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EMPLOYMENT TRIBUNALS

Claimant

Respondents

Mr D Rai

AND

Interserve FS (UK) Limited

Heard at: London Central

On: 15 February 2019

Before: Employment Judge Brown

Representation

For the Claimant: Mrs A Kalra, Solicitor

For the Respondent: Mr M Xoudavi, Counsel

JUDGMENT AT AN OPEN PRELIMINARY HEARING

The judgment of the Tribunal is that:

- 1. The Claimant does not have permission to amend his claim to include further particulars presented to the Tribunal on 15 February 2019.**
- 2. The Claimant presented his claim out of time and the Tribunal has no jurisdiction to consider it. It is struck out.**

REASONS

1. By a claim form presented on 12 September 2018 the Claimant brought complaints of race discrimination and harassment against the Respondent, his employer. The Claimant had commenced Early Conciliation through ACAS on 2 August 2018. The Early Conciliation period ended on 2 September 2018. In his claim form, the Claimant said that his supervisor had accused him of sleeping on duty. It was not in dispute that the Respondent had suspended the Claimant from work on 27 March 2018, following the supervisor believing that he had found the Claimant asleep at work on 26 March 2018. The Claimant's claim form gave no particulars of any other act of alleged race discrimination or harassment.

2. Given that the Claimant was complaining about being accused of being found asleep at work and suspended from duty on 27 March 2018, the Claimant should have contacted ACAS to commence Early Conciliation, at the latest, on 26 June 2018, in order to comply with the three month time limit for bringing complaints of race discrimination or race harassment.

3. The Claimant made an application today to add further particulars of his race harassment and discrimination complaints. These included allegations that his supervisor responded rudely to the Claimant on 5 June 2018; that the Respondent failed to properly investigate the Claimant's grievance submitted on 8 June 2018 and delayed giving him an outcome to the grievance until 7 August 2018; an allegation that his supervisor increased the Claimant's workload on 6 June 2018; and that his supervisor had denied the Claimant's various requests for annual leave on a number of dates, up to and including 9 July 2018. The latest date of the new allegations sought to be added by way of further particulars was, therefore, 7 August 2018.

4. To bring a timeous claim in respect of those new allegations, the Claimant would have had to have presented his claim by 6 November 2018, but the further and better particulars were not presented to the Tribunal until today, 15 February 2019.

5. In considering whether to allow an amendment to a claim, the Tribunal applies the guidelines set out in *Selkent Bus Company v Moore* [1996] IRLR 661 and also considers the *Presidential Guidance on General Case Management (2014): Amendment to the Claim and Response Including Adding and Removing Parties*.

6. In deciding whether to grant an application to amend, the Tribunal must balance all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Relevant factors include the nature of the amendment: applications to amend range, on the one hand, from correcting clerical and typing errors and the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded, to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal has to decide whether the amendment sought is one of the minor matters, or a substantial alteration pleading a new cause of action.

7. Other factors include the applicability of time limits: if a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended. Other factors to be considered include the timing and manner of the application: an application should not be refused solely because there has been a delay in making it, as amendments can be made at any stage of the proceedings. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made, for example the discovery of new facts or new information appearing from the documents disclosed on discovery.

8. Even if there is an entirely new claim presented out of time, the Claimant may still be allowed to amend, taking into account the balance of injustice and hardship. In considering whether to allow an amendment, the Tribunal should analyse the extent to which the amendment would extend the issues and the evidence, *New Star Asset Management Holdings Limited v Evershed* [2010] EWCA Civ 870.

9. In this case, I have decided that the amendment sought brings new claims, alleging new facts. It is a substantial, rather than a minor, amendment. It pleads very substantial new facts. The time limits apply because it is a substantial new claim. By s123 *Equality Act 2010*, complaints of discrimination in relation to employment may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable. By s123(3) *EqA 2010*, conduct extending over a period is treated to be done at the end of the period.

10. As I have indicated, the application to amend has itself been presented some months out of time; 3 months after the time limit would have expired following the last date of the act complained of on 7 August 2018.

11. The Claimant gave evidence today. From his evidence, I found the following. The Claimant is a union member. He was assisted in respect of his suspension by his union; he contacted the union when he was suspended in March 2018. He was accompanied by his union representative at a hearing into the suspension allegation on 22 May 2018. He asked the union for legal advice. It is not clear when he did so, but he also took advice from a friend in July 2018, about Employment Tribunals. He was told then about the existence of a three month time limit. He knew of his right to bring a claim to an Employment Tribunal, because he brought a claim in September 2018.

12. I also found that the Claimant knew of the facts on which he now relies in bringing the amended claim, when those matters occurred. He submitted a grievance on 8 June 2018, setting out complaints in respect of some of the facts alleged in the further and better particulars.

13. While it is contended on behalf of the Claimant that he does not have English as a first language, and that he has only recently sought legal advice, I found the Claimant's language barrier did not prevent him from seeking legal advice in July 2018, or doing his own research. He knew of the time limits for bringing claims to the Tribunal in July 2018.

14. There is no reason therefore why the Claimant could not have brought the complaints, of which he was aware, within the three month time limit.

15. I have considered the balance of hardship and injustice which would be caused to the parties by allowing or refusing the amendment. While the Claimant will not be able to have his amended claim considered by the Tribunal, I consider that there is no injustice because he was aware of the existence of Employment

Tribunals and was substantially at fault in not bringing the claims, the facts of which he knew, earlier than he did. On the other hand, there would be considerable hardship and injustice caused to the Respondent in having to face claims brought very substantially out of time.

16. I therefore do not allow the Claimant's application to amend his claim.

17. Turning to the Claimant's original claim form, I have found, from his evidence, that the Claimant could have asked his union representative for advice on bringing a Tribunal claim at any time after 27 March 2018. He consulted a friend, who told him about Employment Tribunals and the time limits for claims in July 2018. The Claimant also told me that he conducted searches on the internet into the existence of Tribunals. I have also found that the Claimant knew about the existence of relevant discrimination legislation because he submitted a grievance on 8 June 2018, complaining about race victimisation and discrimination. He was aware of the facts on which he relied, because he was suspended on 27 March and invited to a disciplinary hearing in May 2018 to discuss the matters.

18. I considered that there was no good reason for the Claimant failing to present his claim in time. I did not accept that the Claimant's language barrier has prevented him from seeking advice, or bringing a claim, or investigating his rights. While there was some delay in dealing with his grievance, the Claimant was aware of the facts alleged in his 8 June 2018 grievance. He could equally have presented a Tribunal claim on the same facts.

19. Its not just and equitable to extend time for presentation of the claim, which was presented very much out of time.

20. The Tribunal has no jurisdiction to hear the Claimant's claim and it is struck out.

Employment Judge Brown

Dated: 28 February 2019

Judgment and Reasons sent to the parties on:

4 March 2019

For the Tribunal Office