



EMPLOYMENT TRIBUNALS

Claimant: Mr E Elsamelghi

Respondent: (1) Lloyds Bank plc
(2) Reed Specialist Recruitment Ltd

PRELIMINARY HEARING

Heard at: Manchester (in public by CVP)

On: 12 November 2020

Before: Judge Brian Doyle (sitting alone)

Representatives

For the claimant: In person

For the respondents: (1) Ms J Duane, of counsel
(2) Ms A Smith, of counsel

JUDGMENT

(1) It is agreed by all parties that the claimant was employed by the 2nd respondent.

(2) The claimant has not resigned his employment with the 2nd respondent and he has not been dismissed, expressly or constructively, by the 2nd respondent.

(3) As the claimant remains employed by the 2nd respondent, and he has not been dismissed by it, his claim against the 2nd respondent (of unfair dismissal and wrongful dismissal in breach of contract) has no reasonable prospect of success and that claim is struck out such that the 2nd respondent ceases to be a party to these proceedings.

(4) As the claimant was not employed by the 1st respondent his complaint of unfair dismissal and wrongful dismissal in breach of contract against the 1st respondent has no reasonable prospect of success and is struck out or otherwise dismissed.

(5) So far as the claimant's complaints against the 1st respondent under section 41 of the Equality Act 2010 are concerned, all such complaints arising before March 2018

are out of time and it is not just and equitable to extend time. Those complaints are dismissed.

(6) So far as the claimant's remaining complaints against the 1st respondent under the Equality Act 2010 are concerned, all such complaints arising from March 2018 onwards may proceed to final hearing, but any time limitation issues arising shall fall for determination by the tribunal conducting the final hearing.

(7) The claim is subject to separate case management orders.

REASONS

Introduction

1. I conducted today's preliminary hearing in public via the Cloud-based Video Platform (CVP).
2. I had provided to me by the parties a hearing bundle in PDF format comprising 157 pages (references to which below are in square brackets) and an agenda for case management purposes. Other documents were provided to me during the course of the hearing. These were the 2nd respondent's strike out application dated 30 March 2020; a supporting bundle of documents comprising 19 pages; the 2nd respondent's skeleton argument; and the claimant's email of 11 November 2020 with two documents attached.
3. I took witness evidence from Ms Hazel Pickles for the 2nd respondent and I heard from the claimant in support of his position on the preliminary issues. I am also grateful to be both counsel for their submissions and to the 2nd respondent's solicitor for his assistance with documents.

The claim

4. This claim arises from an early conciliation process concluded on 11 and 12 April 2019 [2-3]. A claim on form ET1 was then presented to the Employment Tribunal by the claimant on 23 May 2019 [4-21]. The respondents responded to the claim on form ET3 on 1 July 2019 [22-31] and 27 June 2019 [32-43] respectively. The claimant provided undated further particulars of his claim and an initial schedule of loss following a case management hearing on 9 December 2019 [51-67 and 68-71].
5. The earlier preliminary hearing for case management purposes was held by Employment Judge Sherratt on 9 December 2019 and a case management summary resulted [44-50]. As a result, the Tribunal identified a number of preliminary questions [44-45], which fall for decision at the present hearing.

Application to strike out the claim against the second respondent

6. The 2nd respondent accepts that the claimant is its employee. The 1st respondent agrees with that position. The claimant also accepts that he is or was the employee

of the 2nd respondent. It is not contended that he was also employed by the 1st respondent to whom he was assigned to work by the 2nd respondent.

7. The 2nd respondent applies to strike out the claim against it. That claim comprises only complaints of unfair dismissal and wrongful dismissal in breach of contract. The 2nd respondent contends that it has not dismissed the claimant and he has not resigned his employment.
8. I heard the evidence of Ms Hazel Pickles, who was at the relevant time a Senior Talent Support Consultant employed by the 2nd respondent. She gave evidence in the form of a witness statement [81-85] and answered questions put to her by the claimant and by the tribunal.
9. The tribunal accepts Ms Pickles's evidence. It finds that the claimant is an employee of the 2nd respondent. At the relevant times he was assigned temporarily to work for the 1st respondent. He was not an employee of the 1st respondent. That assignment was ended by the 1st respondent in circumstances that are the subject of the claim against the 1st respondent. His employment with the 2nd respondent has not been terminated. He has not resigned. He has not been dismissed by the 2nd respondent. He has continued to apply for assignments via the 2nd respondent. The 2nd respondent has continued to process those applications. No P45 has been issued, although to date the claimant has not been successfully re-assigned to any of the 2nd respondent's clients. See supporting documents 12-19.
10. The evidence points overwhelmingly towards the claimant being the employee of the 2nd respondent. His employment continues. He has not resigned. He has not been dismissed. He has continued to apply for assignments. The 2nd respondent has continued to put them forward to its clients. Although he has not been reassigned, this is not due to any termination of his employment with the 2nd respondent. The tribunal is unable to draw any adverse inferences from the otherwise passive relationship between the 2nd respondent and the claimant. He remains employed.
11. It follows inevitably that in the absence of a resignation or dismissal or constructive dismissal the claimant's complaints against the 2nd respondent of unfair dismissal and wrongful dismissal in breach of contract cannot succeed. They have no reasonable prospect of success. They are struck out under rule 37 of the Employment Tribunals Rules of Procedure 2013.
12. The 2nd respondent took no further part in the preliminary hearing.
13. As the claimant was not employed by the 1st respondent his complaint of unfair dismissal against the 1st respondent has no reasonable prospect of success and is struck out or otherwise dismissed.

Time limits

14. That leaves only the claimant's complaints of race and disability discrimination against the 1st respondent, which rely upon section 41 of the Equality Act 2010 (contract workers).

15. The 1st respondent seeks to persuade the tribunal that the majority of the complaints against it are out of time and that it would not be just and equitable to extend time. See counsel's skeleton argument and the references therein to the claimant's further and better particulars of his claim at [51-67].
16. The complaints appear to fall into two separate periods of time: (1) December 2015 to May 2017 [57-62] and (2) March 2018 to February 2019 [62-65]. Not only are these two periods clearly separated by a gap of some 10 months, but they also date back some three and a half years as at the date of the ET1 and some four years (or longer) by the time they were particularised.
17. The complaints in the first group are clearly out of time. Although the claimant has had a history of depression, he does not otherwise offer any or any adequate explanation as to why he could not take advice or pursue any action regarding this group of complaints sooner or in time. The claimant's email of 11 November 2020 and his two supporting documents do not provide any sound basis either for treating both groups as representing a course of conduct or for extending time on the just and equitable ground. I also accept that the 1st respondent would be prejudiced by having to attempt to defend such complaints at this remove in time. In contrast, the claimant is relatively little disadvantaged because he has complaints that are accepted as being in time and other complaints that I am permitting to proceed below.
18. Therefore, in respect of the complaints that pre-date March 2018, I accept the arguments put forward on behalf of the 1st respondent in counsel's skeleton argument and oral submissions.
19. So far as the claimant's complaints against the 1st respondent under section 41 of the Equality Act 2010 are concerned, all such complaints arising before March 2018 are out of time and it is not just and equitable to extend time. Those complaints are dismissed.
20. I take a different view of the complaints in the second group from March 2018 to February 2019. Here there is a common thread that leads through the first, second and third "strikes" issued to the claimant by the 1st respondent in April 2018, July 2018 and February 2019. Despite there being gaps within this period, there appears to be an arguable course of conduct such that it is possible that all the matters complained of across this period are within the primary limitation period. In any event, the claimant's depression taken with evidence of his brain haemorrhage from February 2018 onwards may be capable of extending time on the just and equitable basis.
21. I consider that these questions are best decided by the tribunal at the final hearing, having heard evidence and made crucial findings of fact, aided by further submissions. At this stage, I do not dismiss any part of the complaints from March 2018 onwards, but I expressly leave open the time limitation defence potentially available to the 1st respondent.

22. Accordingly, so far as the claimant's remaining complaints against the 1st respondent under the Equality Act 2010 are concerned, all such complaints arising from March 2018 onwards may proceed to final hearing, but any time limitation issues arising shall fall for determination by the tribunal conducting the final hearing.

23. The claim is subject to separate case management orders.

Judge Brian Doyle

DATE 12 November 2020

JUDGMENT & REASONS
SENT TO THE PARTIES ON

23 November 2020

FOR THE TRIBUNAL OFFICE