EMPLOYMENT TRIBUNALS

Claimant: Mr J Fidalgo

Respondent: London United Busways Limited

Heard at: London South via CVP **On: 27 October 2020**

Before: Employment Judge Khalil (sitting alone)

Appearances

For the claimant: Mr Curtin, Legal Consultant
For the respondent: Mr Craven, Solicitor

JUDGMENT ON PRELIMINARY ISSUES WITH REASONS

Decision:

The complaint of unfair dismissal pursuant to S.98/111 of The Employment Rights Act 1996 and the complaint of the denial of the right to be accompanied under S. 10/11 the Employment Relations Act 1999 are dismissed as the Tribunal has no jurisdiction to hear the complaints.

The complaint of race discrimination can proceed as the Tribunal exercised its discretion to hear the claim out of time as it was just and equitable to do so pursuant to S.123 (1) (b) Equality Act 2010.

Reasons

1. This was an Open Preliminary Hearing to determine the Tribunal's jurisdiction in relation to the unfair dismissal claim and the race discrimination complaint. The claim form was presented on 4 December 2019 (and again on 20 December 2019). Early conciliation commenced on 30 September 2019 and concluded on 13 November 2019.

2. The claimant was represented by Mr Curtin legal consultant (retired solicitor) and the respondent was represented by Mr Craven a solicitor at Ward Hadaway.

3. The Tribunal had received an agreed electronic bundle, submissions from both parties, and an authorities bundle from the respondent's solicitor. The bundle contained witness statements of the claimant.

4. Mr Curtin stated that the claimant did not wish to provide oral testimony, thus the Tribunal was being asked to determine the issues based on submissions alone.

5. It was confirmed on behalf of the claimant that the key reason for the delay in commencing early conciliation was because the claimant was awaiting on the outcome of his appeal against dismissal.

6. Mr Curtin also confirmed to the Tribunal that the reference to disability discrimination in the claim form was an error. There was no disability discrimination complaint being pursued.

7. The Tribunal also sought clarification about whether there was complaint about the right to be accompanied on 11 March 2019. It was confirmed that there was not but there was a complaint about the right to be accompanied at the fact-finding meeting on 10 December 2018.

Relevant findings of fact

8. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence, documentation and submissions provided during the hearing.

9. Only relevant findings of fact relevant to the preliminary issue (s) only, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in a statement or in submissions and considered relevant.

10. The Tribunal first considered the effective date of termination. The Tribunal found this to be 11 March 2019 which was the date upon which the claimant was summarily dismissed. This was acknowledged in paragraph 3 of the grounds of complaint (page 20 of the bundle).

11. The Tribunal also had regard to the disciplinary procedure and in particular the statement that a decision to dismiss would be effective immediately and any appeal against it would be regarded as a request for reinstatement (if successful) (page 80 of the bundle).

12. The claimant appealed against his dismissal on 24th of May and an outcome was provided on 29th of June 2019. The claimant confirmed that that was the date on which he received the appeal outcome.

13. Mr Curtin on behalf of the claimant confirmed that the claimant had started to consult him about the matter from early May 2019.

14. The claimant also confirmed that he was a member of the union at the time who had also accompanied him to his disciplinary meeting on 11 March 2019 when he was dismissed.

15. The claimant posted a letter to ACAS on 25th of September 2019. This was not an early conciliation form and the letter at page 1 of the bundle did not contain the respondent's address.

16. The ACAS early conciliation certificate at page 5 of the bundle stated that early conciliation had been initiated on 30 September 2019 and concluded on 13 November 2019.

17. The claimant subsequently presented the claim form on 6 December 2019. A further claim form was presented on 20th of December 2019.

18. The last act of discrimination relied upon is 11 March 2019 (the decision to dismiss). The claimant says that there were other (unparticularised) acts of discrimination which predated 11th of March 2019. This finding does not determine that there was a continuing course of conduct extending over time ending on 11 March 2019.

Applicable Law

19. A Tribunal cannot consider a complaint unless it has been presented within three meet three months of the effective date of termination pursuant to S.111 Employment Rights Act 1996 ('ERA') or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to have been presented before the end of the period of three months.

20. Section 207B ERA provides extension of time provisions where ACAS early conciliation has been initiated within the primary limitation period.

21. In ***Palmer and Saunders v Southend-on-Sea Borough Council 1984 1 ALL ER 945***, the Court of Appeal confirmed that awaiting on the outcome of an internal appeal would not of itself make it not reasonably practicable to bring a claim within the time limit.

22. In ***Walls Meat Company V Khan 1978 IRLR 499***, Court of Appeal stated that ignorance of rights or ignorance of the time limit is not just cause or excuse unless it appears that he or his advisers could not reasonably be expected to have been aware of them.

23. By section 123 of the Equality Act 2010 ('EqA'), a complaint of discrimination may not be brought after the end of the period of three months starting with the date of the alleged act of discrimination or within such other period as a Tribunal considers just and equitable. Section 140B of the EqA provides similar extension of time provisions where ACAS early conciliation has been initiated within the primary limitation period.

24. Pursuant to ***British Coal Corporation V Keeble 1997 IRLR 336***, a Tribunal can take into account the length and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the parties sued had cooperated with any requests for information, the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain professional advice once he knew of the possibility of taking action. These factors mirror what is set out in section 33 of the Limitation act 1980, referred to by the EAT in ***Keeble***.

Conclusions and analysis

25. Dealing first with the unfair dismissal complaint, the Tribunal finds that it was reasonably practicable for the claimant to have initiated early conciliation within the primary limitation period.

26. It appears that the claimant was operating on the basis that he would consider his options after the appeal outcome had been made known but there was nothing preventing the claimant from initiating early conciliation which in fact could have been done simply by a phone call.

27. In accordance with, ***Palmer and Saunders*** it is not sufficient excuse for the claimant to delay taking protective action pending the outcome of an internal appeal.

28. The claimant had consulted with Mr Curtin who the Tribunal concluded would amount to a skilled adviser, from early May 2019, well within the primary limitation period. The claimant was also a member of Unite and was represented by his union representative at his meeting on 11th of March 2019 which led to his dismissal.

29. The Tribunal thus concludes that the claimant had access to advice to submit his claim sooner than he did. To the extent that the erroneous belief or cause of delay was attributable to Mr Curtin, which was how it appeared to be put in submissions, the claimant would be fixed with that.

30. The Tribunal also had regard to the claimant's statement in paragraph 6 of his third with the statement where he referred to early conciliation and Tribunal time limits as being well known (page 69 of the bundle).

31. Even if the Tribunal was wrong in the conclusion above, if the effective date of termination was 29th of June 2019 the claimant initiation of early conciliation was still out of time. The claimant's initiation of early conciliation by a letter posted on 25 September 2019 was not on an early conciliation form and neither did it have the respondent's address under the early conciliation rules of procedure section 2 (1) (b) and 2 (2) (b) (even if the Tribunal had accepted that ACAS would have received the letter on or before 28th of September 2019).

32. For the same reasons the S.10 Employment Relations Act 1999 complaint is also out of time (S.11 (2)), even more so as this relates to a meeting in December 2018.

33. In relation to the discrimination complaint, the Tribunal considered the ***Keeble*** factors which are essentially guidelines to determine the key question of the balance of prejudice if the discretion to extend time was to be exercised or, alternatively, declined.

34. The Tribunal considered that the length of delay to be quite significant. The claim form was ultimately presented on 6 December 2019 some four months after it ought to have been presented had for example, the claimant initiated early conciliation by 10th of June 2019.

35. Having regard to the above findings and conclusions regarding reasonable practicability, the reasons for the delay were not that convincing either.

36. However, the fault appeared to lie with Mr Curtin in whose hands the claimant had entrusted safe initiation of early conciliation.

37. Within the just and equitable extension territory this of itself is not necessarily fatal as it can be under the reasonable practicability test. This has been made clear in various EAT authorities for example ***Chohan v Derby Law Centre 2004 IRLR 685*** and ***Anderson v George S Hall Ltd EAT 0631/05.***

38. The Court of Appeal confirmed ***in Apelogun-Gabriels v Lambeth London Borough Council & another 2002 ICR 713 CA*** (paragraph 16) that resolution through an internal procedure *may* justify an extension of time. It is a factor, albeit not a general principle it will happen.

39. The Tribunal had regard to the respondent's submissions that Ms Leane Hansen the dismissing officer was no longer employed. She left in March 2019. Also, Mr Kelsall, in relation to whom various discrimination allegations were made had also left in June 2019. There will be some prejudice to the respondent in not being able to seek input from these witnesses sooner whilst they were still employed but at least since 30 September 2019 or shortly thereafter, or alternatively 6 December 2019, or shortly thereafter, the respondent has been on notice of this claim with jurisdiction undetermined and the Tribunal concludes that with reasonable effort individuals could (still) be contacted.

40. The Tribunal does not consider the cogency of evidence to be affected by the delay to such a degree that this factor would count against the claimant and balanced against the respondent's comparative prejudice.

41. The other ***Keeble*** factors had lesser significance as this was not a case focusing on efforts 'from awareness'. Neither was there anything either way in the cooperation factor.

42. The respondent also relied on ***Robertson v Bexley Community Centre 2003 IRLR 434***- that the just and equitable discretion to extend time is the exception rather than the rule. That case however does not establish any new factor to be weighed into the assessment of the balance of prejudice. The Tribunal interprets that statement as meaning that cases should be presented within the primary limitation period unless a claimant can convince the Tribunal it is just and equitable to extend time – in accordance with the EAT guidance in ***Keeble.***

43. The Tribunal thus concludes that it is just and equitable to permit the race discrimination complaint to proceed.

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Employment Judge Khalil

12 November 2020