



EMPLOYMENT TRIBUNALS

Claimant

Respondent

v

Mr K Malek

Atom Supplies Limited

PRELIMINARY HEARING

Heard at: Ashford Employment Tribunal

On: 30 October 2019

Before: Employment Judge Martin

Appearances

For the Claimant: In person

For the Respondent: Ms Gyane – Counsel

RESERVED JUDGMENT

The Claimant's application to amend his claim to include race discrimination is refused.

RESEVED REASONS

1. This was a hearing to consider the Claimant's application to amend his claim to include the claim of discrimination on the protected characteristic of race. The Respondent opposed the application. The Respondent says it terminated the Claimant's employment because he had not satisfactorily completed his probationary period. The Claimant's position is that he did complete his probationary period and was therefore entitled to 4 weeks notice pursuant to his contract. The Claimant did not have two-year service which is required to bring an unfair dismissal claim.
2. The Claimant presented his claim to the Tribunal on 6 June 2019 having entered early conciliation on 7 April 2019 which lasted until 7 May 2019. The effective date of termination of his employment was 9 January 2019.
3. The Claimant accepts that his claim form does not tick the box saying he is claiming discrimination; that the narrative on page 7 does not mention discrimination and that the emails which he attached to his application also did

not mention discrimination or include any information from which it could be inferred that the Claimant was claiming discrimination. This is therefore a new cause of action which the Claimant is seeking to introduce.

4. The Respondent provided a written skeleton argument and the Claimant was given time to present his application in full. The Claimant was given time during an adjournment to consider the Respondents skeleton argument and prior to the adjournment I explained to the Claimant that the law are set out in the Respondents skeleton argument was correct and went through the areas he would need to address when he returned following the adjournment.
5. The relevant law is clearly set out in the Respondent's skeleton argument and I referred myself to s123 Equality Act 2010 and the following case law:
 - a. British Coal Corporation v Keeble [1997] RLR 336
 - b. Selkent Bus Co Ltd v Moore [1996] ICR 836
 - c. Robertson v Bexley Community Centre [2003] ICR 836
6. The Claimant told me that he received legal advice on 12 June 2019. He did not see the solicitor but emailed him and spoke to him on the telephone. He said that he sent them the substance of the email he sent to the Tribunal on 5 September 2019 which referred to discrimination. The Claimant told me that he was aware of the time limits for bringing a claim to the Tribunal.
7. The Claimant waived privilege and said that his solicitor told him to do a subject access request and to contact the Equality Advisory Service (EAS) to enquire whether his claim merited inclusion of discrimination and victimisation. Despite receiving this advice on about 12 June 2019 the Claimant did not contact EAS until 30 August 2019. He told me the reason for this was that he was unwell with a mental impairment and that at this time he was unable to get out of bed. There was no medical evidence to substantiate this before me.
8. The ET1 was accepted as a breach of contract claim and as is normal practice the Tribunal sent automatic directions that the Claimant shall by four weeks of the date of the letter set out in writing to the Respondent what remedy the Tribunal is being asked to award and that he should include any evidence and documentation supporting what is claimed and how it is calculated. What the Claimant did, was to write a letter dated 5 September 2019 to the Tribunal in which he made two references to discrimination which prompted an enquiry from the Tribunal as to whether the Claimant wanted to include a claim of discrimination and if so on what ground. Although his letter of 5 September 2019 mentioned discrimination in general terms, it did not identify the protected characteristic or the acts of discrimination relied on.
9. The Claimant responded on 11 October 2019 (only two days after receiving the letter from the Tribunal) which the Tribunal took as being an application to amend which led to this hearing. It was not clear from the letter of 11 October 2019 what the precise grounds for his claim for discrimination were.
10. At the hearing, I asked the Claimant to explain his own words what his claim for discrimination was about. I let the Claimant speak uninterrupted for about 10

minutes. The Claimant referred to incidents when other workers (from Bulgaria, Romania and Poland) were treated unfairly and that he thought that this was discriminatory. He said that he stood up for them but did not say that he was treated detrimentally because of this.

11. The only incident of discrimination which related directly to him was when there was a tasting (of gin et cetera which they produced) which is normally done in a black mark so people were not influenced by the colour of the liquid. He said that on one occasion he and only he was given a white mug and the Claimant commented "*I said you give the South African white glasses and Mr Massey said he had not met anyone more racist than South Africans and polls*". There was no specific date attributed to this act, but it appears that this happened sometime in September/October 2018.
12. The Claimant confirmed that he did not complain about it and that he "*tried to make light of it*". He confirmed he did not raise a written grievance.
13. The Claimant attributes the delay in raising discrimination issues to the Tribunal to his mental health. However notwithstanding this the Claimant was able to engage with ACAS having acquainted himself with the time limits; had instructed a solicitor to give advice; had made a subject access request, had contacted EAS and had produced a schedule of loss within the relevant time period together with the letter of 5 September 2019 referred to above.
14. The Claimant also told the Tribunal that when he spoke to ACAS he spoke about discrimination as well as notice pay and therefore this was on his mind at the relevant time. There was nothing to stop him putting this in his claim form. I particularly note that the email correspondence (which was extensive) which the Claimant attached to his ET1 did not mention discrimination at all. This related to the Claimant's communications with the Respondent after his employment had terminated.
15. The Claimant accepts his claim for discrimination is substantially out of time. The Claimant has not shown that he was unable to have brought the claim in time. He says he was hindered by his mental impairment, but there was no evidence to substantiate this or how much he was hindered. The fact that he says he mentioned discrimination to ACAS and how he has engaged with the process as set out above indicates that he was able to bring a discrimination claim in time if he so wished.
16. The time limits in the Tribunal are not guidance and are statutory time limits. Whilst there is discretion to extend time on the basis that it is just and equitable to do so, this is still the exception rather than the norm. It is for the Claimant to provide sufficient evidence to convince me that time should be extended.
17. I considered whether the Claimant had brought his claim within a reasonable time after knowing the facts that arise from it and I find that he did not. Firstly he could have brought this claim easily when he presented his claim especially as he said this was in his mind when he spoke to ACAS; secondly he said he discussed this with his solicitor in June 2019; thirdly he spoke to the equality advisory service on 30 August 2019 and yet only made an application on 11

September 2019 when prompted by the Tribunal.

18. Even if I had found otherwise on this point, I would not have allowed the amendment because of the hardship and prejudice to the Respondent. What the Claimant identified as discriminatory behaviour towards him was one instant during the tasting. He says he laughed it off as he wanted to make light of it, and he did not complain or raise a grievance. Given that this is likely to have taken place over a year ago already, the prejudice to the Respondent is evident in that memories will have faded and it may be difficult to recollect the incident at all. In relation to him saying he stood up for other members of staff who he felt were being racially discriminated against the Claimant did not identify any unfavourable treatment towards him because he took this step.
19. I do not find it that it is just and equitable to extend time to allow the discrimination claim to be accepted by the Tribunal. Claimant's application to amend his claim to include discrimination is therefore refused. With the agreement of the parties' date was listed for the full merits hearing (which was to have been converted into a preliminary hearing had the amendment been allowed) on 7 February 2020. This will start at 10 am at the Ashford employment Tribunal.
20. The Respondent's position is that the Claimant's employment was terminated because he did not satisfactorily complete his probationary period and that contractually he was therefore only entitled to one weeks notice. The Claimant's position is that he had satisfactorily completed his probationary period in June 2018 and consequently he is entitled to one months notice. The Claimant queried whether he was entitled to compensation not being given reasons for his dismissal. This was not pleaded on his claim form and therefore is not a matter which the Tribunal can consider.
21. **In order to ensure that the hearing on 7 February 2020 progresses smoothly the Claimant and all witnesses for the Respondent shall prepare a written witness statement setting out the evidence that witness will give in relation to the issues which are set out in the previous paragraph. Such witness statements shall be exchanged simultaneously on 24 January 2020.**

Employment Judge Martin

Date: 30 October 2019