pay (backpay for salary and associated benefits during my whole employment period) since I was imposed to various forms of discrimination including but not limited to gross pay discrimination.

2 The Respondent is a company incorporated in Luxembourg. It is part of an international group based in South Korea. Although incorporated in Luxembourg the Respondent is based in Crawley, Sussex. The Claimant is a Turkish national, and was employed to work in Istanbul.

3 A response was presented on behalf of the Respondent on 23 August 2017. It dealt in with various factual allegations made by the Claimant in a separate document. In section 6 of the form the following issues were raised (and I paraphrase):

3.1 The facts as pleaded did not show any grounds to substantiate the allegations of discrimination;

3.2 That the pleadings did not relate in any relevant way to the equal pay protection;

3.3 The Tribunal did not have jurisdiction as the Claimant did not have a strong connection to the UK to enable him to bring proceedings in the UK;

3.4 The Claimant's contract provided that it was subject to Turkish law, and disputes were to be referred to the Turkish court; that the Claimant had issued proceedings in Turkey; that the UK proceedings should be dismissed as being the *forum non conveniens*;

3.5 That the claims had been presented out of time.

A judge ordered that there be this preliminary hearing to consider the above issues.

4 It was not in dispute that the Respondent carried on business within in the Tribunal's jurisdiction. It appeared to me that the point to be decided in connection with the third issue above was whether the Claimant had a sufficient connection with England and Wales for this Tribunal to have jurisdiction in respect of his claims.[1] That would have involved making findings of fact, and then applying the law to those facts. For reasons mentioned in the next paragraph the consideration of that point was not possible.

5 This hearing was listed to commence at 10 am. Unfortunately I was not able to start the hearing until about 10.45 because of having to hold another urgent hearing first. On Saturday 20 January 2016 the Claimant had sent to the Respondent and the Tribunal various emails containing 363 pages of documents. He also sent a document of 53 closely printed pages which the Claimant described as his witness statement. It was not a witness statement in the normal sense. It contained relatively few facts. It consisted principally of submissions on the law relating to various issues which the Claimant considered relevant to whether the Tribunal had jurisdiction. It made reference to various international treaties, conventions and regulations. There was an analysis of *Lawson v. Serco* and subsequent authorities. It was clearly not possible in the time available for the Tribunal properly to consider the mass of detail in the document to seek to understand exactly what the Claimant was saying, and for Mr Munro to respond adequately. Mr Munro said that he had received a copy of the document during the preceding week, that he had read it, and that he had found it to be dense. The document ended with the equivalent of one page relating to the time limit point. If the document had been provided to the Tribunal earlier then I would have had a chance to consider it and hopefully ascertain the points which the Claimant was seeking to make concerning the territorial aspect, and then discuss them with him.

6 I concluded that the appropriate course of proceeding would be to consider the time limitation issue on the assumption that there were no other bars to the Tribunal having jurisdiction, and that if I were to find in favour of the Claimant in any respect then a further hearing could be convened to

[1] The Tribunal would need to consider the series of cases following the decision of the House of Lords in *Lawson v. Serco Ltd* [2006] ICR 250

consider the territorial jurisdiction and similar points. I would then make case management orders to ensure that the issues to be decided were clarified, and steps taken to ensure that the relevant evidence was adduced to the Tribunal.

7 The Claimant seeks to bring claims under the Employment Rights Act 1996 and the Equality Act 2010. Let me deal with one point immediately. The Claimant argued that there was a six month time limit in respect of his claim for equal pay. The comparator the Claimant relies upon is Emre Dökmen, who is also male. The Claimant cannot therefore avail himself of the provisions of Chapter 3 in Part 5 of the Equality Act 2010 which provides for equality of terms between men and women.[2] The claims which he is seeking to bring are all subject to a three month time limit, extended by virtue of the ACAS early conciliation process. The relevant statutory provisions are as follows:

Employment Rights Act 1996

97 Effective date of termination

(1) Subject to the following provisions of this section, in this Part "the effective date of termination"--

(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and

(c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect.

111 Complaints to employment tribunal

(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 subsection (3), 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.

This is subject to the provisions of section 207B:

207B Extension of time limits to facilitate conciliation before institution of proceedings

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

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

[2] See section 64(1)

(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 a 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 a time limit set by 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 limit expires instead at the end of that period.

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

Equality Act 2010

123 Time limits

(1) 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) – (3) . . . .

(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 it, 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.

Section 140B of the 2010 Act contains provisions identical in all material respects to the provisions of section 207B of the 1996 Act.

8 I find the following facts as being material to the issues arising from those provisions.

9 The Claimant’s employment was terminated on 7 February 2017. He was entitled under either or both of his contract and Turkish law to payments on termination. The Claimant told me that he had to issue proceedings in a Turkish court in order to obtain payment, but that does not appear to me to be particularly relevant by itself.

10 The Claimant carried out research on the internet as to UK law and procedure. He discovered the existence of the Tribunal, and that before a claim could be issued he had to contact ACAS under the early conciliation procedure. The Claimant had also by the end of April or in early May 2017 learned about the applicable time limits. He notified ACAS of his intention to issue a claim on 5 May 2017 and the early conciliation certificate was issued on 13 June 2017. The claim form ET1 was presented to the Tribunal on 24 July 2017.

11 The Claimant stated that there was a time limit of 30 days in Turkey (which I accept) and that he was busy dealing with his money claims against the Respondent. The other reason he gave for not having issuing proceedings in the Tribunal earlier is that he calculated the time limit as beginning to run from the date that his 42 notice period would have expired if he had been dismissed with notice.

12 The first question to be decided is whether in fact the claims were presented out of time. I have no doubt that that is the case. I will deal first

of all with the unfair dismissal claim. Time runs under section 111 from the 'effective date of termination'. Section 97 of the 1996 Act defines that term. The applicable provision is in section 97(1)(b). The Claimant was dismissed without notice, and therefore time runs from 7 February 2017. I reject the Claimant's submission that time runs from 42 days after the actual dismissal.

13 Absent section 207B, the time limit would have expired on 6 May 2017. The Claimant presented his claim on 5 May 2017, and so gains the benefit of an extension under section 207B. The ACAS early conciliation procedure was commenced on 5 May 2017 (Day A) and the certificate was issued on 13 June 2017 (Day B). The period between Day A and Day B was one month and nine days. Adding that period on to 6 May 2017 in accordance with subsection (4) creates a limitation date of 15 June 2017. Subsection (5) provides in the alternative for an extension of one month from Day B, and that provision applies here. Thus the limitation date becomes 13 July 2017. Neither of the provisions assists the Claimant as the claim form was presented on 24 July 2017. It was therefore presented out of time.

14 The next point to consider is whether time is to be extended in respect of the unfair dismissal claim made under the Employment Rights Act 1996. Time is potentially to be extended where it was not reasonably practicable for the claim to have been presented in time. That is a question of fact. I find that it was reasonably practicable for the claim to have been presented in time, and that the Tribunal does not have the jurisdiction to consider the claim of unfair dismissal.

15 Although it is not possible to find out exact dates it is obvious that by 5 May 2017 the Claimant had found out about the jurisdiction of the Tribunal and the need to enter into the early conciliation process. He was also aware of the time limit and he had made a calculation, although he had based it upon the wrong date for time to start running. No valid reason was given as to why the claim could not have been presented within one month of the early conciliation certificate having been issued. It was an error by the Claimant. That is not sufficient.

16 The Claimant also said that he made contact with a lawyer in the UK who would not accept instructions as the Claimant was abroad. I do not accept that the Claimant was not able to obtain advice. I am sure he would have been able to do so if he had tried further, although no doubt he would have been required to make a payment on account of fees to be incurred. It is obvious from the lengthy and detailed document that the Claimant has produced that he is quite capable of undertaking detailed research and/or obtaining advice and assistance. I did not enquire whether the Claimant was the sole author of the document, but that matters not.

17 I turn to the claims of discrimination. It was clarified that the claim of race discrimination relates to an issue of unpaid expenses going back to 18 July 2015. The Claimant said in his details of claim that he claimed petrol expenses through the Respondent's online expense system and it was rejected. He was informed that the allowance only applied to UK

employees. The expenses were only paid, he says, when he took the Respondent to the Turkish court in early 2017.

18 The claim of age discrimination relates to the pay and benefits package for Mr Dökmen who was employed in September 2014, which is after the Claimant became employed. Mr Dökmen is 6 or 7 years younger than the Claimant. He was employed on S4 grade and the Claimant was employed on D grade. Mr Dökmen's grade was more senior to that of the Claimant and from December 2016 the Claimant reported to him. The allegation by the Claimant is that Mr Dökmen was being paid in all nearly three times as much as he was. I am not making any specific finding of fact, but it is not disputed that Mr Dökmen's remuneration package was more beneficial than that of the Claimant. The Claimant says that 'basically we were doing the very same job'.

19 I will assume for the moment (without making any such finding) that the Claimant and Mr Dökmen were doing the same job. It is agreed that there is a difference in age, although it is only a few years. Those two facts by themselves are insufficient to enable a Tribunal that there had been unlawful discrimination. The Claimant was unable to provide me with any additional evidence from which the Tribunal could reasonably conclude that the difference in the remuneration packages was due to the small difference in age.

20 The statutory provision that time may be extended where it is just and equitable to do so provides the Tribunal with a wide discretion, but one that must be exercised judicially taking relevant factors into account, and ignoring factors which are not relevant. The background to any decision is that there is a statutory time limit, and it is the Claimant to show that it is just and equitable to extend that limit. I will deal with each of the two claims in turn.

21 The claim of race discrimination goes back to July 2015. That can be dealt with easily. The obvious point is that the Claimant says that the expenses in question were paid following the issuing of proceedings in Turkey. There is therefore no monetary loss. Apart from a declaration, any remedy would be for injury to feelings. That would be a very modest amount in the circumstances. It is in my judgment clearly not just and equitable to extend the time for some two years.

22 The other claim is for age discrimination. The question arises as to when date of the alleged discrimination occurred and so the cause of action arose. In my view the date was September 2014 when Mr Dökmen was first employed. This was a one-off act, being a decision to employ Mr Dökmen on terms more favourable than those of the Claimant, albeit that that decision had continuing consequences.[3] There was no evidence that the Respondent had any general practice of remunerating employees aged 39 or 40 better than ones aged 46. The claim is therefore very substantially out of time.

[3] See *Sougrin v. Haringey Health Authority* [1992] ICR 650 CA

23 I am not persuaded that there was any good reason for the delay during the Claimant's employment, nor indeed thereafter. The Claimant did not seek to justify not issuing proceedings during his employment. The Claimant said he was involved in the issuing of proceedings in Turkey after his employment ended, which had to be done within 30 days. By then of course the time limit had long since expired. Even if time were to run from the end of the employment, the Turkish proceedings do not justify a breach of the much more generous time limit in this jurisdiction. Another reason the Claimant gave for not presenting the claim earlier following the end of the employment was that he was concerned that there may have been adverse consequences resulting from doing so as he was then involved in proceedings in Turkey. He did not specify what those consequences might have been, and I give no weight to that point.

24 A critical factor to be considered is the relative prejudice to the parties, and in particular whether by an application of the time limit the Claimant would be deprived of obtaining redress for a wrong, and the Respondent have a windfall in not having to defend the claim. The apparent merits of the claim are therefore relevant.

25 From what I heard this claim has no reasonable prospect of success. The Claimant was unable to point to anything which could enable a Tribunal reasonably to conclude that the difference in the remuneration packages between the Claimant and Mr Dökmen had anything to do with the difference in age. If the claim had been within time then clearly the Tribunal would have given consideration to an order striking it out on the basis that it had no reasonable prospect of success.[4] In those circumstances it would be to the undue prejudice of the Respondent if this matter were allowed to proceed and a further hearing held to consider the question of territorial jurisdiction.

26 I therefore conclude that the Tribunal does not have any jurisdiction in respect of any of the claims, and they are dismissed.

Employment Judge Baron

26 January 2018

[4] See for example *ABN Amro Management Services Ltd v. Hogben* UKEAT/0266/09