



EMPLOYMENT TRIBUNALS

Claimant
Mr D Butti

v

Respondent
Kier Limited

PRELIMINARY HEARING

Heard at: Watford

On: 10 July, 28 July, 25 September, 2 October 2020

Before: Employment Judge Smail

Appearances:

For the Claimant: Mr C Kennedy, Counsel

For the Respondents: Mr C Kelly, Counsel

JUDGMENT

1. The claimant withdraws a claim of breach of contract relating to accident insurance cover. This is understood by all concerned as being without prejudice to the claimant's right to pursue such a claim in the county court.
2. Claim 2 is struck out.
3. Claim 5 is struck out.
4. Claim 4 is dismissed.
5. Time is extended for the presentation of Claim 3 to 3 February 2020.
6. The first claim is stayed generally.

REASONS

Definition of terms – the five claims

1. Claim 1 - 3319915/2019, presented to the tribunal on 1 July 2019; Claim 2 – 3323491/2019, presented to the tribunal on 23 August 2019; Claim 3 – 3302331/2020, presented to the tribunal on 3 February 2020; Claim 4 – 3302421/2020, presented to the tribunal on 12 February 2020; Claim 5 – 3302686/2020, presented to the tribunal on 17 February 2020.

2. The claimant has made this matter extraordinarily complicated by bringing five claims. This preliminary hearing has been heard over four separate days between July and October 2020 in an effort to sort matters out. Given the scale of the confusion, it is my judgment that this has been a sensible use of time. Within the course of these hearings I have issued an earlier judgment and reasons flowing from the hearing on 25 September 2020. At that hearing I ordered that the judgment of Employment Judge K Palmer, dated 27 January 2020 and promulgated on 17 February 2020, be revoked and that the first claim, 3319915/2019, be accepted from 26 July 2020 when the claimant rectified the error on that claim form relating to Acas early conciliation certificates. Whilst that resolved the matter of acceptance of claim 1, there remains the problem of time limits and abuse of process in respect of one or more of the subsequent claims.
3. Mr Butti was in person for the first two dates of this preliminary hearing. He very sensibly instructed lawyers in the meantime and has been represented by Mr Kennedy on the last two occasions. Mr Kennedy has assisted the claimant as constructively as could be in the circumstances. He has submitted a way through the mess. It is his proposed way that I concentrate upon first.

Background

4. The claimant was employed by the respondent between 23 August 1993 and 12 April 2019 latterly as a Senior Building Surveyor. In the first claim, presented on 1 July 2019, he ticks the boxes claiming unfair dismissal, disability discrimination, notice pay, holiday pay, arrears of pay and other payments. There is some reference to pay benefits and pension. The particulars of claim are not clear. They do not contain a significant number of dates. Doing the best I can to understand the claims, borrowing also from the grounds of resistance, the following desired claims are suggested.
5. The claimant was dismissed for gross misconduct on 12 April 2019. It seems on 12 February 2018 the claimant had an accident at work when he broke his leg and required surgery. It seems he was in the process of inspecting a roof and fell on the roof surface. The respondent then sought to hold an internal enquiry into the circumstances of the accident. The respondent suggests that the claimant failed repeatedly to cooperate with that investigation resulting in the decision to dismiss him. The gross misconduct, as I understand it, was repeated failure to comply with reasonable management instructions, namely participating in the internal investigation.
6. The claimant describes himself as a whistle blower and as disabled. The alleged whistle blowing, I infer, related to matters of health and safety. Mr Kennedy has indicated that the case would usefully benefit, if it proceeds, by a lawyer's identification of issues. That is plainly right.
7. It is clear that the claimant was contemplating a personal injury claim in respect of his accident. It is not immediately clear how the claimant puts disability discrimination. The respondent does not admit disability. It denies disability discrimination. It is also not immediately clear what the protected disclosure in terms of whistle blowing was.

8. The respondent's response to the first claim form essentially puts the claimant to proof on whistle blowing and on disability discrimination. The respondent puts forward a positive case of gross misconduct.

The second claim

9. The second claim was presented on 23 September 2019. The claimant incorrectly says that he did not have an Acas early conciliation certificate number. He incorrectly represents that the employer had already been in touch with Acas on the matter. The particular significance of the second claim may no longer arise.
10. In the second claim the claimant claims accident insurance cover in the sum of £183,797.38. There are other financial claims mentioned also in Claim 1. The claimant, on 2 October 2020, expressly withdrew a claim for breach of contract in respect of accident insurance cover with the proviso that he be free in the county court to pursue it, if appropriate. The respondent did not oppose that course. This is mentioned in the judgment.

The third claim

11. The third claim was presented on 3 February 2020. Shortly after the judgment of Employment Judge Palmer rejecting the first claim. The claim is a repetition of the first claim to all intents and purposes.

The fourth claim

12. This was presented on 12 February 2020. In the narrative extension appended to the claim from the complainant purports to set out a history of alleged bullying at the hands of his Unit Manager, David Cook. These details are new in the history of the litigation. It amounts to a long series of allegations about managerial harassment. It is far from clear however that any harassment or bullying alleged is of the nature covered by the Equality Act 2010, namely connected to a protected characteristic. Self-evidently, this claim has time limit problems. Allegations go back to 2008. There is reference to dyslexia on the part of the claimant. The allegations are not set out as a coherent set of allegations relating to disability. The claimant has given evidence in Tribunal at these preliminary hearings. There is no good explanation for why he waited until the fourth claim form to raise these matters.

The fifth claim

13. There are two time stamps on this claim form. The earliest is 5 February 2020, the latter is 17 February 2020. I assume it was hand delivered to Watford Employment Tribunal on 5 February 2020.
14. In addition to ticking unfair dismissal and disability discrimination, the claimant makes a particular claim for loss of pension entitlement from 13 April 2019 to 28 November 2023 in the sum of £8,324.62 and future losses projected from 29 November 2023 to 29 November 2043 in the sum of £11,728.

15. The narrative of the claim relates to alleged pension entitlements following TUPE transfers. The respondent submits that there is no known cause of action enjoyed by the employment tribunal in respect of this.

Timing difficulties with claim 1

16. Having been presented on 1 July 2019, Employment Judge Manley rejected the claim form correctly on 9 July 2019 because the claimant mistakenly asserted that he did not have an Acas early conciliation certificate number and that Acas did not have the power to conciliate on some of all of the claims. This was incorrect. It is common ground that an Acas conciliation certificate number was needed. It is also common ground that the 23 June 2019 Acas certificate that the claimant had obtained should have been appropriately cited here. The matter was not regularised until we dealt with the matter on 25 September 2020 noting that the claimant had rectified the matter by application dated 26 July 2020. The claimant has never given any good explanation for why he made this mistake. I have already found in my earlier reasons dealing with the reconsideration of the rejection, that the claimant displays a profound lack of understanding of the Acas Rules. That is as good as the explanation gets.
17. Upon the rejection of the claim form by Employment Judge Manley on 9 July 2019, the claimant was sent information on how to seek a reconsideration. He sent in, on 19 July 2019, what he described as the 'updated' number of his Acas certificate. That related to a certificate dated 19 July 2019. Upon being chased for a copy of it by the tribunal, he sent that in on 22 July 2019. The claimant sent in a copy of the certificate dated 19 July 2019, not the earlier one dated 23 June 2019. I referred in the reasons, following the 25 September 2020 hearing, that the claimant had confused time limit rules with the certificate rules. It was his belief that the certificate had to be renewed every three months and that the effect lasted 30 days.
18. On 23 July 2019, an employment judge accepted the certificate that had been sent in. There was an internal note, "Accept ET1 in the date of certificate". The certificate in front of the employment judge was that dated 19 July 2019. All that was sent to the claimant was a letter dated 29 July 2019 saying, "Your claim has been accepted" without any further comment as to from when the claim had been accepted. I accept, therefore, that as far as the claimant was concerned he did not have a problem with time limits. His claim form sent in on 1 July 2019 had been accepted. The employment judge might have deemed the acceptance of the claim form to be from when the certificate had been sent in, which was 22 July 2019. Be that as it may, that was not a message sent to the claimant. We know that the correct certificate was numbered R161759/19/42, the date of receipt by Acas of the EC notification was 23 May 2019 and the date of issue by Acas for the certificate was 23 June 2019. We know that both the claimant and the respondent had this certificate. We know that the primary period of limitation from the date of dismissal on 12 April 2019 would ordinarily have expired on 11 July 2019 to be added to that would be 31 days of the Acas process taking the date of presentation expiry of the limitation period up to 10 August 2019.

19. There was time, then, for the matter to have been properly rectified had the employment judge, on 23 July 2019, pointed out the problem.

The claimant's position on 2 October 2020.

20. Mr Kennedy, on behalf of the claimant, suggests that the way forward is to treat Claim 3 as the relevant claim form for present purposes. He submits, and about this he is factually right, that the claimant believed he had a valid claim until Employment Judge Palmer rejected it on 27 January 2020. One week later on 3 February 2020, submits Mr Kennedy, the claimant had purported to rectify matters by sending in the third claim. Mr Kennedy submits – and this is important – that issuing a subsequent claim following a rejection of the first claim is not an abuse of process. He relies upon the judgment of Simler J, as she then was, in the case of Adams v British Telecommunications Plc (EAT) [2017] ICR 382. In that case a first claim form was rejected because the Acas certificate number was incorrectly cited. The Judge concluded that that matter could not be treated as a minor error and so ignored. The claimant's response was to send in a new claim form. There was no suggestion in that case, and other cases cited in it, that this would be an abuse of process. Time limits tests then applied to the second claim form: not the first claim form.
21. I agree that in circumstances where an earlier claim form is rejected, it is not an abuse of process to issue a fresh claim form. There is no requirement, in my judgment, to seek a reconsideration of the first rejected claim form. To insist otherwise would add yet a further procedural obstacle to access to justice in a forum which is meant to be relatively informal, namely the employment tribunals. It does not prevent, further in my judgment, a claimant from relying upon an earlier second claim form if the claimant also applies for a reconsideration of the rejection of the first claim form which results in a much later date of acceptance of the first claim form. Paradoxically, the second claim form is treated as having been presented earlier than the first.
22. The issuing of a second claim following a rejection of an earlier claim for Acas early conciliation certificate is an exception to an otherwise general rule that a second claim, claiming much the same as a first claim, is likely to be vexatious under the Employment Tribunal Rules. That principle was entertained by Lady Smith in Lynch and others v East Dunbartonshire Council [2010] ICR 1094 EAT(SC).
23. In claim 3 there is citation of the correct Acas certificate number.
24. The issue then becomes the application of time limit rules in relation to the third claim form. That remains the case even if, as here, out of precaution a claimant applies for reconsideration of the rejection of the first claim even where that application is successful albeit resulting in a deemed later presentation date.

Extension of time for the third claim?

25. In my judgment it was not reasonably practicable for the third claim to be presented in time. The claimant had an unequivocal statement from the tribunal

in a letter dated 29 July 2019 that the first claim had been accepted. That was still within the primary period of limitation as extended by the appropriate certificate for the claim. Had there been a rejection at that point with the observation that the certificate supplied post-dated the claim form, the claimant would have been put on notice and, on the balance of probability, would have submitted the correct certificate rather than the “updated” certificate as he saw it. Within a week of the position having been clarified to the claimant at the preliminary hearing in front of Employment Judge Palmer on 27 January 2020, he issued the third claim with the correct certificate number.

26. In my judgment, because of the representation from the tribunal, it was not reasonably practicable for the third claim to be presented in time. In my judgment, it is reasonable to extend time to 3 February 2020, being a short period following the claimant’s realisation of the problem on 27 January 2020.
27. Accordingly, the unfair dismissal claim and all claims under the Employment Rights Act 1996 are in. Similarly, it is just and equitable to extend time for the Equality Act 2010 claims. Those claims would likely have been brought in time if the tribunal had rejected the claim with the clear reason that the certificate supplied post-dated the claim form. That would have put the claimant on notice to supply the earlier certificate. All of that would have been likely to have taken place in the primary period of limitation. To decline to exercise the just and equitable jurisdiction here would land the respondent in the windfall position of being released from having to defend a claim that would otherwise have been brought in time by reason substantially of a mistake by the tribunal.
28. Time having been extended then for the third claim, it is not necessary to consider whether to extend time for the first claim. It is appropriate therefore to stay the first claim.

The second claim

29. The second claim did in fact have the relevant certificate number placed in the narrative of the background of the claim rather than at the appropriate point earlier in the claim form. It is not therefore defective for early conciliation reasons. The second claim, however, now serves no purpose. Its principal claim was breach of contract in respect of accident insurance cover. That has now been withdrawn with a view to pursuing in the county court, if necessary.
30. In so far as the second claim puts financial figures on claims in the third claim, those figures can be relied upon in the schedule of loss to follow the third claim. The second claim was presented on 23 September 2019 and on the face of it, it is out of time. The sensible course in my judgment, is to strike out the second claim as no longer being pursued and as being an abuse of process in that it adds nothing in reality.

The fourth claim

31. The practical effect of the fourth claim is to add a whole set of harassment allegations in respect of the conduct of David Cook. It was presented on 12 February 2020. It is presented substantially out of time. There is no good

reason why the matters contained therein were not present in the first claim and subsequently in the corrected third claim. In so far as the harassment can be argued as being related to the protected characteristic of disability – and that is far from clear – the balance of prejudice lies in favour of the respondent, in my judgment. The respondent should not be subject to the burden of defending this late claim when first, there is no good reason for the delay in presentation, and secondly, the nature of the claim itself is far from clear. The respondent, in my judgment, should not be subject to the burden of defending this weak claim.

The fifth claim

32. In his submissions Mr Kennedy makes “no submissions in relation to claim 5”. There is an acknowledgement that there is no known cause of action in respect of this claim which relates, principally, to pension. Accordingly, I strike out the fifth claim as having no reasonable prospects of success.

Employment Judge Smail

5 November 2020

Sent to the parties on:

6 November 20

For the Tribunal: