



EMPLOYMENT TRIBUNALS

Claimant: Mr R Pora

Respondent: Cape Industrial Services Ltd

HELD AT: Manchester

ON: 16 July 2018

BEFORE: Employment Judge Slater

REPRESENTATION:

Claimant: In person

Respondent: Mr Warren-Jones, solicitor

JUDGMENT

1. The tribunal does not have jurisdiction to consider the complaint of unfair dismissal which was presented out of time so this complaint is dismissed.
2. The tribunal does not have jurisdiction to consider the complaints of race discrimination in relation to matters up to and including 2 June 2016 and these complaints are dismissed.
3. The issue of whether the tribunal has jurisdiction, having regard to time limits, to consider the complaint of race discrimination in relation to the claimant's dismissal will be considered at a final hearing.
4. The claimant is given leave to amend his claim to include a complaint of discrimination arising from disability in relation to his dismissal, subject to the tribunal considering at the final hearing whether it has jurisdiction to consider this complaint, having regard to time limits.
5. There shall be a private preliminary hearing on a date to be notified in a separate notice of hearing before an employment judge, with a time estimate of 3 hours, for the purpose of fully clarifying the issues, making case management orders and listing the case for a final hearing or, if the judge considers this appropriate,

some other type of preliminary hearing. The judge may, if they consider this appropriate, consider at that preliminary hearing whether any of the claimant's claims should be struck out as having no reasonable prospect of success or order the claimant to pay a deposit, not exceeding £1000, as a condition of continuing to advance any allegation or argument.

REASONS

1. This was a preliminary hearing to determine whether the tribunal had jurisdiction to consider the claimant's complaints of race discrimination and unfair dismissal, having regard to the relevant time limits. In the course of clarification of the complaints, the claimant informed me that he wished to bring a complaint of disability discrimination about his dismissal. I treated this as an application to amend the claim and said I would consider this at the same time as considering the time limit issues. There was insufficient time for me to make and deliver a decision on these matters in the time allocated to the preliminary hearing so I reserved my decision. I, therefore, give my reasons for my decision in writing.

2. I heard evidence from the claimant. He spoke in Polish throughout the hearing and interpretation was provided by Ms E Stadnik. The claimant had prepared a witness statement in English with the assistance of his wife who he tells me speaks good English. Both parties provided documents which I read.

The complaints in respect of which the claimant wishes the tribunal to provide a remedy

3. I clarified with Mr Pora the complaints which he wishes to pursue to a sufficient extent for the purposes of this preliminary hearing, but said that, if the claims were allowed to proceed, further clarification would be required.

4. I did not discuss with Mr Pora the correct legal labels to be attached to his complaints of race discrimination but it appears likely to me that these are complaints of direct race discrimination and harassment. He complains of race discrimination in relation to the following matters:

5. Comments from co-workers and his manager, Steve, relating to the claimant being Polish. The claimant said these were made over a period of more than one and a half years, with the last incident being at the end of May 2016.

6. Being required to work longer hours than his co-workers (the claimant says their working times on the schedules were the same but, in practice, other employees were allowed to start later and finish earlier than the claimant). This continued until his last working day – 2 June 2016 – the day he had an accident at work.

7. Being given worse jobs. This continued until his last working day – 2 June 2016.

8. Being dismissed. The effective date of termination was agreed to be 12 May 2017.

9. The claimant wishes to pursue a complaint of disability discrimination in relation to his dismissal. It appears that this would be a complaint of discrimination arising from disability; the claimant arguing that he was dismissed because he was off sick and did not feel able to return to his old job and the reason he could not return to his old job was because of his mental health. The disability relied upon would be a mental impairment, being depression and mental health problems.

10. The claimant also claims unfair dismissal. He was dismissed with effect from 12 May 2017 after he had been off sick for nearly a year, following an accident at work on 2 June 2016. The respondent says he was dismissed by reason of capability, there being no prospect of him returning to his job within the foreseeable future.

Facts

11. The claimant worked for the respondent as an industrial cleaner operative from February 2014 until his dismissal on 12 May 2017.

12. The claimant had an accident at work on 2 June 2017 when he suffered an injury to his arm. He was off work sick from this date until his dismissal. It appears that, at some point, the sickness absence became attributable to anxiety and depression rather than the physical injury. An occupational health report of 8 November 2016 noted that he was signed off work with neurotic depression and was taking anti-depressants. At that time, the view of the Occupational Health Physician was that the prospects of the claimant returning to work in the foreseeable future (3 months) were negligible.

13. The claimant claims that he was the subject of derogatory comments from co-workers and his manager related to being Polish until the end of May 2016. The claimant raised a grievance about this and other matters in a letter to the respondent dated 6 April 2017, in which the claimant also sought compensation for his injury at work. The claimant uses the words “discrimination” and “racism” in the letter. The claimant ended with a statement that he would go to “Civil Court (according to Bullying and Discrimination at work and Protection from Harassment Act 1997)” if there was no resolution to his complaint. I did not hear evidence from the claimant as to what, if any, assistance he had to write this letter.

14. The claimant had a meeting with the respondent on 14 March 2017. It appears to be agreed that, at that meeting, the claimant said he could not return to the same job but asked if he could return to work in a different job. The respondent said this was not possible. There is a dispute as to whether the claimant, who was accompanied by his wife at the meeting, agreed that the most appropriate action was for the company to terminate his employment on the grounds of ill health.

15. By a letter dated 3 May 2017, the respondent terminated the claimant’s employment with effect from 12 May 2017. In that letter, Mr Casey, the respondent’s Senior Operations Manager wrote, in relation to the allegations of discrimination on the grounds of racism:

16. "I find no evidence to substantiate your claims. Given the amount of time that has lapsed since the alleged incidents took place, I find I am unable to investigate the matter further including speaking with the named individuals as they are no longer employed by the Company. Additionally, during the meeting on 14th March, we clarified that the management team you refer to within your grievance, who were based on the Cargills Brocklebank site at the time of your accident are also no longer working on that site."

17. Mr Casey offered to meet with the claimant if he wished to discuss the allegations of race discrimination further.

18. The claimant appealed against his dismissal. I did not hear any evidence that the claimant took the allegations of discrimination any further by internal company processes.

19. The claimant did not present a claim to the employment tribunal until 23 March 2018. He approached ACAS under the early conciliation procedure on 22 March 2018 and the certificate was issued the same day.

20. The evidence about who the claimant sought advice from after his dismissal was difficult to follow because the claimant appeared to believe that a "Peter" who he saw at Merseyside Employment Law was the same person as a "Peter Monteith", an employee of Peninsula Business Services, who sent the claimant an email on 24 August 2017 inviting the claimant to a "Peninsula HR Briefing for local Business Owners" at a hotel in Liverpool on 8 September 2017 which the claimant attended. The claimant did not see "Peter" at this event, which he attended, apparently believing it has some relationship to the claim which he understood "Peter" and others at Merseyside Employment Law to be dealing with on his behalf. It was unclear to me why the claimant would have been invited by Peninsula to an HR Briefing for local business owners. It appears unlikely to me that the person inviting the claimant to a Peninsula HR briefing was the same person the claimant had seen at Merseyside Employment Law.

21. I considered whether the claimant might have confused taking advice from Peninsula with going to Merseyside Employment Law, but it appears to me more likely from such limited documentation as I have seen and from the claimant's evidence, that the claimant did go to Merseyside Employment Law and saw a "Peter" initially, but this "Peter" was not the same person as "Peter Monteith" who invited him to a Peninsula event.

22. I find that, on 16 May 2017, the claimant went to Citizens Advice North Liverpool. They referred him to "Merseyside Law Centre", giving him the telephone number for this organisation, which is known as Merseyside Employment Law. The claimant phoned Merseyside Employment Law and was given an appointment which he attended on 19 or 20 May 2017. The claimant saw someone called "Peter" and filled in some forms. The claimant understood that Merseyside Employment Law were going to take his case forward. The claimant visited the offices of Merseyside Employment Law a number of times over the next few months and was assured that everything was up to date. The claimant was not given anything in writing from Merseyside Employment Law at this time. In February 2019, the claimant went to

Merseyside Employment Law and saw a different person, Melanie, who told the claimant that Peter had left. The claimant's evidence is that Melanie told him that Merseyside Employment Law could not do anything for him. It is not necessary for me to make findings about what else Melanie said to the claimant and I do not do so. The claimant says he complained to Merseyside Employment Law. The claimant was told that no claim for unfair dismissal had been presented to the tribunal and that it was now too late to make a claim. On 6 March 2018 the claimant wrote a letter of complaint to the Legal Ombudsman about Merseyside Employment Law.

23. The claimant went in March to Justyna McMahon, who works for Polish Community UK, dealing with vulnerable clients whenever they meet language barriers. The claimant was told about Justyna McMahon by friends. She wrote on the claimant's behalf to Merseyside Employment Law on 15 March 2018 and helped the claimant complete the claim to the employment tribunal.

24. The claimant's GP certified the claimant as unfit for work due to neurotic depression reactive type from 19 May 2017 to 19 June 2017. I have not seen any medical evidence relating to the claimant's condition after 19 June 2017.

25. The claimant did not, until this preliminary hearing, say that he wished to bring a complaint of disability discrimination, although his claim form referred to him suffering from depression and PTSD and that his employment had been terminated on grounds of ill health whilst he was on sick leave.

26. The claimant says he did not bring complaints about the race discrimination up to 2 June 2016 at an earlier stage because he was afraid and was concerned about keeping his job.

The Law on Time Limits

27. In relation to the complaint of unfair dismissal, the test is whether it was reasonably practicable to present the claim in time, and, if not, whether the claim was presented within a reasonable time thereafter.

28. In relation to the discrimination claims, the test is whether it is just and equitable to consider them if presented outside the normal time limit. The Tribunal must consider whether it was just and equitable to consider the complaint out of time having regard to all the relevant circumstances, taking a multifactorial approach in which no single factor is determinative.

29. The initial time limit for the unfair dismissal complaint is three months beginning with the effective date of termination. The initial time limit for the complaints under the Equality Act 2010 is 3 months starting with the date of the act of discrimination. The effect of the early conciliation procedure is that, if the notification to ACAS is made within the initial time limit period, the time is extended by the period of conciliation.

The Law on Amendment Applications

30. An employment tribunal has the discretion in any case to allow an amendment which introduces a new claim out of time. The test which was established in the

case of *Cocking v Sandhurst (Stationers) Limited* [1974] ICR 650 and revisited in *Selkent Bus Company Limited v Moore* [1996] ICR 836 was that the employment tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The relevant circumstances were said to include: the nature of the amendment, for example, whether it is a relabelling of facts already pleaded or the making of new factual allegations changing the basis of the existing claim; whether it is a minor matter or a substantial alteration pleading a new course of action. Another relevant factor is the applicability of time limits. If it is a new complaint, is that complaint out of time and, if so, should the time limit be extended under the applicable statutory provisions? A further relevant factor is the timing and manner of the application. This list is not exhaustive.

Time limit issue for unfair dismissal complaint

31. The time limit for presenting a claim expired on 11 August 2017 (there is no extension because of the effects of early conciliation since the claimant did not contact ACAS within the primary time limit). The claimant did not present his claim until 23 March 2018 i.e. more than 7 months late.

32. The claimant placed his claim in the hands of Merseyside Employment Law, which provides skilled advice in matters including unfair dismissal and discrimination claims. He relied on them to present his claim for him and he understood that they were assuring him that all was in hand. The claimant sought their advice well within the time limit for bringing a complaint of unfair dismissal. He was not prevented from seeking advice by his illness. If he had not relied on their advice, I consider he could have taken other steps which would have resulted in him presenting his claim on time. For example, he may have sought out the help of Justyna McMahon at an earlier stage.

33. I conclude that it was reasonably practicable for the claimant to present his complaint of unfair dismissal within the relevant time period. The tribunal, therefore, does not have jurisdiction to consider the complaint of unfair dismissal.

Time limit issue for race discrimination complaints

34. The last act complained of is the dismissal which took effect on 12 May 2017. The claim was presented on 23 March 2018. The claim was presented more than 7 months out of time in relation to last alleged act of discrimination. Unless the earlier complaints, which relate to matters up to and including 2 June 2016, form part of a continuing act of discrimination with the dismissal, the complaints in relation to the earlier complaints are about 19 months out of time.

35. I do not consider there is any reasonable prospect of the earlier matters complained of forming part of a continuing act of discrimination with the dismissal. There was a very substantial gap in time between the earlier matters and the dismissal. The earlier acts complained of are of a very different nature from the act of dismissal. The persons involved in the earlier acts are different from the people involved in the decision to dismiss.

36. The claimant was aware, by, at the latest, 6 April 2017 when he wrote his grievance letter, that he could potentially make a complaint of race discrimination about things that had happened at work. He did not present his claim until 23 March 2018. The claimant's reliance on Merseyside Employment Law may explain why he did not present a claim himself for some months from May 2017 but does not explain why action was not taken within the relevant time limits. The claimant says he was afraid and was concerned about keeping his job. This is a factor to weigh in the balance of whether it is just and equitable to allow the complaints to proceed out of time. Against that, I need to weigh other factors, including the possibility of a fair trial on these issues after the lapse of time and the possibility lack of available witnesses. The fact that relevant people have left the respondent does not mean it is impossible for the respondent to call relevant witnesses but it makes it more difficult. The lapse of time since events prior to June 2016 makes it more difficult for witnesses to recall, with any accuracy, events so long ago.

37. I conclude that, in relation to the matters complained of up to and including 2 June 2016, it is not just and equitable to consider these complaints out of time.

38. In relation to the dismissal, the same practical objections do not apply to the same extent. Relevant witnesses are still available. The respondent will be in a position to explain why they dismissed the claimant. I consider it appropriate that the question of whether it is just and equitable to consider the complaint of race discrimination in relation to the claimant's dismissal out of time should be dealt with at the final hearing by the tribunal who will have heard all relevant evidence.

The amendment application, including time limit issues relating to the disability discrimination claim

39. The complaint is presented out of time. The complaint, if added to the claim, would be treated as made at the date of the amendment application, which is the day of this preliminary hearing i.e. 16 July 2018. This is even further out of time than the complaint of race discrimination in relation to the dismissal.

40. The claimant did not identify in his claim form that he wished to bring a complaint of disability discrimination. However, he did refer to facts which could form the basis of a complaint of discrimination arising from disability: that he was suffering from depression and PTSD and was "too scared to get back to work yet"; that he was dismissed on grounds of ill health whilst he was on sick leave.

41. The respondent will be able to explain its decision to dismiss the claimant. The respondent is already facing a complaint of race discrimination in relation to the dismissal. Whilst the respondent will be required to address more issues if the disability discrimination complaint is added, I do not consider this will add substantially to the cost and time spent in defending this claim.

42. If I do not allow the amendment, the claimant loses the opportunity to pursue a complaint which might potentially have merit (although I make no assessment of the merits at this stage). If I allow the amendment, I do not consider the additional burden on the respondent to be great. I conclude that the balance of injustice and

hardship comes down in favour of allowing the amendment, but on the basis that the time limit issue in relation to this complaint is to be decided at the final hearing.

Case management

43. I consider that a private preliminary hearing is required for the purpose of fully clarifying the issues, making case management orders and listing the case for a final hearing or, if the judge considers this appropriate, some other type of preliminary hearing.

44. From the discussion we had, I did not understand the basis for the claimant's belief that his dismissal was an act of race discrimination. The claimant should come to the next preliminary hearing prepared to explain this.

45. After clarification of the issues, it will be open to the judge, if they consider this appropriate, to consider at that preliminary hearing whether any of the claimant's claims should be struck out as having no reasonable prospect of success or to order the claimant to pay a deposit, not exceeding £1000, as a condition of continuing to advance any allegation or argument.

46. An interpreter will be required for the further preliminary hearing.

47. To allow sufficient time to deal with all possible matters, I am listing the preliminary hearing with a time estimate of 3 hours.

Employment Judge Slater

Date: 16 July 2018

JUDGMENT AND REASONS
SENT TO THE PARTIES ON
24 July 2018

FOR THE TRIBUNAL OFFICE

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