



EMPLOYMENT TRIBUNALS

Claimant: Ms I Nichifor

Respondent: Zinc Group Ltd

Heard at: Birmingham **On:** 22 January 2020

Before: Employment Judge Hindmarch

Representation

Claimant: In Person

Respondent: Mrs J Patel (Trainee Solicitor)

JUDGMENT ON AN OPEN PRELIMINARY HEARING

1. The claim of direct race discrimination is out of time and it would not be just and equitable to extend time and the claim is dismissed.
2. The application to amend the claim to include complaints of harassment and breach of contract is refused.

REASONS

1. Oral Judgment and reasons were handed down at the end of the hearing on 22 January 2020. These written reasons are provided at the request of the Claimant made in writing to the Tribunal on 30 January 2020.
2. This claim came before me for an Open Preliminary Hearing on 22 February 2020. There was an agreed bundle and I heard evidence from the Claimant who represented herself and the Respondent's two witnesses Mr Hague (Managing Director) and Mrs Clarke (Customer Account Manager). The Respondent was represented by Mrs Patel. There was a joint bundle of documents.
3. This matter was listed following a Preliminary Hearing Case Management on 18 October 2019 before Employment Judge McCluggage. He listed the hearing to consider whether the Claimant's claim for direct race discrimination was in time and if not whether time should be extended. He also listed matters to consider the Claimant's application to amend the claim to consider a complaint of harassment,

(based on the same facts pleaded as direct race discrimination) and any other amendments sought. The Claimant had indicated before Employment Judge McCluggage she might want to pursue a Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 Claim. I pointed out her contract of Employment with the Respondent appeared to be a permanent one and she conceded she was no longer pursuing this. The Claimant indicated she wished to pursue an amendment to include an entirely new claim of Breach of Contract, based she said on the Respondents failure to follow contractual Disciplinary Procedures on dismissing her.

4. The relevant dates were as follows. The claim was issued on 28 May 2019. The Claimant was dismissed on 26 September 2018 after a short spell of employment with the Respondent from 13 August 2018 - 26 September 2018. The date of dismissal must be the last act of discrimination and time begins to run on 26 September 2018.
5. The Claimant engaged with ACAS Early Conciliation from 25 October 2018 to 2 November 2018 and thus the time limit expired on 2 January 2019.
6. Employment Judge McCluggage's Case Management Order noted that the Claimant had referred to possibly issuing an earlier claim in the Tribunal. The case file noted there was another claim and I asked my clerk to fetch the file. This revealed the Claimant had brought another claim against another employer in April 2019.
7. In her witness evidence before me the claimant stated she believed she may have brought this claim against this Respondent at a date in December 2018 (i.e in time) possibly at a Liverpool address but she had no evidence for this. There is no earlier claim on the Employment Tribunal system and the Claimant appears to have done nothing to chase this up.
8. The claim is plainly out of time and was filed nearly 5 months out of time. S123 Equality Act 2010 gives me the right to extend time on a just and equitable basis. S123 provides as follows, "*Proceedings on a complaint within S120 may not be brought after the end of – a) the period of 3 months starting with the date of the act to which the complaint relates, or, b) such after period as the employment tribunal thinks just and equitable*".
9. The Claimant asserts she delayed because she was in poor health. She has provided no medical evidence despite having the burden of proof in this regard. She says she is not taking medication for fear this will scupper her job prospects and instead is taking vitamins to help with stress and depression. She was however able to engage in ACAS in time, apparently consider a claim as early as the date of dismissal (the Respondent's notes record of her as threatening legal action at the dismissal meeting and referring to discrimination, page 100 of the bundle) and importantly holding down 2 further jobs, one from October/November 2018 to February 2019 giving rise to the April 2019 claim, which she managed to file in time, and one she commenced on 1 March 2019 as recorded in her ET1. There is evidence that the Claimant was aware of the time limits. She admitted under questioning that ACAS had made her aware.

10. For all these reasons it would not be just and equitable to extend time. I have reminded myself I have a wide discretion but that exercise of that discretion is not a forgone conclusion.
11. The Claimant was cognisant of her rights, was able to engage with ACAS, was able to find 2 other jobs and file another claim. I have therefore decided not to extend time.
12. Turning to the application to amend. Firstly to add a claim of harassment under S26 Equality Act 2020. This is a relabelling and the Respondent agreed. It is the same factual matrix with a different label. The Principals in Selkent Bus Co Ltd v Moore 1996 ICR 836. EAT would have persuaded me to look favourably upon this had the original claim been in time given there would be little prejudice to the Respondent (the same witnesses and same evidence would need to be called). However the original claim is woefully out of time for the reasons already given so I cannot allow this amendment.
13. As regards to the Breach of Contract amendment this is entirely new facts and a new head of claim. Selkent requires me to look at all factors therefore including the application of time limits and the timing and manner of the application. On timing and manner today is the first time these new facts have been alleged. This is many months after the September 2018 dismissal.
14. On the time point the reasonably practicable test applies, a more onerous test than the Equality Act 2010 test. Regulation 7 of the Employment Tribunals Extension of Jurisdiction (E&W) Order 1994 provides “... *an [employment tribunal] shall not entertain a complaint in respect of an employee’s contract claim unless it is presented – a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented ... a) ..., within such further period as the tribunal considers reasonable*”. For the reasons I have refused to extend time for the discrimination claims, I would be refusing to do so for the Breach of Contract claim.
15. I need to consider the balance of injustice and of course the overriding objective. I was taken to the contractual Disciplinary Process. The statement of Main Terms and Conditions, page 35-36 of the Bundle, states the disciplinary and capability procedures are contractual and refers to an Employment Handbook. The procedures within the Handbook have a carve out for short service employees. It states at page 60 of the Bundle, ‘*we retain discretion in respect of the disciplinary procedures to take account of your length of service and to vary the procedures accordingly. If you have a short amount of service you may not be in receipt of any warnings before dismissal*’. On any objective construction of that clause any complaint of Breach of Contract would be unlikely to meet with success so the balance of hardship falls in the favour of the Respondent. If I allowed this amendment the Respondent would be put to the further cost of defending such a claim.

16. I also may consider the merits of the claims generally. I heard evidence from the Claimant and two witnesses of the Respondent. The Claimant would have the burden of proof in respect of all of her claims. I am afraid I have seen nothing that would shift the burden of proof. There is no doubt the Claimant is Romanian and she was dismissed. The Respondent however was persuasive in giving non race related reasons for terminating the contract of employment. I fully accept the Claimant disagreed with these reasons but there was nothing before me to suggest any less favourable treatment was because of race.

17. For the reasons the claim must fail.

Employment Judge Hindmarch

12 March 2020