



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH
BEFORE: EMPLOYMENT JUDGE BALOGUN
BETWEEN:

Mr M Vary

Claimant

and

The London Borough of Southwark

Respondent

ON: 4 September 2019

Appearances:

For the Claimant: No attendance

For the Respondent: Mr W Young, Counsel

JUDGMENT ON PRELIMINARY ISSUE

1. The claims of unfair dismissal and disability discrimination are struck out as they were presented out of time.
2. The claim for a statutory redundancy payment is struck out on grounds that it has no reasonable prospect of success.

REASONS

1. By a claim form presented on 30 August 2018, the claimant brought complaints of constructive unfair dismissal, disability discrimination and a claim for a statutory redundancy payment. All claims were resisted by the Respondent.
2. The purpose of today's hearing was to determine the respondent's application for strike out of the above claims, as set out at paragraphs 32-34 of its Grounds of Resistance.
3. The claimant had not arrived for the hearing by 10.00am, when it was due to start. I waited until 10.20am just in case he was running late but he still did not show. Upon satisfying myself that he had received notice of the hearing and in the absence of any correspondence from him explaining his non-attendance, I decided to proceed with the case in his absence.

4. Based on submissions from the respondent's counsel, I have reached the following findings and conclusions.

Findings and Conclusions

5. By an email dated 9 February 2018, the claimant tendered his formal resignation from his employment as a Pest Control Scheduler with the respondent. The resignation was with notice and the effective date of termination was 20 February 2018.
6. Section 111(2) of the Employment Rights Act 1996 provides that a complaint of unfair dismissal must be presented to the tribunal –
 - a) before the end of 3 months beginning with the effective date of termination, or
 - b) within such other period as the tribunal considers reasonable where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
7. The claimant did not commence ACAS early conciliation until 30 July 2018. As this was outside the 3-month limitation period for unfair dismissal, the claimant does not have the benefit of an acas extension to the period. The time limit for presenting the unfair dismissal claim expired on 19 May 2018. As the claim was presented on 30 August 2018, it is, on its face, out of time. I have therefore considered whether it was reasonably practicable to extend time.
8. On account of the claimant's absence, I had no live evidence from him as to his reasons for presenting the claim late. However, on the tribunal file is an email from him dated 16 November 2018 in which he sets out his case before the tribunal. At the end of the document, he provides two reasons for not contacting acas before the three-month deadline. As the deadline is the same as that for presenting his claim, I have treated the reasons given as applying also to the late submission of his ET claim.
9. The first reason he gives is that he had symptoms of anxiety and panic attacks which rendered him unfit to present his claim. No medical evidence has been presented in support of this even though the email suggests that such evidence exists. I do not consider the claimant's untested assertion of ill health alone to be sufficient evidence of his inability to present his claim on time.
10. The second reason given was that he was waiting for the respondent to conclude an internal investigation into his allegations against his line manager. The fact that an internal process is still underway will not generally prevent the presentation of a claim. If the process has some bearing on the claim, such as an appeal against dismissal, the usual approach would be to present the claim and then seek a stay of proceedings. In our case, the investigation arose out of allegations made by the claimant on 10 April 2018 - 2 months after his resignation. The claimant was not seeking to be reinstated in his position therefore the outcome of that investigation had no bearing on when his claim was presented.

11. The claimant has the burden of showing that it was not reasonably practicable to present his claim on time. He has not adduced sufficient evidence to discharge that burden and I therefore find that it was reasonably practicable for him to present his unfair dismissal claim within the primary time limit. The claim is therefore struck out.
12. Turning to the disability discrimination claim, section 123 of the Equality Act 2010 provides that a discrimination complaint must be presented after the end of 3 months starting with the act complained of or such other period as the tribunal considers just and equitable. It is unclear from the pleadings what the alleged acts of discrimination were but it is reasonable to assume from the document that the last act occurred no later than the 20 February 2018, the effective date of termination. The time limit is therefore the same as the unfair dismissal claim i.e. 19 May 2018.
13. Although the tribunal has a wider discretion to extend time in discrimination cases, The case of Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA makes clear that the discretion should be exercised exceptionally and that the burden is on the claimant to satisfy the Tribunal that there are reasons why the Tribunal should exercise its discretion.
14. There is no evidence before the tribunal other than the matters already referred to above in relation to unfair dismissal. For the same reasons stated above, they are insufficient to satisfy the tribunal that there are just and equitable reasons to extend time for presentation of the discrimination claim. That claim is therefore dismissed.
15. Turning finally to the redundancy payment claim. The entitlement to a redundancy payment only arises where there has been a dismissal for redundancy. It is common ground that the claimant resigned. Whilst the claimant contends that the resignation amounts to a dismissal, there is nothing in the ET1, or indeed the ET3, to suggest that the termination was by reason of redundancy. This claim is therefore struck out pursuant to rule 37 of the Tribunal Rules of Procedure 2013 on grounds that it has no reasonable prospect of success.

Employment Judge Balogun
Date: 4 September 2019