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EMPLOYMENT TRIBUNALS

Claimant

Mr R Williams

Respondents

AND

BT Facilities Services Ltd

Heard at: London Central

On: 5 February 2019

Before: Employment Judge Okafor-Jones (Sitting alone)

Representation

For the Claimant: Mr S Phillips, Union Rep

For the Respondent: Ms K Bradley, Solicitor

The Judgment of the Tribunal having been sent to the parties on 6 February 2019, the Reasons are provided below:

REASONS

1. The case was listed today for a Preliminary Hearing in public to determine issues that were identified by Employment Judge Wade at a Preliminary Hearing (Case Management) on 6 December 2018. She decided that the Preliminary Hearing would consider issues as to time limits and an application made by the Respondent that the Tribunal should strike out the claim because of a substantial delay in the service of the Claim Form on the Respondent.

2. Since the Case Management Hearing, the case had moved on somewhat in that the Claimant had withdrawn his claim of unfair dismissal which was dismissed upon withdrawal on 24 January 2019. The Respondent's Solicitor also confirmed at the hearing that she no longer sought a determination of the application to strike out the claims that had been made on the basis of the delay in service of the Claim Form. The only remaining issue therefore, for the Tribunal to determine at the Preliminary Hearing was the question as to whether or not the disability discrimination claim brought by the Claimant had been presented out of time and if so, whether or not it would be just and equitable to extend time to /allow the claim to proceed.

3. The Claimant was represented by Mr Phillips, of his Trade Union, The Communication Workers' Union. Mr Phillips confirmed that he had taken over the case once it had been issued at the Tribunal and that prior to his involvement the Claimant had throughout his period of discipline and dismissal, and in commencing the claim, being supported by Mr Steve Doherty, who was also a Trade Union Representative from the CWU.

4. Mr Phillips confirmed that the claim to disability discrimination was as follows. The Claimant relies upon the disability of dyslexia. The Respondent is yet to decide whether or not it admits that that was a 'disability' within the meaning of the Equality Act 2010 at all material times. The Claimant confirmed that he makes two complaints: (1) a failure to make reasonable adjustments and (2) he claims that he was discriminated against for a reason arising from the disability. That reason was the difficulty he has in processing information especially written communication. Mr Phillips confirmed that the failure to make reasonable adjustments claim was that the Claimant had been dismissed on 16 August 2016 in circumstances in which he would not have been dismissed had reasonable adjustments been made for him. Those reasonable adjustments were those which were set out in an Occupational Health report dated 3 February 2016. The Claimant also asserted that his claim for disability-related discrimination was purely in connection with the dismissal.

5. In brief, the facts which led to the Claimant's dismissal were as follows. He was employed by the Respondent as a fabric engineer electrician and at the time of his dismissal was in receipt of a final written warning for issues that had arisen during 2015. His dismissal was for reasons set out in a letter of dismissal in the bundle of documents before the Tribunal dated 22 August 2016 (page 73). This letter explained the outcome of the disciplinary hearing in connection with a number of allegations but for the purpose of this decision it is necessary only to highlight the two claims which were found to have been proven. These both related to the events of 29 and 30 May 2016. During that weekend, the Claimant did not attend for work. The Respondent's procedure was that he should telephone his line manager, Lisa Harrison, if he was unable to attend work but he did not do this - instead he spoke to his shift partners. This was an alleged failure to follow reporting procedures for which he was investigated. He also made a claim for pay in relation to that weekend and did not bring it to his manager's attention that his time sheet had gone in erroneously indicating that he was present at work. He was therefore overpaid.

6. The Respondent concluded that the Claimant had breached the absence reporting procedure and also had made a fraudulent claim for pay in connection with that weekend. The Claimant alleged in relation to the timesheet error that he had been advised to process his timesheets in advance and that this was the reason why the claim was made. He also advised that he had not sought help from his manager in connection with some of his communication difficulties but was relying instead upon his colleagues to assist him. He said he did not feel able to seek the help of his manager.

7. Those being the reasons for the dismissal, it is necessary now to look at the chronology of events. These dates were not in dispute between the parties.

8. The Claimant's dismissal was 16 August 2016. It was not until 18 November 2016, when his trade union contacted ACAS on his behalf to commence early conciliation. Having failed to reach a successful conciliated agreement, ACAS issued the certificate on 15 December 2016. The Claimant did not issue his Claim Form until 16 January 2017. Those are the salient facts but it is worth mentioning for the sake of completeness that unfortunately the ET1 Form was not served on the Respondents until as late as 12 September 2018. There were administrative reasons for this which this judgment does not need to cover but suffice it to say, that the Respondent was then notified of the claims, submitted an ET3 on 10 October 2018 and a Full Merits Hearing is scheduled to take place in April 2019.

Arguments

9. The Claimant's representative accepted that the Claim Form was lodged out of time and that he therefore must persuade the Tribunal that it would be just and equitable for the case to proceed nevertheless. He called the Claimant to give evidence. The Claimant's evidence, which the Tribunal found to be entirely honest, was simply that he had throughout relied upon the advice of his trade union representatives, that he had provided information when requested and had trusted that his claim was being processed in accordance with the relevant time limits. The Claimant also relied on a very short statement (page 86 in the bundle) from Mr Doherty. This dealt purely with the lodging of the Claim Form at the Tribunal and was not signed nor did Mr Doherty give evidence. It stated simply that he had assisted the Claimant to complete the ET1 because of the Claimant's disability and had left it at the security desk at the Tribunal "before the expiry time". There was no reference to any dates in his statement or to any other facts that would tend to explain the delay.

10. The Claimant's representative submitted that it would still be possible to have a fair hearing notwithstanding the lateness of the claim and that the Respondent had since found some documents which would mean that there would be less prejudice. The Respondent's Solicitor Ms Bradley drew the Tribunal's attention to the test to be applied in relation to the extension of time jurisdiction and outlined the various factors which arise, borrowed from the Limitation Act 1980 Section 33. First, the Tribunal must remind itself that the discretion to extend time should only be exercised sparingly. It is a question for the Tribunal to weigh up the balance of prejudice between the parties. This is where the Tribunal came into some difficulty. The Tribunal considered, first of all, the length of and reasons for the delay in lodging the Claim Form. The evidence and information before the Tribunal at the Preliminary Hearing was scant indeed as to what were the true reasons for the delay, why the conciliation form had not been submitted in time and why the Claim Form had not been submitted before the expiry of the conciliation certificate. There was no evidence of the Claimant's Union chasing up the Claim Form once it had been submitted on 16 January 2017.

11. In the absence of Mr Doherty, Mr Phillips was in difficulty, as it was not he that was dealing with the matter at the material time. The Tribunal was therefore left in a situation where in exercising discretion, it did not have a full or any real explanation as to the length of or reasons for the delay.

12. Secondly, the Tribunal had to consider the cogency of the evidence and whether it would be likely to be affected adversely by the delay. This was more difficult because the substantial delay before the hearing had largely been the result of the Tribunal's omission in relation to the service of the Claim Form. That said, the facts of the matter in the exercise of discretion must be considered based on the position as it now appears and the Tribunal was bound to take account of the fact that in April 2019, a Tribunal was being asked to determine the reasons for the dismissal and whether there was any link to disability almost three years after the event. That would inevitably have an impact on the cogency of the evidence. Apparently, there was a tape recording of the disciplinary hearing but the Respondent advised the Tribunal that it has not been retained by the Respondent. Apparently, it was sent to the Claimant, but again the Tribunal was given no evidence about that and could not therefore take into account the presence of that recording as part of its deliberation. The Claimant is not to be criticised for the promptness with which he responded once he realised time had expired and the Tribunal accepted his explanation personally that he had followed up and spoken to the Tribunal by telephone.

13. Finally, the Tribunal considered the effect of the delay and whether or not a fair hearing would still be possible in addition considering the merits of the case. The Claimant's representative was not able to explain to the Tribunal how it is to be alleged that there was a link between the failure to make reasonable adjustments and the Claimant's allegation that he was dismissed for the two reasons identified in the letter of dismissal. Indeed, when asked by the Tribunal, Mr Phillips said that he accepted that failing to following the correct reporting procedures by telephoning his manager, would not in any way be linked to the allegation that the Respondent had failed to make reasonable adjustments. The timesheet allegation was slightly more difficult to understand but again there was no clear explanation given to Tribunal as to why it was that this was going to succeed as a claim for disability discrimination. It appeared to the Tribunal that there may well have been arguments about the fairness or otherwise of the dismissal and that indeed the Claimant may well have had a genuine sense of grievance about his dismissal. That is not a matter to be determined however, because the unfair dismissal claim has been dismissed as there was no jurisdiction to consider it.

14. In all the circumstances, weighing up the factors that the Tribunal is obliged to consider and in the exercise of its discretion, the Tribunal concluded that this is not a case in which discretion should be exercised to allow the claim to proceed. Accordingly, the claim will not go forward and will be dismissed for lack of jurisdiction.

Employment Judge Okafor-Jones

Dated: 8 July 2019

Judgment and Reasons sent to the parties on:

12 July 2019

For the Tribunal Office