Case No: 2301498/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr. D. Barnett

Respondent: Lewisham Homes Limited

Heard at: London South, Croydon
On: 17 August 2018 and on the 22 October 2018 on reconsideration

Before: Employment Judge Sage
Representation

Claimant: Mr McKenzie Evelyn 109

Respondent: Ms. N. Cobner-Vale Solicitor

RECONSIDERED JUDGMENT

The Claimant's claim is struck out on the grounds that it is no longer possible to have a fair hearing.

RECONSIDERED REASONS

1. The Claimant presented a claim for unfair dismissal on the 7 December 2015, this was evidenced by a stamp showing "CPF E&W" which was the stamp used by the Leicester Office. The EDT was the 31 July 2015. It was not disputed that the Claimant did not proceed with his claim in 2015 as he was unable to afford the issue fee. The ET1 was not served on the Respondent at the time.

2. The Tribunal did not have a copy of the ACAS certificate, but the claim form made reference to a certificate number. The Tribunal had no way of knowing whether the claim was in time or out of time, the statutory three month time limit would have expired on the 30 October 2015 and would only have been extended if he had entered into conciliation before the time limit expired. Without the ACAS certificate it was impossible to determine when conciliation began and the length of the conciliation period.

3. Following the decision of Unison v Lord Chancellor on the 26 July 2017 [2017] UKSC 51 which determined that the fee system was void ab initio the Claimant was contacted by HMCTS before the 19 December 2017 asking if he wished to have his claim reinstated, he indicated that he wished to do so (the Tribunal noted that the letter referred to below at paragraph 5 dated the 19 December 2017 referred to an earlier letter which was not before the Tribunal). The Claimant confirmed in cross examination that he was aware of the Unison decision at the time and of how important it was and described it as a 'policy thing' and accepted it was 'Headline news'. Despite the Claimant confirming that he was aware of the decision and how important it was, he was vague as to what action he took after the decision was published to find out his rights or to seek advice as to what he should do to have his case reinstated. The tribunal conclude that the Claimant appeared to take no proactive steps to find out his rights and what he should do to pursue his claim after the 26 July 2017.

4. As HMCTS could no longer trace the Claimant's original ET1 or the ACAS certificate, they wrote to the Claimant again on the 19 December 2017 asking him to provide "a new claim form containing the information which formed the basis of your original claim". They confirmed that without this information they would be unable to proceed.

5. Even though the Claimant received this letter around the 19 December 2017 he could not explain why he failed to return the form until the 14 March 2018. He told the Tribunal that he telephoned Evelyn 109, his legal representative, to make an appointment but he could not recall when this was or who he spoke to. The Claimant could not recall whose fault it was that it took so long to pursue his right to have his claim reinstated. The Claimant then stated that he took the letter to Evelyn 109 and it was some time before he heard anything; he was told a person was on holiday. The Claimant denied that he was the person who caused the delay. The tribunal find as a fact that the Claimant delayed for more than three months before presenting the forms for presentation, he could not explain to the Tribunal why this was. This was a further significant delay.

6. The Claimant was asked in cross examination if he had retained a copy of the original ET1 and his evidence on this point was not entirely clear, he seemed to say that he took the letters to Mr McKenzie but his evidence as to whether he had a copy of his original ET1 was vague. The Claimant candidly accepted that when he attended an appointment with Mr McKenzie he was asked "why he left it so long?" but unfortunately the Claimant did not say what he said in reply to explain the reason for the delay. The comment made by Mr McKenzie appeared to suggest that he was concerned about the Claimant's significant delay in pursuing this matter.

7. The documents were sent to HMCTS and the Respondent saw the claim form for the first time on the 26 April 2018, nearly three years after the date of termination. The Respondent contends that the claim has been presented out of time and that it is no longer possible to have a fair hearing.

8. Mr Smallwood gave evidence to the Tribunal for the Respondent. It was his evidence that it was no longer possible to have a fair hearing because the investigations manager had since left the company and the Respondent no longer had his details. The Respondent states that in the absence of the investigations manager Mr Hart, they are at a disadvantage as the Claimant complains about the sufficiency of the investigation in his claim. It is stated that the Respondent will be unable to defend this part of the claim.

9. Mr Smallwood told the Tribunal that as HR he attended the dismissal and appeal hearings but had no specific recollection of what happened and would have to rely on the minutes taken. Mr Smallwood has enquired of the dismissal manager Mr Tutt and the appeals manager Ms Mills as to their recollection of the hearings they conducted, and he reported that they had no recollection of the hearings and would be unable to recall any specific details of the case. All would have to rely on the notes taken.

10. In cross examination Mr Smallwood confirmed that he gave advice to the dismissal and appeals managers about the correct procedure to follow but could not recall the advice that was given at the time.

11. The tribunal find as a fact that the consistent evidence before the Tribunal showed that the Respondent was at a considerable disadvantage as they would be unable, due to the passage of time, to recall the specific facts of the case. They are particularly vulnerable in respect of the investigation which was one of the Claimant's specific grounds of appeal. As the investigations manager cannot be traced, the Respondent will be unable to respond to any claim that the investigation was inadequate. It was noted that the HR manager also had no clear recollection of the events and neither did the hearing or appeals manager.

12. There was little challenge to Mr Smallwood's evidence in cross examination.

13. It was also noted that the Claimant appeared to have little or no recollection of details surrounding his contact with his representative a few months before this hearing. This is inevitable with the passage of time. The tribunal noted that if it was difficult for the Claimant to recall what steps he took to contact his legal representative 6 months earlier, it would be considerably more difficult for the Respondent to defend itself in respect of a disciplinary process that took place in early 2015.

The Respondent's submissions

14. These were oral and in writing and also included the further submissions in their letter dated the 30 August 2018.

15. The Respondent submits that it is no longer possible to have a fair hearing as the delay places them at a significant disadvantage. The investigations manager has left the Respondent's employment; he is pivotal to some of the issues in the Claimant's case. The Respondent gave the example of the Claimant's complaint about the classification of his actions as gross misconduct and he challenges the decision not to

take disciplinary action against his colleague. The Claimant also complained in the appeal of the poor investigation carried out. The Respondent suggests that as Mr Hart, the Investigations Manager was no longer with the Respondent they would be unable to defend this part of the claim. The Respondent also had concerns that the managers who dealt with the hearing and appeal would be unable to recall the facts of the case. The tribunal heard the evidence from Mr Smallwood of HR who confirmed that having spoken to the managers they will both have to rely on their notes of the hearing; this will place the Respondent at a significant disadvantage.

16. The Respondent has submitted at paragraph 34 that the Claimant appeared in his statement to be pursuing new allegations (referred to in paragraph 30 of the Respondent's submissions) that were not referred to in the hearing and appeal. The Respondent submitted that this will place them at a significant disadvantage as they will be unable to effectively defend the claims as those who will give evidence will have to rely on their notes, the Claimant appears to have a better recollection of the events, being able to make new allegations. The Respondent state that they are prejudiced as a result.

17. The Respondent submits that the prejudice caused to them by the delay such that it is no longer possible to have a fair hearing. The Respondent asks for a strike out as the only proportionate approach to adopt and cites the cases of Blockbuster Entertainment v James [2006] EWCA Civ 684 and Abegaze v The Shrewsbury College of Arts and Technology [2009] EWCA Civ 96 which confirmed that a strike out must only be utilized if no other lesser sanctions are appropriate. They submit that the prejudice suffered by the Respondent means that a strike out is proportionate.

The Claimant's submissions

18. These were oral and in outline he stated that the claim form was presented in a further reasonable time. He referred to the letter dated the 19 December 2017 indicting that this was probably received around the 21 December 2017. He stated that the Evelyn 190 Centre was closed around Christmas time and would reopen around the 2-3 January 2018. It is possible that the Claimant may have seen someone around mid-January but it is not easy to get an appointment. We then turn to the form; the Claimant was told in this letter that the claim form had to be sent with the letter to reinstate his claim. The new claim form was similar to the old one.

19. It is not unreasonable if the claim form requested on the 19 December is then sent on the 15 March 2018, that would be within the 3-month time limit. We say the normal three-month time limit had not elapsed and the form is in time.

20. You heard some evidence from Mr Smallwood who advised the hearing and appeals managers, as far as we are aware, there is only one person who was involved is not here. Mr Smallwood who provided guidance is here. All he has to do is to look at it to refresh his memory. I cannot see the Respondent's case being prejudiced due to the passage of time. Memories do fade but they are still aware of the circumstances. The

Claimant says the Respondent has failed to show consistency in the way he was treated. We say he has a right to have the matter heard by a Tribunal.

The Decision

21. It was impossible to determine if the claim from was presented in time when it was originally presented in December 2015. The ACAS form has been lost and this was not the fault of the Claimant, it was unfortunate that the Claimant and his representative had not kept a copy. The claim form was reinstated as a result of an administrative process and there was insufficient evidence to suggest that in 2015 the claim was out of time.

22. Although the Respondent has submitted in their further submissions in their letter dated the 30 August 2018 that the ordinary time limit would have expired on the 30 October 2015 and in support they said that they had no record of having been contacted by ACAS at this time. The Respondent questioned whether the claim form was presented in time in 2015. Although the Respondent has questioned whether the claim form was in time, this matter could not be resolved. This was due to the passage of time and the highly unsatisfactory situation of the original documents presented in December 2015 no longer being available. As there was insufficient evidence to consider the matter, I have erred on the side of caution and concluded from the limited evidence before me that the claim was presented in time.

23. There was a subsequent reinstatement of the original claim (dated the 7 December 2015) by the administration. By the time the Respondent was served with the papers, it had been nearly three years since the effective date of termination.

24. I have to ask whether it is possible to have a fair hearing, in the light of the passage of time and taking into account that the investigations manager no longer works for the Respondent and the hearing and appeals managers have no recollection of the Claimant's case. I have considered the overriding objective and the European Convention on Human Rights at Article 6 which requires that "everyone is entitled to a fair and public hearing within a reasonable time…". The Respondent submits that the significant delay has resulted in significant prejudice to them with the result that there can no longer be a fair hearing in this case. The Claimant's case is that he has a right for his claim to be heard.

25. Having considered all the evidence I conclude that the Respondent will be prejudiced, they will be unable to defend the accusations against them and will be unable to effectively respond to the complaints pursued by the Claimant in respect of the investigation and the failure to pursue similar disciplinary actions against others. The right to a hearing is not an unfettered one, the right is to a fair hearing is one that take place within a reasonable time. A fair hearing must be viewed from both side in any case. Delay causes memories to fade and adversely impacts the quality of evidence. I have referred above to the Claimant being unsure of when he contacted his representative in December 2017 and when he attended an appointment to discuss the reinstatement of his claim; he was unable to

recall with clarity any of the times and dates. The Respondent have a greater uphill task of attempting to piece together details of events that occurred over three years ago. The difficulty of this task is further compounded by the fact that one of their key witnesses no longer works for the Respondent. This causes further prejudice to the Respondent.

26. Even when the Claimant was contacted by HMCTS (and it is concluded that this was sometime before the 19 December 2017) the Claimant failed to take prompt action to reinstate his claim. He could not explain when he contacted Evelyn 109, even if Christmas holidays intervened, he could not explain why it then took him until the 15 March 2018 to present the papers to HMCTS. The consistent evidence before the Tribunal was that the Claimant took a further three months to provide the evidence for the reinstatement of his claim thus resulting in further prejudice to the Respondent. The Claimant could provide no explanation for his delay.

27. Although in closing submissions for the Claimant Mr McKenzie said that he presented his claim with 3 months, this was a further delay of three months. The primary time limit for presentation of the claim expired on the 31 October 2015 and the tribunal have concluded that the claim was presented in time. The Claimant does not however get a second bite of the cherry, to take a further three months before he takes any action to reinstate his claim. The Claimant's conduct resulted in further and entirely avoidable delay which has prejudiced the Respondent with the result that there can no longer be a fair hearing.

28. Although the Claimant was not responsible for the delay caused up to and including the delivery of the Union decision as until that date he was prevented from pursuing his claim. However, the Claimant's clear evidence to the tribunal was that he was aware of this decision saying it was headline news. Even though he was aware of the decision, he could provide no evidence that he sought advice and assistance from his legal representatives reasonably expeditiously.

29. I conclude from all the evidence that it is no longer possible to have a fair hearing in this case. I then considered whether it would be possible to identify a less draconian approach rather than a strike out and I conclude that there is no other possible approach that would ensure that a fair hearing could be achieved for both parties.

30. The Claimant's claim is therefore struck out.

Employment Judge **Sage**

Date: 23 October 2018