Case numbers: 2600625/2019
2600973/2019

EMPLOYMENT TRIBUNALS

BETWEEN:

Claimant		**Respondent**
	And	
Mr C Eaves		Darley Limited (1) Mr Stewart Hughes (2)

AT A PRELIMINARY HEARING

Held at: Nottingham On: 7 August 2019.

Before: Employment Judge Clark (Sitting Alone)

REPRESENTATION
For the Claimant: DNA
For the Respondent: Mr Forrester, Solicitor

RESERVED JUDGMENT

1. The Claimant's claims are **stuck out**.

REASONS

1. Introduction

1.1 The claimant presented two separate ET1 claims. The financial loss being claimed seems to be in the region of £14.00.

1.2 The first claim was presented on 23 February 2019 and brought a claim against the employer "Darley". It was not particularised with any precision but appears to be, and has been treated by both the tribunal and the first respondent, as a claim of trade union related detriment under s.146 of the Trade Union and Labour Relations (Consolidation) Act 1992. In that claim, the detriment complained of is the employer's deliberate act of deducting 1 hour's

pay for time the claimant spent attending an unofficial trade union meeting during working hours on 26 July 2018.

1.3 The second claim was presented on 31 March 2019 and brought a claim against the managing director of the first respondent, Mr Stewart Hughes. It is similarly unparticularised. In fact, it does not appear to make any explicit allegation save that Stewart Hughes was involved in the initial decision to deduct pay and did not respond to the claimant's solicitor's letter dated 13 February 2019. It ticked the box to indicate it was a claim of age discrimination.

1.4 Today's preliminary hearing was listed to determine the respondents' application for orders striking out the claims or imposing a deposit. They are based on a number of grounds.

a) That the second claim did not comply with early conciliation.

b) That all claims are out of time.

c) That all claims have no / little reasonable prospect of success such that they should be struck out / a deposit ordered.

2. Preliminary

2.1 The claimant did not attend. Attempts were made to telephone him on two numbers provided without success. The notice of hearings and prior directions both had been emailed to the claimant's email address some time ago. I established that the respondents' solicitor had also emailed him concerning the hearing without a reply. The claimant was still employed by the first respondent and I was told he had finished a night shift last night. There was nothing to hint at any reason for his non-attendance other than he had chosen not to attend.

2.2 I decided to proceed to hear the application.

3. Background

3.1 Mr Eaves was employed by the first respondent as printer since 1996. That is about 23 years. He is now aged 66.

3.2 In this workplace there are usually two printers operating each printing machine. On 26 July 2018, the first respondent was short staffed due to sickness absence. The respondents implemented a contingency backup system, apparently agreed with the trade union, that meant 3 employees worked over 2 machines. When the claimant started his shift, that arrangement was in place. He and two of his colleagues did not start work as expected at 8:30. Instead, they held an unofficial meeting lasting about an hour.

3.3 The claimant did not get paid for that hour that he was not at work. There is a dispute of fact as to whether the other two similarly suffered a deduction of one hour. The claimant says they did not. The respondent says they did.

3.4 The claimant was absent for about 9 weeks due to surgery but seems to have engaged with his colleagues and the employer during that time on the subject of his complaint. On his return he raised a grievance on 15 November 2018. His grievance was in part, if not wholly, based on his belief that the other two printers did not have their pay deducted. The grievance was considered and rejected on the basis all three were treated the same and that the deduction was correct as this was an unofficial trade union meeting taking place within working hours for which there wasn't any facilities arrangement. The claimant escalated his grievance. A hearing was arranged for 21 November but postponed at the claimant's request until 5 December 2019. That grievance was rejected by a manager Steven Tawn. The claimant appealed that outcome further. That appeal was arranged for 18 December again but delayed to 17 January 2019. The second respondent, the first respondent's managing director, Stewart Hughes, rejected the appeal. The claimant avers that Mr Hughes was involved in the original decision.

3.5 The claimant then instructed solicitors. They wrote to Mr Hughes on his behalf on 12 February 2019, about 6½ months after the deduction. They alleged he had been discriminated against on the basis of his trade union membership in relation to the deduction.

3.6 ACAS early conciliation commenced 13 February 2019 identifying the employer simply as "Darley". It ended on 22 February 2019. The first claim was presented the following day. The second about 6 weeks later.

4. Claims Acceptance Procedure

4.1 Claims are subject to an initial acceptance or rejection process. In both cases the claims had to satisfy rules 8-14 of schedule 1 to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.

4.2 The claims were not vetted until 12 April 2019. By then, both seem to have been considered at or around the same time.

4.3 The first claim was accepted. The ACAS early conciliation certificate and ET1 both named "Darley" as the employer/prospective respondent. Clearly, that should have been Darley Limited but the match satisfied vetting and the correct legal name has subsequently been remedied.

4.4 At or around the same time, the clerk referred to the second claim. That claim relied on the same early conciliation certificate. The order made as a result of that referral was to consolidate both claims to be heard together. It seems to me, looking at what appears to have happened in that process, that the ACAS early conciliation requirements were not considered despite the mismatch in names being identified by the clerk. (In this case naming "Darley" and "Mr Hughes"). It seems clear that the claimant intended the second claim to be brought against Mr Hughes personally.

5. Is the second claim properly before the Tribunal?

5.1 Whether or not the acceptance procedure has been correctly applied, it remains the case that in order to engage the statutory jurisdiction of the tribunal, a claimant must have complied with his obligation in s.18A(1) of the Employment Tribunals Act 1996 and, until then, the prohibition in s.18A(8) of that act precludes the tribunal considering a claim being presented.

5.2 There is no doubt that the claimant has not engaged in early conciliation in respect of relevant proceedings being brought against Mr Hughes. The claim should, therefore, have been considered for rejection subject only to the discretion provided by rule 12(2A) of the 2013 rules. Following ***Chard*,** the two parts of that rule, namely the seriousness of the error and whether it is in the interests of justice, are to be considered as one single test.

5.3 Performing that process today, if the claimant intended to sue his employer but named the "boss" instead, it is possible that the application of Chard could theoretically except the error and allow the claim to be accepted although that would itself require further detailed consideration. However, that is not the case. Although the initial events remain largely the same, this is a completely different claim alleging a different statutory cause of action and has clearly been brought against a different respondent deliberately. To present such a claim required a compliant early conciliation certificate. Relying on the previous certificate does not assist the claimant because not only do the names clearly not match but there is no "error" in either the certificate, which was intended to engage with the employer, or the ET1, which was intended to sue Mr Hughes.

5.4 It seems to me if the claim was not accepted in the vetting process, it falls to me to reject it now. Alternatively, to the extent that it has been accepted, the claimant is still unable to get past the effect of s.18A(8) of the 1996 Act. Without overcoming that, there is no jurisdiction for the tribunal to consider a claim of age discrimination. It is therefore open to me to consider the application in the alternative as a claim with no reasonable prospects of success and to exercise the power to strike out the claim provided by rule 37(1)(a) of the 2013 rules.

5.5 I have given some consideration to whether the second claim could be advanced by way of an application to amend the first claim. The obligation to comply with early conciliation does not apply once a claim is accepted. However, there is no such application, any application would have to satisfy the test established in ***Selkent*** and other related cases. Within that, consideration would have to be given to time limits and merits. In the absence of the claimant this is not something I am prepared to embark on of my own motion.

6. Time Limits

6.1 It is arguable that this hearing has not been listed with notice that the tribunal will determine the question of time limits, albeit that time limits formed part of the respondents' basis for their application for strike out. I do not intend to reach a conclusion on it and would not even had Mr Eaves attended. However, time limits remain a factor in the case which is relevant to the summary assessment of merits that I am seized of.

6.2 The complaint in the first claim is that the claimant was deducted 1 hour's pay. A claim of trade union detriment time runs from the detriment That occurred on the pay date immediately following 26 July 2018. The claimant pleads how he noticed this on 2 August 2018.

6.3 Section 147 of the 1992 Act requires a claim to be brought within 3 months of the detriment or such further period as is reasonable where it was not reasonably practicable to present it within 3 months.

6.4 The primary time limit, before any period of early conciliation is accounted for, appears to expire on the claimant's case on 1 November 2018. He was absent on sick leave due to a surgical operation for 9 weeks from 9 August which may, and only may, provide some argument for why compliance was not reasonably practicable. But this is only for part of the period, 9 weeks not 12, and it seems clear the claimant was able to engage in other aspects of the dispute during that time. In any event, even if it was not reasonably practicable to present the claim on time, the second limb of the test requires the further delay itself to be a reasonable period. Most of that further period is taken up with internal grievance procedures and solicitor's correspondence. It is well settled that concluding an internal procedure will not assist a claimant to discharge the not reasonably practicable test. The question of reasonableness, although a different part of the test, may still prevent the further delay of 3 months being reasonable.

6.5 It seems to me that the prospects of establishing the extension of time would alone raise a question mark over the prospect of success which I go onto consider further in terms of substantive merits.

7. Merits

7.1 The claim of trade union detriment needs to be considered specifically against the statutory provision set out in section 146 of the 1992 act. It prevents detrimental treatment on 4 proscribed grounds. To succeed the tribunal must be satisfied one of those is the sole or main reason for the treatment. The central issue in the case is whether the reason for the deduction was, as the respondent advanced, the fact that the claimant did not commenced work until an hour later than his shift started or one of the four proscribed reasons. Although it is for the respondent to prove the reason for its actions, unless the circumstances fall within one of those proscribed reasons the claim fails.

7.2 There is nothing pleaded by the claimant, however informally, that engages the proscribed reasons set out in s146(1)(a)-(c). The first proscribed reason is preventing or deterring him from being a member of a union. The second and third relate to taking part in union activities or services, but only where they take place at an appropriate time. That is further defined as being outside working hours or within working hours were there are agreed arrangements for such activity. This condition immediately creates a fundamental obstacle to the claimant as there is no facilities agreement and the meeting was in working time. It also brings into sharp focus the corollary which is that if the employee is not at work when he

should be, that is the reason for the deduction. The fourth proscribed reason relates to a compulsion to join a union which is not engaged here.

7.3 The only reason which has any glimmer of application is the first. It will sit in an agreed evidential landscape whereby the only detriment is the one hour's pay deducted when he spent the time in a meeting when the claimant should have been at work. There is no basis for him being entitled to absent himself and, in all other respects, this has been for some time a unionised environment without any suggestion of other tensions between the two sides of industry on the recognition and membership. The potential dispute of fact about whether the other two printers suffered a deduction does not assist the claimant. If he is correct, the fact the other trade union members did not suffer a deduction would seem to reinforce the conclusion there was something other than trade union membership behind the decision.

7.4 Having considered the respective contentions, to the extent I can in the absence of the claimant, I am satisfied there is an overwhelming link between the deduction and the employees absenting themselves for one hour that the respondent will discharge the burden it has under s.148(1) of the 1992 act and there are therefore no reasonable prospects of the tribunal finding in the claimant's favour. Consequently, the first claim is also struck out.

7.5 The ultimate consequence of my conclusion is that both claims end today.

EMPLOYMENT JUDGE R Clark

DATE 7 August 2019

JUDGMENT SENT TO THE PARTIES ON

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AND ENTERED IN THE REGISTER

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FOR SECRETARY OF THE TRIBUNALS