



EMPLOYMENT TRIBUNALS

Claimant: Mr Sebastiaan Crebolder
Respondent: Pinnacle Office Equipment Limited
Heard at: Cardiff **On:** 19 September 2019
Before: Employment Judge R Brace

Representation:

Claimant: In person
Respondent: Mr A Baker (representative)

JUDGMENT having been sent to the parties on 23 September 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided. These written reasons are a slightly amended transcribed version of the oral reasons delivered by Employment Judge at the conclusion of the hearing.

REASONS

1. This is a Preliminary Hearing to consider whether any claim presented by the Claimant was outside the relevant time limits in the Employment Rights Act 1996, the Equality Act 2010 and the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and if so, should they be dismissed on the basis the Tribunal has no jurisdiction to hear it further or, alternatively, because of those time limits and not for any other reason, should any complaint be struck out under Rule 37 on the basis that it has no reasonable prospects of success and/or should one or more deposit orders be made under Rule 39 on the basis of little reasonable prospect of success.
2. The claims before the Tribunal are ones of breach of contract, or in the alternative, unlawful deductions from wages, and discrimination.

3. The Respondent employed the Claimant from 19 February 2016 until it dismissed him by reason of redundancy on 16 November 2018. The last payment of wages made to the Claimant was on 30 November 2018. The period of ACAS Early Conciliation lasted from 22 March 2019 to 1 April 2019.
4. On 13 April the Claimant presented his ET1 claim form to the Tribunal and a Case Management Preliminary Hearing took place before Employment Judge Davies on 8 July 2019. At that Preliminary Hearing Employment Judge Davies identified that the claims were brought outside the primary limitation period and she granted the Respondent's application for a Preliminary Hearing to determine jurisdiction.
5. The complaints of discrimination were not fully particularized and Employment Judge Davies made orders that by 22 July 2019 the Claimant should provide those further particulars to include information in respect of each allegation in relation to date, act or omission, alleged perpetrator, names of witnesses and protected characteristic relied upon.
6. A copy of the further particulars was emailed to the Tribunal by the Claimant on 20 July 2019.
7. In relation to the discrimination claim, the acts in question all related to comments that the Claimant alleged had been made by a director of the company. These comments related to protected characteristics of sex, disability, religion, race and age. Dates were provided by the Claimant of the alleged acts. These varied as follows:
 - a. Around November 2017;
 - b. around 18 February 2018 and "at other times";
 - c. numerous times during the Claimant's employment at Pinnacle;
 - d. around the beginning of 2016;
 - e. around April/May 2016; and
 - f. from the start of 2016 until February 2018.
8. No complaint has been made by the Claimant that either the dismissal, or indeed his grievance which he brought on 23 September 2018, were acts complained of, rather the acts complained of in relation to his discrimination claims, were acts which took place during the continuance of his employment.
9. Even if the matters, that the Claimant complains of, were to be treated as a continuing act of discrimination, Section 123(3)(a) of the Equality Act 2010 makes special provision that for conduct extending over a period this is to be treated as done at the end of that period.

10. Whilst there is nothing in the further particulars to indicate that the alleged comments continued up to and including the Claimant's very last day in work, even if that was accepted to be the case, that date would have been 23 August 2018 when the Claimant last attended the workplace. This was accepted by the Claimant.

11. The primary limitation periods therefore expired on:

- a. 15 February 2018 for breach of contract; or, in the alternative
- b. 28 February for unlawful deduction from wages; and
- c. 23 November for any discrimination claim.

12. The claim was not presented until 13 April 2019 and therefore, in essence, all claims are out of time. I therefore have to consider whether or not the time for presenting each claim should be extended.

Breach of contract / unlawful deductions

13. In relation to the breach of contract and/or unlawful deduction from wages claim, the claim has to be presented within 3 months beginning with the effective date of termination (for the breach of contract claim) or within 3 months from the last deduction in accordance with Section 23(3) ERA 1996 i.e. from the end or 30 November 2018 (for the unlawful deduction from wages claim). The claim was presented on either basis out of time.

14. The Employment Tribunal can only extend time if it is satisfied that it was not reasonably practicable for the Claimant to have presented his claims in time and, that if that was in fact the case, whether the Claimant nevertheless presented his claims within such further time as the Employment Tribunal considers reasonably practicable.

15. The burden of proof for establishing that it was not reasonably practicable rests with the Claimant and the Court of Appeal case of **Marks and Spencer plc -v- Williams Ryan Marks 2005 ICR 1293**, set out a number of legal principles which provide that the provisions should be given a liberal interpretation in favour of the employee, regard should be had to what, if anything, the employee knew about the right of complaint to a Tribunal and of the time limit for doing so, and regard should be had to what knowledge the employee should have had, had they acted reasonably in the circumstances. Knowledge of the right to make a claim does not, as a matter of law, mean that ignorance of the time limits will never be reasonable. It merely makes it more difficult for the employee to prove their ignorance and that their ignorance was reasonable.

16. Taking into account fact that the time started running for the claims between 16 and 30 November 2018 (dependent on how the Claimant chose to frame

his claim i.e. as one of breach of contract or unlawful deduction from wages,) I took into account the following reasons for the delay:

- a. his redundancy process,
- b. his grievance process;
- c. the advice he received from ACAS;
- d. the continuing job hunt; and
- e. the claim he brought in the County Court against the Respondents.

17. Turning first to the redundancy process, I found that this had taken place between June and November 2018 and the process was concluded on the termination date. This was therefore not determinative of whether the claims could have been brought within time and was not in my mind a factor which assisted the Claimant.
18. With regard to the grievance process which started in September, having reviewed the documentation I find that the grievance outcome was concluded on 2 November 2018 and the grievance appeal outcome communicated by way of letter dated 1 February 2019 (this is at page 139 of the bundle of documents provided to me (the "Bundle"). This was therefore not a factor which could or did explain why it was not reasonably practicable to bring the Early Conciliation or lodge a complaint within the primary limitation which would have ended on 15 February or at the latest 29 February 2019, either in isolation or in conjunction with the advice which the Claimant indicated he was having from ACAS which was to exhaust the internal procedure.
19. Whilst I accepted that the ACAS officer had provided that advice to the Claimant, that internal process had been completed by the beginning of February. Therefore even though I accepted that ACAS are not treated in the same way as skilled advisors, and the Claimant placed reliance on their unqualified advice to exhaust the internal appeals procedure before bringing a claim, that still does not in my mind assist the Claimant to demonstrate that it was not reasonably practicable to bring his claim.
20. Notwithstanding this, in addition, the Claimant was able to bring a claim in the County Court and bring proceedings under that process.
21. Whilst I accepted that the grievance process was stressful for the Claimant, as was the redundancy, the Claimant was still able to look for and find alternative work which he did so by 23 December 2018 and was still able to issue County Court proceedings against the Respondents. I found that being in the middle of pursuing a County Court claim against the Respondents was not a significant determinant as to why the Claimant did not issue sooner and this was not a factor which could or should render it not reasonably practicable to present a claim at the Employment Tribunal.

22. I therefore concluded that I was not satisfied that it was reasonably practicable for the Claimant to have presented his claims in time and that time for bringing either a breach of contract, or an unlawful deduction from wages claim, should not be extended either under Article 7 of the Extension of Jurisdiction Order (breach of contract) or under Section 23 (unlawful deductions) and the claim is dismissed.

Discrimination

23. In relation to the discrimination claim, the claims brought by the Claimant appear to be twofold:

- a. direct discrimination under Section 13 Equality Act 2010; or
- b. harassment under s.26 Equality Act 2010

24. Section 13 of the Equality Act refers to treatment *because of* protected characteristics. It therefore extends to cases where the Claimant does not possess the relevant protected characteristics themselves. Likewise a Section 26 in harassment makes no reference to the protected characteristic of a particular person and victims of harassment do not have to possess the protected characteristics themselves in order to bring a claim and for a claim to succeed, thus the fact that the Claimant is not female, nor is of a certain faith by way of examples, is not the relevant consideration if the allegation of less favourable treatment or harassment relates to the protected characteristic.

25. In relation to the discrimination claim, the 3-month time limit for bringing a discrimination claim is not absolute. Employment Tribunals again have the discretion to extend the time for presenting a complaint where they think it just and equitable to do so and the Tribunals thus have a broader discretion under discrimination law than they do in the cases of breach of contract/unlawful deduction from wages as those provisions provide that the time limit for presenting a claim can only be extended if the Claimant shows that it was not reasonably practicable to present the claim.

26. I have had my attention drawn to the Court of Appeal in ***Robertson -v- Bexley Community Centre (t/a Leisure Link) 2003 IRLR 434*** in which the Court of Appeal stated that when Employment Tribunals consider exercising discretion, under what is now Section 123 Equality Act 2010, there is no presumption that they should do so unless they can justify failure to exercise the discretion. The position is quite the reverse. A Tribunal cannot hear a claim unless the Claimant convinces it that it is just and equitable to do so and so the exercise of discretion is the exception rather than the rule. This does not mean that exceptional circumstances are

required before the time limit can be extended on just and equitable grounds.

27. In exercising my discretion to allow out of time claims to proceed, the checklist, contained in Section 33 of the Limitation Act as modified by the Employment Appeal Tribunal in ***British Coal Corporation -v- Keeble 1997 IRLR 336***, is a valuable reminder of what may be taken into account, but the relevance of factors depends on all the facts of the case and the Tribunals do not need to take into account all the factors in each case.
28. Section 33 as modified by ***British Coal*** requires the Court to consider the prejudice that each party that would suffer as a result of the decision reached and to have regard to all the circumstances of the case in particular:
 - a. the length of and reasons for the delay;
 - b. the extent to which the cogency of the evidence is likely to be affected by the delay;
 - c. the extent to which the party sued has cooperated;
 - d. the promptness within which the Claimant in this case acted once he knew of the facts given rise to the cause of action; and
 - e. the steps taken by the Claimant to obtain appropriate advice once he or she knew of the possibility of taking action.
29. A Tribunal considering whether it is just and equitable to extend time is liable to err, if it focusses solely on whether the Claimant ought to have presented their claim in time. Tribunals must weigh up the relative prejudice that extending time causes the Respondent on one hand, and to the Claimant on the other, and consider the prospective merits of the claim before reaching the conclusion on whether to extend time.
30. Whilst the test differs, the Claimant's explanation for the delay is the same, save that in this case, the last act complained of was at the latest, a date prior to 23 August 2018, being the last date that the Claimant was in work.
31. The Claimant accepted that no comments had been made by the Respondent's directors on that particular date. No grievance was brought about these issues until 23 September 2018, when the Claimant, having been made redundant had no fear of losing his job, it was a certainty by that stage.
32. However, my conclusions, on why I considered the Claimant could not demonstrate why it was not reasonably practicable to bring his breach of contract or wages act claim within time, also applied equally to my considerations on whether I should exercise my discretion to extend time on a just and equitable basis.

33. In that regard I did not consider that either

- a. the redundancy;
- b. the grievance procedure;
- c. the ACAS advice on exhaustion of the procedure; or
- d. the Claimant choosing to pursue his County Court claim

were factors which assisted the Claimant and were not factors which led me to conclude that I should extend time on a just and equitable basis.

34. I did however consider that there were additional factors at play that were relevant. I was concerned that a large number of the discrete allegations in the further and better particulars were extremely historic, some dating back 3 to 4 years.

35. I did hear evidence from two witnesses for the Respondent, Sian Woodhouse and Sharn Richards. Despite many of the allegations being of a historic nature, I did take into account the evidence that a director of the Respondent did make some reference to the race or religion of a particular vendor of the company back in 2016, and that the director did engage her and another female colleague in relation to a joke related to the protected characteristic of sex. I do not, for the purposes of this Judgment, intend to go into the detail of the jokes.

36. After considering their evidence, whilst there are comments dating back to early 2016 that were alleged by the claimant to have been made by a director of the Respondent, which were in part recollected by the witnesses before me, I formed the view having heard the witnesses that the witnesses had and would have difficulty in recollecting such comments, particularly one off comments. I was concerned that the cogency of evidence would be affected by the delay.

37. Finally, the balance of prejudice and potential merits of the claim were factors I took into account. I considered that the Claimant's prospect of success, taking into account the burden is primarily on the Claimant to prove on the balance of probabilities primary facts from which it could be inferred that further discrimination had taken place. In determining the proscribed effect on the Claimant, I have taken into account that there was no contemporaneous complaint from the Claimant at any time and the Respondent now cannot realistically call evidence with regard to what happened back in 2016 through to 2018 as to the effect on him and therefore this prejudices him in meeting the statutory test.

38. Whilst the Claimant is entitled to say that he did not want to raise these issues whilst he was in employment, this is a claim that now has emerged

only when and at the time when he was being dismissed. Unfortunately for the Claimant the combination of the delay, which will affect the cogency of the evidence, which will prejudice the Respondent and the choice made by the Claimant in delaying in bringing his claim, either before the grievance on September 2018 or indeed for some 5 months later means it is not just and equitable to extend time.

39. I am not persuaded that it is just and equitable to extend time for bringing the discrimination complaints for all the reasons given, and the discrimination complaints are too dismissed.

Employment Judge R Brace
Dated: 13 November 2019

REASONS SENT TO THE PARTIES ON

.....17 November 2019.....

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS