



EMPLOYMENT TRIBUNALS

Claimant Mr John Bryant v
Respondent BMW UK Manufacturing Ltd

Heard at: Watford by CVP
Before: Employment Judge Cotton

On: 10 February 2020

Appearances

For the Claimant: Claimant in person

For the Respondent: Mr Ellerby (representative)

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was a video hearing. A face to face hearing was not held because it was not practicable and all issues could be determined at a remote hearing.

JUDGMENT

1. The claimant's claims are dismissed.

REASONS

Introduction

1. The claimant claims that he was unfairly dismissed by the respondent contrary to the Employment Rights Act 1996 and that the respondent discriminated against him on the ground of his race contrary to the Equality Act 2010.
2. In summary, the claimant was dismissed by the respondent for failing to return to work following a holiday to Jamaica. The claimant's position was, broadly, that the dismissal was unfair and discriminatory because he had been detained in Jamaica for reasons beyond his control.
3. This was a preliminary hearing to determine the respondent's application that the claims should be struck out under rule 37 of the Employment Tribunal Rules of Procedure because they have no reasonable prospects of success. Alternatively, that a deposit order should be made against the

claimant under rule 39 of those Rules because his claims have little reasonable prospect of success.

4. At the hearing the claimant, who had been employed by the respondent as an 'Assembly Associate,' had no legal representation but was accompanied by his daughter Ms Julia Bryant. It emerged that she was present in three capacities: to speak on the claimant's behalf, to give witness evidence in his support and to be generally supportive. Mr Lyne, an HR consultant at the respondent, appeared as a witness for the respondent.
5. The hearing took place by video link. This went smoothly until I was giving my decision when the claimant and Ms Bryant repeatedly 'froze'. Eventually they joined on telephone with the speaker on so that all those participating could hear what was being said. At the end of the hearing Ms Bryant, on behalf of the claimant, requested written reasons.

Preliminary matters

Name of respondent

6. By consent, the respondent's name is to be given as BMW UK Manufacturing Ltd.

Late evidence from the claimant

7. The respondent had provided the bundle for the hearing. However, Ms Bryant said that on 9 February 2021 she had submitted further documents to the tribunal. Neither I nor the respondent had seen these documents. They were emailed to the tribunal and I was able to look at them quickly. They included a witness statement from Ms Bryant, evidence about the reasons the claimant had not been able to return to work, his date of return and evidence of the steps Ms Bryant had taken to keep the respondent fully informed, by email and other means, about the claimant's difficulties in Jamaica. In line with the overriding objective in rule 2 of the Employment Tribunal Rules of Procedure, including the need to avoid delay so far as is consistent with the proper consideration of the issues, I did not formally admit the documentary evidence but asked the claimant and Ms Bryant to cover the information it contained in their evidence to me given orally during the hearing. In this way, I took account of this evidence. Ms Bryant read out her witness statement at the end of the hearing.

Issues and applicable law

8. The issues were identified as follows:-
 - 8.1 Did the claimant have the sufficient qualifying service to bring a claim of unfair dismissal. Section 108(1) of the Employment Rights Act 1996 ("The Employment Rights Act") says, so far as relevant here, that to be eligible to bring such a claim the claimant must have been employed by the employer for at least two years continuously.

- 8.2 Was the claimant's claim for unfair dismissal out of time. Section 111 of the Employment Rights Act says that a tribunal shall not consider an unfair dismissal case unless it is presented in time.
- 8.3 If this claim is out of time, should the tribunal extend time. Time can be extended if the claimant can show that it was not reasonably practicable for him to bring the claim in time and that he brought the claim within a reasonable period after the time limit had ended.
- 8.4 Was the claimant's claim for race discrimination out of time. Section 123 of the Equality Act 2010 says that a complaint of discrimination may not be brought after the end of the period of three months starting with the act to which the proceedings relate; or such other period as the tribunal thinks is just and equitable.
- 8.5 Should the claims be struck out under rule 37(1)(a) of the Employment Tribunal Rules of Procedure. This says, so far as relevant here, that a tribunal may strike out all or part of a claim because it has no reasonable prospect of success.
- 8.6 Alternatively, should the claimant be required to pay a deposit order under rule 39 of the Employment Tribunal Rules of Procedure because his claims have little reasonable prospect of success.

Qualifying service

- 9 Although he had worked for the respondent since 2011, at the hearing the claimant accepted that he had previously been an agency worker and was only an employee of the respondent from 1 December 2018. The respondent terminated the claimant's employment without notice by a letter dated 7 February 2020. This letter was sent by post to the claimant's UK address. The claimant was in Jamaica at this time. However, the respondent emailed the claimant on 21 February 2020, informing him that his contract had been terminated, and the claimant responded by email on the same date.
- 10 I find that the claimant worked for the respondent from 1 December 2018 to 21 February 2020, this being the effective date of termination. He therefore does not have two years continuous service with the respondent as required by section 108 of the Employment Rights Act, so is not eligible to bring a claim for unfair dismissal.

Time limits

- 11 I considered whether, had the claimant shown the necessary qualifying service, the claim would in any event have been out of time.
- 12 Section 111 of the Employment Rights Act says that a claim for unfair dismissal must be made within three months less one day of the effective

date of termination. However, the early conciliation process operates to extend this period, as set out in section 207B of the Employment Rights Act. Ms Bryant communicated with ACAS and managed the early conciliation process on the claimant's behalf. The ACAS Early Conciliation Certificate was included in the bundle.

13 I find as follows:-

13.1 The 'effective date of termination - the date when the claimant's employment with the respondent ended - was 21 February 2020. The 'primary time limit' therefore expired on 20 May 2020.

13.2 However, time was extended by the ACAS conciliation process. ACAS was notified on 15 April 2020 and issued a certificate on 29 May 2020. The total number of days of early conciliation was 44 days (excluding 15 April).

13.3 Since the conciliation process concluded after the primary time limit had expired, a month is added to the time. The extended time limit therefore expired on 29 June 2020.

13.4 The claimant's claim was received by the tribunal on 4 September 2020.

13.5 Therefore, the claim is out of time by approximately two months.

Extension of time

14 The claimant, through his own testimony and that of Ms Bryant, explained why the claimant had been unable to submit his claim on time. He had gone on holiday to Jamaica in October 2019 and had planned to return to the UK by a flight which left Jamaica on 28 October 2019. However, he did not board his flight. He was detained by the authorities in Jamaica for reasons that I do not need to go into, but in respect of which I note he was eventually released without blame or sanction. For an initial period of perhaps a month - the claimant and Ms Bryant could not be precise about dates - it was very difficult if not impossible for the claimant to communicate personally through electronic means with the respondent or with anyone else in the UK. By February 2020, he had greater ability to communicate in this way but it was still limited. The claimant explained that he remained unable to leave Jamaica and was staying with distant relatives. He had only limited access to the internet. Ms Bryant said that in any case he was not computer literate and needed help in using the internet and email. Additionally, he was in a state of acute stress because of his detention and his inability to return to the UK and his job. There is also a time difference between Jamaica and the UK which exacerbated his communication difficulties. I heard that July 2020 had been a particularly difficult month but that as soon as the claimant was able to return to the UK he did so, arriving on 1 September 2020 and submitting his claim as soon as he could thereafter. Ms Bryant explained that although she had kept in regular contact with the respondent on the

claimant's behalf, and had managed the ACAS conciliation process for him, she was not able to complete the ET1 on his behalf because it asked for very detailed information – such as the name and address of the respondent, the claimant's rate of pay, the date he began working for the respondent-to which she did not have access and needed to obtain from the claimant.

15 I accept that the claimant had intended to return to the UK on 28/29 October 2019, and to return to his job on 4 November 2019; and that he was prevented from doing so because he was detained in Jamaica for reasons beyond his control. I am persuaded that the period leading up to the claimant's return to the UK on 1 September 2020 was a stressful period for the claimant. I also accept that following his dismissal on 21 February 2002 the claimant, being based in Jamaica with relatives, would have found it more difficult to bring his claim than would have been the case had he been in the UK.

16 However, I also take into consideration the following:-

16.1 The fact that two months is a significant delay.

16.2 Ms Bryant's evidence that she was in regular contact with the claimant and travelled to Jamaica and spoke with the claimant face to face at least 4-5 times during this period (although such visits were impeded by the COVID lock down.) Accordingly she was well placed to assist him and obtain information from him, and did so on a number of occasions.

16.3 That Ms Bryant furnished the claimant with a 'smart phone' in or around January 2020.

16.4 That the claimant was able to email the respondent on 21 February 2020, in response to their email to him. In this email the claimant said 'I have been in touch with you via phone calls and emails, keeping you posted on my situation.' The claimant and Ms Bryant's assertions that they were in regular contact with the respondent by emails, calls and messages are not consistent with an inability to progress the claim due to having little or no access to electronic communication.

16.5 That, with Ms Bryant's assistance, the claimant successfully completed the ACAS conciliation process from Jamaica.

16.6 That it is highly likely that Ms Bryant and the claimant were aware of the time limitation issue through their involvement with ACAS.

16.7 That it would have been possible for Ms Bryant to complete the ET1 form without all the detailed information she described. The form can be submitted with only some of the requested information, and this is made clear on the form itself through the use of asterisks. In particular, I am persuaded that Ms Bryant could have obtained the

respondent's address for inclusion on the form – she said she was in regular contact with the respondent by emails, calls and messages, keeping them updated as to the claimant's situation; and that she was also in regular contact with the claimant.

- 17 It is for the claimant to demonstrate that was not reasonably practicable for him to bring his claim within the time limit, and the hurdle is a high one. For the reasons set out in paragraph 18 above, I am not persuaded that it was not reasonably practicable for the claimant to bring his claim within the time limit.

Race discrimination claim

- 18 The claimant is black. In his ET1 he ticked the box indicating that he had been discriminated against on the ground of his race. He also writes that 'During my employment with BMW I have felt there were many occasions where I had been racially discriminated against and feel that the company had used this situation as an excuse to terminate my contract without my presence.' He says 'In addition I would like to advise you that this is not the first occasion that I have been unfairly dismissed by BMW. On the previous occasion my job was re-instated however I have continued to feel racially discriminated against.' No further information was provided and it was not clear from the ET1 what acts of discrimination were alleged to have taken place or when.
- 19 The ET3 addresses the previous dismissal. It says that the claimant was dismissed on 11 July 2019 for leaving the site without permission but was reinstated on appeal on 1 August 2019.
- 20 During the hearing I asked the claimant to tell me about instances where the respondent had treated him unfairly because of his race. I explained that race discrimination occurs when, because of a person's race, an employer treats an employee less favorably than it treats or would treat others of a different race. The claimant said that he felt he had been dismissed because he had been detained in Jamaica which was seen as a third world country. He also said that he thought some of his colleagues did not like him. However, no further information was forthcoming from the claimant and Ms Bryant did not provide any information either.
- 21 I was therefore unable to identify any specific acts of alleged race discrimination to use as a basis for calculating whether the claim had been brought within the three month time limit. The respondent argued that any such act must have occurred prior to the claimant's absence on holiday commencing 23 October 2019. However, I find that the last date upon which an act of discrimination could have occurred was 7 February 2020, this being the date of the dismissal letter. When questioned, the claimant confirmed that it was not his case that anything done by the respondent after the dismissal was discriminatory. On this basis the claim was issued more than two months after the time limit. The question I have to consider is

whether it is nevertheless just and equitable to extend time.

- 22 I find that it is not, and that because of this the claimant's race discrimination claim is dismissed. Two months delay is a significant period. For the reasons set out above, based on the claimant's evidence to me it would have been possible for the claimant to bring his race discrimination claim within the three month period set down by the Equality Act 2010. The race discrimination claim is not particularised and does not extend far beyond a bare assertion of discrimination. On the day of the hearing I was unable to identify specific acts of the respondent which in the claimant's view amounted to less favourable treatment on the ground of his race. On the face of it there was a valid reason for the claimant's dismissal in February 2020, namely that he had not returned to work on 4 November 2019, following annual leave, and he was unable to provide the respondent with any information about when he would be able to return to work.

Employment Judge Cotton

Date: 5 March 2021

Sent to the parties on: 15 April 21

For the Tribunal Office