



EMPLOYMENT TRIBUNALS

Claimant: Miss W Sims

Respondent: (1) The London Borough of Lewisham (2) Governing Body of Adamsrill Primary School

Heard at: London South **On: 4 November 2019**

Before: Employment Judge Khalil (sitting alone)

Appearances

For the claimant: in person

For the respondent: Mr Patel, Counsel

RESERVED JUDGMENT ON A PRELIMINARY ISSUE

Appearances & documents

1. The claimant appeared in person, the respondent was represented by Mr Patel, Counsel. The claimant had prepared a bundle of documents numbered 1-24. Documents 1 to 5 essentially stood as her witness statement.

The claims

2. The case was listed to determine whether the Tribunal had jurisdiction to hear the claimant's complaints of unfair dismissal and race discrimination as they had been presented outside of the primary limitation period. These preliminary issues were listed for determination today by EJ Balogun on 5 September 2019.
3. By a claim form presented on 18 March 2019, the claimant brought a complaint of unfair dismissal and race discrimination. The claimant was employed by the respondent as a scale 5 teaching assistant from 2 March 2015 until the termination of her employment on 30 April 2018 as the respondent says she was unable to satisfy the respondent's right to work checks. The respondent resists the unfair dismissal claim in accordance with section 98 (2) (d) of the

Employment Rights Act 1996 as the respondent states that to continue to employ the claimant would have been a criminal contravention of section 15 of the Immigration and Asylum and Nationality Act 2006.

4. The claimant's complaint of race discrimination was clarified and particularised at a Case Management hearing which took place on 5 September 2019. The claimant, who is of American nationality, alleges that at her dismissal meeting on 30th of April 2018 Allyson Hollidge of Human Resources made the following comments to the claimant:
 - a) that the claimant and her mother were illegal immigrants
 - b) that the claimant had forged her American passport and
 - c) that the claimant had somehow been evading the authorities
5. The claimant said that these comments were made to her because of American nationality.

Relevant Findings of fact

6. The claimant was suspended from work one 16th of April 2018.
7. The claimant was asked to provide evidence of her entitlement to work in the UK, she produced her previous passport, which had expired. A copy of this passport had previously been provided to the respondent. This contained her indefinite leave to remain stamp ('ILR'). The current passport did not contain an ILR stamp.
8. The claimant contacted the Citizens Advice Bureau ('CAB') on the same day.
9. The claimant contacted her MP on 24 April seeking her assistance to establish her indefinite leave to remain in the UK/her right of residence and work in the UK. In her letter, the claimant explained that she had an old passport with an indefinite leave to remain though this did not appear in her current American passport. The claimant explained that she had previously been informed that as if she had an old passport with an ILR stamp, her status could not be revoked. The claimant had a strong belief in her legal entitlement to work.
10. On 30 April 2018 the claimant was dismissed from her employment because of her inability to satisfy the respondent's right to work checks. The claimant was not afforded a right of appeal.
11. By a letter dated 16th of May 2018, the claimant's MP responded to the claimant requesting further information in order to take up her situation with the Home Office.
12. By letter dated 22nd of October 2018 the claimant's MP wrote a letter to the claimant summarising her situation and confirming that she had written to the Home Office on her behalf recommending that the fee to apply for a biometric residency permit was waived.

13. On 15 February 2019 the claimant received her biometric residency permit following her application to the Windrush task force. The claimant, through that procedure, had the fee of £2000 waived. The claimant received a letter dated 26th of February from the Home office to confirm that she had been entitled to make an application for a biometric residence permit requesting a waiver of her of the fee because of her financial situation or alternatively to make an application under the Windrush scheme for which the fee would not be payable. This letter confirmed that the claimant's MP had been written to on 19 November 2018.
14. The claimant provided a chronology of dates and gave evidence that since her dismissal in April 2018 until she was able to secure her biometric residence permit, she suffered financial hardship. In addition, the claimant did not receive any state benefits until March 2019. The Tribunal accepted the claimant's evidence in this regard.
15. The claimant also provided consistent evidence to the Tribunal explaining her multiple efforts to seek assistance before and after her dismissal on 30th of April 2018. The claimant explained in her witness statement that she had approached various organisations from June 2018 onwards including the Home Office, the local authority, the CAB, Lewisham Refugee centre, UK Immigration help, Immigration Advice service, The South London law Centre and the JCWI (Joint Council for the Welfare of Immigrants). In addition, the claimant explained that she had also taken advice from Solicitors firms. The Tribunal accepts that the claimant made various enquiries of these organisations over a long period of time.
16. The claimant explained in evidence that she was given the same advice from all of these organisations with regard to any possible employment claim in the Tribunal consequent on her dismissal, that she should first resolve her immigration status and that is why she spent all of her time doing this, ultimately with success as she received her biometric residence permit. The Tribunal accepts the claimant's evidence that for the same reason, she did not commence a discrimination claim any sooner. The claimant had also been concerned during this period if anything more serious may happen because of her immigration status as she was also concerned about her financial situation.
17. The claimant agreed in cross-examination that she was aware of the three-month time limit to bring a claim but that she had accepted the advice she had received that she needed to resolve her immigration status first before commencing an employment tribunal claim. The claimant also stated specifically that she was aware of the three-month time limit at least by 12 or 13 July 2018 before its expiry.
18. Following receipt of her biometrics residence permit on 15 February 2019, the claimant contacted ACAS on 18 March 2019 for early conciliation. The claimant focused on managing her financial concerns, in particular her housing situation before turning her mind to contacting ACAS and then submitting her Tribunal claim.

Applicable law

19. By S. 111 of the Employment Rights Act 1996 a Tribunal will not have jurisdiction to hear a complaint of unfair dismissal unless it has been presented before the end of the period of three months beginning with the effective date of termination or, in a case 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, within such further period as the Tribunal considers reasonable.
20. Under section 123 of the Equality Act 2010, a Tribunal does not have jurisdiction to hear a complaint of discrimination brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Tribunal thinks just and equitable.

Conclusions

21. The claimant's effective date of termination was 30th of April 2018. The claimant initiated early conciliation with ACAS on 18 March 2019. These dates are not disputed by the parties.
22. Having regard to the findings of fact made by the Tribunal above, the Tribunal accepts that the claimant began to seek advice in relation to her immigration status and her employment situation upon being suspended from work initially from the CAB and that she continued her enquiries after being dismissed, at least from June 2018, for a prolonged period of time thereafter.
23. The claimant approached and consulted various organisations and agencies including, notably, the CAB, Solicitors firms and the South London Law centre. She also consulted the JCWI which organisation also provides legal advice.
24. The Tribunal concludes that insofar as the claimant approached the CAB, Solicitors' firms and the South London Law centre she was seeking advice from skilled advisers. It does not matter that she did not officially retain any of these organisations to formally act on her behalf. The claimant was seeking advice by general enquiries mainly by telephone.
25. The Tribunal has found that the claimant was consistently advised to resolve her immigration status before seeking to commence an employment tribunal claim in relation to her dismissal on 30 April 2018. The claimant also confirmed that by about 12 or 13 of July 2018 she was aware of the three month time limit but that because of the advice that she had been given from the organisations and firms that she has consulted, she did not seek to present a complaint in the Employment Tribunal in relation to unfair dismissal or race discrimination.
26. Whilst the claimant was seeking to resolve her employment status and ultimately did do so when she received her biometric residence permit in February 2019, concurrently she was also of the belief and was so advised that her indefinite leave to remain stamp on her previous passport remained satisfactory for the purposes of establishing a right to work when this was requested in April 2018. The Tribunal expresses no view as to whether that was a correct position in law.

27. Insofar as the claimant was given incorrect or erroneous advice from the CAB, the solicitors firms or the South London Law centre not to present (or to delay presenting) her Employment Tribunal claim within the primary limitation period, that does not allow in this case the claimant to benefit from the 'escape clause' in the Employment Rights Act 1996. Accordingly, the Tribunal concludes it was reasonably practicable for the claimant to present her complaint within the limitation period because she had engaged skilled advisers. ***Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53 CA and Walls Meat Company Ltd V Khan 1979 IRLR 499*** applied.
28. The Tribunal concludes that in the event that it had found that it was not reasonably practicable for the claimant to have presented her complaint within the relevant time limit, the Tribunal would have concluded that her complaint was presented within a reasonable period of time thereafter because of her financial difficulties and the claimant's primary focus to avoid eviction from her property.
29. Turning to the discrimination complaint, the circumstances of the claimant being erroneously advised by skilled advisers does not, by way of comparison to the reasonably practicable test, lead to the same conclusion because the legal test is different. The Tribunal needs to consider whether it is just and equitable to allow a complaint to proceed out of time. The Tribunal notes that this is a broad discretion.
30. The claimant has stated consistently that the reason for her delaying her claim was because she was advised that in order to get a claim off the ground, her immigration status needed to be resolved first. She spent several months trying to achieve this through the assistance of various organisations and firms already mentioned and by engaging the services of an MP. Upon her immigration status being resolved she presented her complaint on 18 March 2019 and had approached ACAS for early conciliation on the same date. The Tribunal has accepted that the claimant believed her immigration status issue to be a barrier to both an unfair dismissal complaint and her discrimination complaint.
31. The respondent's counsel, in submissions, stated that save for the additional cost of having to defend a discrimination complaint there was no additional prejudice to the respondent. The respondent's counsel also accepted that the claimant would be prejudiced if she could not bring her claim and he also accepted that the test to be applied by the Tribunal was a broader one and different to that relevant to the unfair dismissal complaint under the Employment Rights Act 1996.
32. Accordingly, the Tribunal finds that the prejudice to the claimant would outweigh the prejudice to the respondent in relation to the discrimination complaint. The Tribunal is satisfied that the claimant's reason for not bringing her complaint sooner was because of her reasonable reliance on legal advice that she had been receiving that she could not that she could not or should not present a complaint to the Employment Tribunal unless and until her immigration status had been resolved first. ***Hawkins v Ball & another 1996 IRLR 258 EAT*** applied.

33. The Tribunal concludes that it is just and equitable for the claimant's complaint of discrimination to proceed.

5 September Orders varied

34. The case remains listed for 1 day on Monday **27 January 2020**.

35. The other orders contained in EJ Balogun's Order of 5 September are amended as follows:

- The claimant is to provide an up to date schedule of loss by **25 November 2019**
- Documents are to be exchanged by **2 December 2019**
- An agreed Bundle is to be provided to the claimant by the respondent on or before **16 December 2019**

36. Witness statements are to be exchanged as already directed on or before **8 January 2020**.

NOTE:

Public access to employment tribunal decisions

All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Employment Judge Khalil

11 November 2019