



EMPLOYMENT TRIBUNALS

Claimant: Ms M Desantos

Respondent: Abellio London Limited

Heard at: London South (by video)

On: 16 October 2020

Before: Employment Judge C H O'Rourke

Representation

Claimant: Not in attendance, or represented

Respondent: Ms S Walkerdine - solicitor

PRELIMINARY HEARING JUDGMENT

1. The Claimant's claims of unfair dismissal, harassment and arrears of holiday pay are struck out, for want of jurisdiction, being out of time.
2. The Claimant is ORDERED to pay a deposit of £1000, not later than **21 days** from the date this Order is sent, as a condition of being permitted to continue to advance the claims of discrimination and victimisation.

REASONS

Background, Issues and Procedure at this Hearing

1. Following a telephone case management hearing before Employment Judge Mason, on 9 July 2020 (at which neither the Claimant, nor her then representatives attended), this Open Preliminary Hearing was listed for hearing today, to determine whether the Tribunal has jurisdiction to hear the Claimant's claims, given that they appear to be, on the face of it, out of time ('the preliminary issue').
2. The Claimant's solicitors wrote to the Tribunal and the Respondent, following that hearing, on 14 August 2020, confirming that they no longer acted for the Claimant and providing her postal and email address.

3. The previous hearing ordered the Claimant (amongst other things) to provide further and better particulars of her claim, by 31 July and a witness statement in respect of the preliminary issue, by 2 October. Neither order has been complied with and there has been no correspondence from the Claimant, to either the Tribunal, or the Respondent, since her solicitor's letter.
4. The Claimant did not attend this Hearing, listed for 10.00 am. It was therefore adjourned for half an hour, to 10.35, during which time an email was sent to the Claimant, reminding her of the Hearing and repeating the CVP log-in details and inviting her to join at that later time. She was also informed that if nothing was heard from her, the Hearing would proceed in her absence. She had not provided a telephone number with her ET1 and therefore no telephone contact could be made. She did not respond to the email, or join the adjourned hearing.

The Law

5. Were the unfair dismissal and holiday pay claims presented within time? (s111(2)(a) ERA 1996).
 - (i) If not, was it reasonably practicable for them to be presented in time?
 - (ii) If it was not reasonably practicable for the claim to be presented in time, was it presented within such period as the tribunal considers reasonable?
6. Was the sex discrimination claim (to include the harassment and victimisation claims) presented in time (s123(1)(a) Equality Act 2010)? If not, should the complaints nevertheless be considered on the basis they were presented within such other period as the Tribunal thinks is just and equitable? (s123(1)(b) Equality Act 2010)
7. The case of **Porter v Bandridge Ltd [1978] EWCA ICR 943** states that the onus of proving that presentation in time was not reasonably practicable rests on the Claimant. In respect of the discrimination claims, the case of **Robertson v Bexley Community Centre [2003] EWCA IRLR 434**, states that '*there is no presumption that they (a tribunal) should do so (extend time) unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant (in this case, the Claimant) convinces it that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule.*'

The Facts

8. The Claimant was dismissed, with immediate effect, on 23 September 2019. Notification of early conciliation was received on 11 December 2019 and the certificate sent out the same day. Her claim was presented on 9 March 2020 and therefore, based on the effective date of termination, the claim is approximately two months out of time.

9. Her claim form and particulars make no submissions as the preliminary issue, or indeed recognise that the claims may be out of time. She does, however, allege that the final act of harassment took place when she attended the appeal hearing, on 29 October 2019 and that the alleged delay in providing her with the appeal outcome, on 11 December 2019, was an act of discrimination and/or victimisation and the continued failure to provide her with notes of the appeal, is victimisation.

Findings

10. In respect of the unfair dismissal and holiday pay claims, there can be no doubt that these claims are out of time and applying **Porter v Bandridge**, the onus being on the Claimant to prove that presentation within time was not reasonably practicable, and her failing completely to provide any evidence on this point, they are dismissed.
11. In respect of the harassment claim of 29 October 2019, that claim is also out of time, as it should have been presented, allowing for early conciliation, by 28 January 2020 and is therefore over a month over the deadline. Applying **Robertson v Bexley Community Centre** and, again, as there has been no submission from the Claimant as to why it might be just and equitable to extend time that claim is also dismissed.
12. In respect of the discrimination and victimisation claims, as to the alleged delay in providing the appeal outcome, on 11 December 2019 and subsequent alleged failure to provide the minutes of the appeal that claim is within time.

Deposit Order

13. Had the Claimant attended today's Hearing, or even provided further and better particulars of her claim then she would have had opportunity to make submissions as to whether or not a deposit order should be made in respect of her claims of discrimination and victimisation. Nor was it possible to make any enquiries of her ability to pay such an order.
14. I find that the Claimant's claims of discrimination and victimisation, in relation to the alleged delay in providing the appeal outcome and the notes of the appeal hearing have, subject to Rule 39(1) of the Employment Tribunal Rules of Procedure 2013, little reasonable prospects of success and therefore that she be ordered to pay a deposit of £1000, as a condition of continuing to advance those claims and I do so for the following reasons:
 - a. The Claimant had made no assertion in her claim form that she has, prior to bringing the claim, carried out a protected act, subject to s.27(1) of the Equality Act 2010 and therefore the detriment that she alleges as to delay in providing the appeal outcome cannot be victimisation.
 - b. The bringing of her claim is a protected act and therefore, potentially any detriment post-dating 9 March 2020 is victimisation. However, the Respondent states in their Response that they have

provided the minutes of the appeal hearing and therefore absent any evidence from the Claimant on this point, I have no reason not to believe that to be the case. Accordingly, she has suffered no detriment.

- c. The Claim as to direct discrimination, in respect of the delay in providing the appeal outcome, is, despite the last order of the Tribunal, unparticularised. The Claimant has provided no detail of any comparator, or why any alleged delay is because of her sex, when, in contrast, the Respondent states that the delay was entirely due to the Claimant insisting that the Operations Director of the Respondent carry out a site visit of the accident site, before reaching his conclusions as to her appeal and he doing so, as soon as was reasonable, within the constraints of his prior work commitments.

15. The Claimant may wish to take advice as to the potential consequences of a deposit order, in particular that if claims that are the subject of such an order proceed to hearing and the Tribunal decides to dismiss such claims, for substantially the reasons given in the order, then the Claimant will be treated as having acted unreasonably in pursuing those claims, for the purposes of a costs order in the Respondent's favour, unless the contrary is shown (Rule 76). Rule 39(5) states:

*'(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—
(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and
(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.'*

16. Conclusion. The claims of unfair dismissal, arrears of holiday pay and harassment are struck out, for want of jurisdiction, being out of time. The Claimant is ordered to pay a deposit of £1000 as a condition of being permitted to proceed with the claims of discrimination and victimisation.

Employment Judge O'Rourke

Date: 16 October 2020

NOTE ACCOMPANYING DEPOSIT ORDER

Employment Tribunals Rules of Procedure 2013

1. The Tribunal has made an order (a “deposit order”) requiring a party to pay a deposit as a condition of being permitted to continue to advance the allegations or arguments specified in the order.

2. If that party persists in advancing that complaint or response, a Tribunal may make an award of costs or preparation time against that party. That party could then lose their deposit.

What happens if you do not pay the deposit?

3. If the deposit is not paid the complaint or response to which the order relates will be struck out on the date specified in the order.

When to pay the deposit?

4. The party against whom the deposit order has been made must pay the deposit by the date specified in the order.

5. If the deposit is not paid within that time, the complaint or response to which the order relates will be struck out.

What happens to the deposit?

6. If the Tribunal later decides the specific allegation or argument against the party which paid the deposit for substantially the reasons given in the deposit order, that party shall be treated as having acted unreasonably, unless the contrary is shown, and the deposit shall be paid to the other party (or, if there is more than one, to such party or parties as the Tribunal orders). If a costs or preparation time order is made against the party which paid the deposit, the deposit will go towards the payment of that order. Otherwise, the deposit will be refunded.

How to pay the deposit?

7. Payment of the deposit must be made by cheque or postal order only, made payable to HMCTS. Payments CANNOT be made in cash.

8. Payment should be accompanied by the tear-off slip below or should identify the Case Number and the name of the party paying the deposit.

9. Payment must be made to the address on the tear-off slip below.

10. An acknowledgment of payment will not be issued, unless requested.

Enquiries

11. Enquiries relating to the case should be made to the Tribunal office dealing with the case.

12. Enquiries relating to the deposit should be referred to the address on the tear-off slip below or by telephone on 0117 976 3033. The PHR Administration Team will only discuss the deposit with the party that has been ordered to pay the deposit. If you are not the party that has been ordered to pay the deposit you will need to contact the Tribunal office dealing with the case.

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DEPOSIT ORDER

To: HMCTS Finance Centre

The Law Library

Law Courts

Small Street

Bristol

BS1 1DA

Case Number _____

Name of party _____

I enclose a cheque/postal order (delete as appropriate) for £_____

Please write the Case Number on the back of the cheque or postal order