



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr I Khan

**Respondent:** Eastern Airlines (UK) Ltd

## RECORD OF A PRELIMINARY HEARING

**Heard at:** Hull **On:** 24 April 2019

**Before:** Employment Judge Rostant

### Appearances

For the claimant: In person

For the respondent: Mr Byrne, solicitor

## JUDGEMENT

- (1) The claim of breach of contract is out of time and is not permitted to proceed to hearing
- (2) the claim of race discrimination is not in time but I'm prepared to extend time to permitted to proceed.
- (3) I decline to strike out the claim of discrimination or order a deposit

## REASONS

### 1. Background

- 1.1 This claim was presented to the tribunal on 12 February 2019 the claimant had undergone a period of early conciliation between 3 October 2018 on 3 November 2018.
- 1.2 The claimant's employment came to an end of 3 October 2018.
- 1.3 The matter which the claimant complained of during the course of early conciliation was that he had been discriminated against in relation to the calculation of his training bond and therefore in relation to the amount which the respondent had recovered from him as outstanding on the termination of his employment.
- 1.4 Originally, the claimant believed that he had been discriminated against in that he had been subject to a higher bond than others and that therefore the amount which the respondent was seeking to recover from him was greater

than that which they were are seeking to recover from others in the same circumstances.

- 1.5 The claim presented on 12 February differed from the original matter brought to ACAS in the following ways. In the first place it contained a complaint that the respondent was in breach of the claimant's contract by seeking to recover £13,000 as compared to £9000 which the claimant says is the correct amount on a proper reading of the contract.
- 1.6 That dispute arose from the claimant's reading of the bond agreement which differed from that of the respondent. That particular dispute had not been canvassed during early conciliation.
- 1.7 The claimant's case of discrimination was now put in a subtly different way. Instead of complaining that he had been subject of a higher training bond at the outset of employment than his colleagues, he now complained that, in contrast to three of his colleagues, he had been subjected to a more restrictive reading of the payment recovery provisions of the training bond agreement. The respondent was seeking to recover a larger amount than it was seeking to recover from his colleagues who had identically worded training bond agreements.
- 1.8 It was my view that the claim of breach of contract claim was presented out of time since, even allowing for the early conciliation extension the claim needed to be presented by 2 February 2019 in accordance with the provisions of Regulation 7, Employment Tribunals Extension of Jurisdiction Order 1994.
- 1.9 The claim for discrimination arose also at the point at which the respondent asserted its right to recover sum of money greater than that which it is entitled to and treated the claimant differently to others in asserting that right.
- 1.10 At the earliest that was 3 October 2018. Based on that date, the claim was out of time in accordance with the provisions of section 123 Equality Act 2010.

## **2. The law**

- 2.1 Regulation 7 of the Extension of Jurisdiction Order provides that a claim for breach of contract must be brought within three months of the end of the employment (in addition to any early conciliation extension) unless it was not reasonably practicable to bring claim within that time period. Time may only be extended if it was not reasonably practicable and the claim was thereafter brought within such further time as is reasonable
- 2.2 Section 123 of the Equality Act provides that the claim must be brought within three months of the act of discrimination (in addition to any early conciliation extension). Time may be extended if, in the view the employment tribunal, is just and equitable so to do.
- 2.3 Rule 37 of the Employment Tribunal's Rules of Procedure 2013 provides that a claim can be struck out if the Tribunal considers that it has no reasonable prospect of success. Rule 39 provides that a tribunal may order a deposit as a condition of the claim proceeding if the Tribunal considers that claim has little reasonable prospect of success.

### 3. Procedure at this hearing

- 3.1 In its response to this claim, the respondent raised the question as to whether or not the claim was brought within time. Judge Lancaster having viewed the claim and the response, ordered that this hearing be made a public one specifically to consider the question of time limits and also to consider it appropriate whether or not the claim should be struck out or deposit ordered.
- 3.2 At this hearing Mr Byrne clarified that the application for a deposit or strike out order applied only to the discrimination claim.
- 3.3 Mr Byrne also told the tribunal that he was not ready to deal with the issue of time although he accepted that the tribunal had advised the parties as early as 5 April that time points will be considered.
- 3.4 I advised Mr Byrne that the time points were to be considered on the basis that the respondent had raised the issue that the tribunal had alerted the parties to the fact that the matter would be dealt with and that in any event it was a matter of jurisdiction which obliged me to make proper enquiry.
- 3.5 I heard evidence from Mr Khan who was cross-examined by Mr Byrne who then made a brief submission.

### 4. My conclusions.

- 4.1 I had no cause to doubt Mr Khan's evidence to me. In summary his case was that his original dispute with the respondent had been based on his understanding that his training bond had been set at a higher level in any of his colleagues' and his belief that he had been discriminated against in that regard.
- 4.2 In the process of pursuing that dispute it came to his attention that he was in fact not the only employee with a training bond set at his level and he therefore abandoned the possibility of pursuing a complaint of discrimination on that basis
- 4.3 He told me however that in late January he had a telephone conversation with a former colleague. That former colleague advised him that a number of pilots leaving the respondent's employment at around the same time as the claimant left, had benefited from a different basis of calculation for the recovery of the bond. That had resulted in them repaying significantly less than the claimant had been required to repay.
- 4.4 The claimant took this matter up with the respondent by email of 23 January. By email of 31 January the respondent, through Ms Wright of HR, told the claimant that it was advised by its own lawyers that the interpretation of the repayment bond applied to him was the correct one and it was not prepared to negotiate the matter further.
- 4.5 At that point the claimant decided to pursue the matter having understood that he could bring a claim to the tribunal without legal help.
- 4.6 In dealing first with the breach of contract complaint I am satisfied that not only was it brought out of time but that it was reasonably practicable for it to have been brought within time. The reason it was not brought earlier was the claimant had not read, analysed and sought advice on his own contract of employment. The argument employed by his colleagues which had resulted

in their having a lower clawback figure had not occurred to him. Indeed, the claimant had taken legal advice, as part of which he had shown his contract to a solicitor, but the solicitor had not spotted, probably because he was not looking for it, the wording of the agreement which cast doubt on the respondent's calculation of the figure.

- 4.7 It is the claimant's responsibility to understand his contractual rights and ignorance of those rights does not, in my view, represent the sort of barrier contemplated by the provisions of Regulation 7. Moreover, the claimant knew the time limit provisions because he had spoken to ACAS who advised him properly. He therefore knew that time expired on 2 February. He knew what he needed to know to bring the claim by 23 January. In the circumstances I do not consider it appropriate to extend time for the breach of contract claim which is hereby struck out.
- 4.8 I take a different view the breach of discrimination claim. The claimant did not know of the difference of treatment which forms the basis of this discrimination claim until late January. Thereafter he acted with reasonable dispatch. The claim is at most 10 days out of time. There is no evidence before me that the respondent will be in any way prejudiced by that short period. Indeed it is clear from its response that it understands the nature of the claim and dispute is on the basis that the claimant's comparators are not appropriate comparators. In the circumstances, I consider that particularly given my decision to strike out the breach of contract claim the balance of prejudice favours the claimant here and I permit the breach of contract claim to proceed.
- 4.9 Although I was not asked for my full reasons for declining to strike out or order a deposit on the race claim I give them now.
- 4.10 The claimant clearly has an arguable case on the contract interpretation point. There appears to be reasonably cogent evidence that others who may well be in the same situation as the claimant have been treated differently and more favourably by the respondent when calculating the amount of training bond to recover. I accept from the claimant that as far as he knows the only difference between himself and his comparators is that of religion and all ethnic origin. On that basis I am in no position to say that this claim has little or no reasonable prospect of success.
- 4.11 The claim of race discrimination will therefore proceed to hearing on the basis of my case management order also made today.

**Employment Judge Rostant**

**Dated: 24 April 2019**

Sent to the parties on: 29<sup>th</sup> April 2019

For the Tribunal: E Mahon