



EMPLOYMENT TRIBUNALS

Claimant

Mr Hamza Elbuhaisi

Respondent

v Alaraby Television Network Limited

PRELIMINARY HEARING

Heard at: Watford

On: 13 May 2019

Before: Employment Judge Alliott (sitting alone)

Appearances:

For the Claimant: Mr C Payne (Counsel)

For the Respondents: Ms Y Montaz (Consultant)

OPEN PRELIMINARY HEARING JUDGMENT

1. Pursuant to the direction of Employment Judge Manley, dated 20 February 2019, this open preliminary hearing has been held to determine the following issue:
 - 1.1 Whether the claimant's claims were presented within the three-month time limit;
 - 1.2 If not, whether it was not reasonably practicable to present any unfair dismissal claim in time and/or whether it is just and equitable to extend time to allow any discrimination claims to proceed.
2. The claimant was employed on 1 July 2014. His employment ceased on 24 April 2018 when he was dismissed. I am told that a payment in lieu of notice was made to him and his outstanding holiday entitlement has been paid.
3. Following his dismissal, the claimant appealed. The appeal was heard on 13 June 2018 and he was notified of the rejection of his appeal on 19 June 2018. It is agreed that the effective date of termination of the claimant's employment was therefore on 24 April 2018.

4. The claimant presents claims of unfair dismissal, discrimination on the grounds of sexual orientation, religion or belief and race. The discrimination claims are both direct and indirect discrimination and a claim of victimisation is also maintained.
5. The primary three-month limitation period for an unfair dismissal claim expired on 23 July 2018. The claimant's claim form is dated 7 November 2018. His claim is therefore three months and 15 days out of time.
6. As far as the direct discrimination claims are concerned (with the exception of the sexual orientation claim) the case that Mr Payne advances is that all the matters complained of represent a series of discriminatory actions, culminating in the rejection of the claimant's appeal which was communicated to him on 19 June 2018.
7. Mr Payne's case is that 19 June 2018 date constitutes the start point for the calculation of the three-month primary limitation period for the presentation of a discrimination claim. Three months from that date would expire on 18 September 2018. The claimant notified ACAS on 13 September 2018. The ACAS certificate is dated 8 October 2018, "DAY B". Time would therefore expire at the end of the period one month after DAY B, ie 7 November 2018. As already recited, the claimant presented his claim form on 7 November 2018, within time.
8. Consequently, on the basis that it is contended that the rejection of the appeal was the last act in a series of discriminatory actions, I find that the claimant's claim was presented within the three-month time limit. Accordingly, as regards the direct discrimination claims (excluding the sexual orientation claim), I do not need to go on to consider whether it would be just and equitable to extend time to allow those claims to proceed.
9. I now turn to consider the unfair dismissal claim. I have a discretion to allow the claim to be brought during such further period as I consider reasonable where I am satisfied that it was not reasonably practicable for the complaint to be presented before the end of the three-month primary limitation period.
10. I note that the claimant asserts that he is an award winning investigative journalist and author with extensive experience working in TV, radio and the printed press. His role with the respondent included information gathering, researching, interviewing expert sources and searching public records and other sources for information. As such, I consider that he can be taken to have a capacity to access information on line concerning bringing a claim in in the Employment Tribunal.
11. The claimant was represented by an NUJ representative at his disciplinary hearing on 24 April 2018.
12. Following his dismissal, the claimant was further represented by the NUJ on his appeal hearing on 13 June 2018. The claimant told me that his trade union

representative told him that he was to follow the whole procedure before he made a claim. In his witness statement, the claimant states:

“I was explicitly informed by the NUJ representative after the appeal hearing that I now had ‘three months from the date of appeal decision’ to contact ACAS and submit my claim against the employer to the Employment Tribunal”

13. That advice was clearly wrong.
14. I have, within the papers put before me, e-mails that indicate that the claimant went to a legal surgery run by the NUJ on 3 July 2018. The claimant confirmed that he went. He did not have his trade union representative with him at that time but the e-mail inviting him to the meeting required him to bring documents, including his contract of employment, a copy of his letter of dismissal, a copy of his letter of appeal along with the outcome letter of his appeal, any minutes relating to it and any relevant correspondence. So, clearly, this meeting was in order to discuss bringing a claim in the Employment Tribunal. The claimant told me that he saw two people, one of who, he thought, was a solicitor.
15. I find that the claimant therefore had access to legal advice during a period when he was still in time to bring his claim for unfair dismissal.
16. A factor in this case is that the claimant was charged and tried in the Magistrates Court for alleged harassment. I do not know when he was charged but his trial in the Magistrates Court took place on 3 August 2018. In his witness statement the claimant has stated:

“Seeing that the material factor in my dismissal was the allegation of harassment brought by one of my colleagues and the fact that I had been charged and subsequently incorrectly convicted of harassment at the Willesden Magistrates Court on 3 August 2018, I believed it advisable to wait until I had further legal advice in regards to the prospects of successfully challenging the criminal conviction as it would have been futile to submit a claim for unfair dismissal whilst the conviction was still effective”.
17. Of course, by the date of the trial, the time limit for presenting a claim had already expired but I find that it was the criminal proceedings that in all probability prevented the claimant for bringing his claim sooner.
18. The claimant was told on 3 July that the union would not support his claim in the Employment Tribunal. Although the claimant told me that he did not have the money to instruct Solicitors, I do not consider that that is a proper reason for failing to bring a claim in time. When the claimant did notify ACAS on 13 September, he told me that he did so in response to a colleague saying that he was up against a deadline. He was clearly able to do so at that stage without legal representation. Certain medical evidence has been placed before me and the claimant says he was under a lot of pressure at this time. I have no doubt that he was under pressure given the criminal proceedings. However, I have a letter indicating that the claimant has suffered from major depression with prominent anxiety for nearly two years and I note that he had been able to hold down his job during that period notwithstanding his mental condition. I do not consider that issues of mental health are relevant to considering whether it was reasonably practicable to bring a claim prior to when it was brought.

19. Mr Payne has cited various cases to me, in particular DHL Supply Chain Limited v Fazackerly (2018) 4WL UK 67 which I have read. This is not directly comparable in that the claimant was advised by ACAS to wait until the disciplinary process had expired without being told of the limitation period and, through no fault of anyone, the appeal was only heard after the three-month period had expired. The appeal in this case was heard well within the three-month limitation period.
20. I take into account the trade union representative's advice in the context of exercising my discretion. Quoting from the IDS Employment Tribunal Practice & Procedure Employment Law Handbook at 5.59:

“Any substantial fault on the part of the claimant’s adviser that has led to the late submission of his or her claim may be a relevant factor when determining whether it was reasonably practicable for the claimant to present the claim within the prescribed time limit. In the majority of cases an adviser’s incorrect advice about the time limits or other fault leading to the late submission of a claim will bind the claimant and the tribunal will be unlikely to find that it was not reasonably practicable to have presented the claim in time.”
21. I have considered the section 33 Limitation Act factors. The length of the delay is relatively long in that it is three months and 15 days. The reasons for the delay are both incorrect advice given to the claimant but also that he was delaying acting pending his criminal proceedings. I do not find that either of those were good reasons. A delay of three months will not necessary affect the cogency of the evidence but I take into account that all delay is the enemy of recollection. The claimant did act reasonably promptly once he realised he was up against a deadline. The fact of the matter is that even on his case, he left everything until the last minute. The claimant did have access to professional advice.
22. Lastly, I consider prejudice but that tends to be neutral in that both sides can point to prejudice, the claimant being deprived of a potentially legitimate claim and the respondent being deprived of a defence.
23. I have concluded that it was reasonably practicable for a claim to have been presented for unfair dismissal within the primary limitation period and consequently, the unfair dismissal claim stands to be struck out.
24. I now go on to consider the discrimination claim in terms of sexual orientation. This is not relied upon as part of a series of continuing events and is related to a period between September 2017 and March 2018. The claim is advanced on the basis of perception and/or association discrimination on the grounds of sexual orientation. At the very latest, the three-month period for presenting those claims expired at the beginning of July 2018 and consequently the claim form is three months and seven days late.
25. I have to consider whether it would be just and equitable to extend time for presenting that claim.

26. I take as a starting point the case of Robertson v Bexley Community Centre, T/As Leisure Link 2003 IRLR 434 Court of Appeal that when Employment Tribunals consider exercising the discretion under what is now 123(1)(b) Equality Act:
- “there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so that the exercise of the discretion is the exception rather than the rule”.
27. I accept and direct myself that the exercise of my discretion in this context is different to that when considering reasonable practicability. In particular, it has been said that the receipt of inaccurate advice may be less important in exercising the discretion on just and equitable grounds, rather than whether it was reasonably practical to present a claim in time. However, I have taken into account the factors that I have recited insofar as the unfair dismissal claim is concerned and will not repeat them here. I have taken into account the length of the delay which is quite considerable at three months and seven days. I have taken into account the reasons for the delay. In my judgment these allegations would not have been presented to an Employment Tribunal had the claimant not been dismissed. In my judgment they have been added to the claim as a result of the dismissal. Nevertheless, they could and should have been brought within three months of the last act complained of. It is clear that the claimant has been a longstanding member of the National Union of Journalists and so at the very least had access to professional advice from them had he wanted to make a claim on this ground.
28. Consequently, I find that the claim for discrimination on the grounds of sexual orientation was not presented within the three-month time limit and that it is not just and equitable to extend time to allow that claim to proceed.
29. As far as the indirect discrimination claim, it is accepted by Mr Payne that the last act complained of must be the date of dismissal, namely 24 April 2018. Consequently, that claim has been presented outside the three-month time limit. For the same reasons dealing with the sexual orientation discrimination claim, I find that it is not just and equitable to extend time to allow that claim to proceed.
30. Lastly, I record that although the claim form refers to automatically unfair dismissal pursuant to section 104 ERA 1996, Mr Payne indicated that that was a claim made in error and by agreement, that claim will be struck out. In addition, insofar as a breach of contract claim is referred to in the claim form, that is not intended to be proceeded with and consequently that claim will be struck out.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. The claimant's claim for unfair dismissal is struck out.
2. The claimant's claim for discrimination on the grounds of sexual orientation (perception and/or association) is struck out.

3. The claimant's claims for indirect discrimination based on a PCP of not considering qualifications and experience gained from Palestine as relevant, is struck out.
5. The claimant's claim for automatically unfair dismissal, based on section 104 of the Employment Rights Act 1996 is struck out.
6. The claimant's claim for breach of contract is struck out.
7. The matter is to be a listed for a telephone, closed preliminary hearing with a time estimate of one hour. I have listed this to be heard by telephone and for only one hour due to both parties assuring me that an agreed list of issues will be submitted to tribunal in advance of the telephone hearing.

Employment Judge Allott

5 June 2019

Sent to the parties on:

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For the Tribunal:

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