



EMPLOYMENT TRIBUNALS

Claimant: Tomasz Tym

Respondent: KTB Rehabilitation Ltd

Heard at: London South (via cvp) **On:** 18 March 2021

Before: Employment Judge Housego

Representation

Claimant: Alastair Hodge, of Counsel, instructed by Knights Plc

Respondent: Monika Tym, wife of Claimant

JUDGMENT

1. The claim for unfair dismissal is struck out.
2. The claim for age discrimination is struck out.
3. The claim under the Equal Pay Act 1970 is struck out.
4. The applications to strike out, of to order the payment of deposits in respect of the claims for breach of contract and for nationality and sex discrimination are dismissed.

REASONS

1. This was a preliminary hearing to decide the Respondent's applications to strike out all the claims (either on time points, or as having no reasonable prospect of success), or to order a deposit to be paid, and if not fully successful to give case management directions.
2. The Tribunal file is coded in accordance with the boxes ticked on the claim form: unfair dismissal, breach of contract, and sex race and age discrimination. It is pleaded as an Equal Pay claim, and both sides agree that there is such a claim. The pleadings do not deal fully with sex discrimination, but both parties accept that there is such a claim.

3. The claim is summarised in the case management order also made today, by consent, and that order should be read as part of this judgment. Mr Hodge submitted very clear written submissions and I considered carefully what he wrote and said. Ms Tym spoke, and my record of proceedings notes what she said.

Out of time issue

4. The claim was filed on 18 May 2020. It is common ground that the effective date of termination was 03 January 2020. The Acas Early Conciliation ("EC") period was 07 March 2020 to 07 April 2020. It is common ground that the last day for filing the claim was 07 May 2020, and so it is 11 days out of time.
5. I considered first the claims for constructive dismissal and for breach of contract, and then the discrimination claims. There is no time point for the Equal Pay Act claim, for the limitation period is 6 months.

Unfair dismissal

6. The Claimant was aware that there was a time limit. He contacted Acas within that time limit. The Acas EC certificate was sent by email only (it so states). Mr Tym says that it was never received (and that he has never seen it, other than in these proceedings). He says that he phoned Acas to ask about it. He points to an email of 20 April 2020 from Acas which stated:

"As you are aware the early conciliation certificate has been issued in the above matter, therefore the clock is ticking to lodge an employment tribunal claim. As long as ACAS were contacted within three months of the date of the incident/termination, you will have at least one month from the issue of the certificate to lodge a claim. Also please note it is your responsibility to ensure it is lodged on time."

7. The Claimant thought the date ran from 20 April 2020 and so made sure the claim was lodged before that date. He says that both he and his wife work full time, that their teenage children were home-schooling at the time, that they used their (the parents') laptops, that he was busy with caring for NHS and other key workers, and that she was a behavioural scientist working on the government's Covid 19 strategy, and so they did not have the time to do so until the time limit (so they thought) approached, when they made the time.
8. Mr Hodge pointed out that none of this was any bar to presenting the claim, and that there was, for example, no illness or other precluding factor. As to Covid 19, they were both able to work so it was not good reason to delay sending in the claim. The Claimant responded by saying this was the height of lockdown 1, and so, given what they both do (an exceptional time for her and a complete readjustment of the work he did) this is not bland *"It was Covid..."* reason but factually the situation. They point out that later the Respondent sought more time to lodge the ET3, so it was hardly a fair objection to make.
9. Mr Hodge said that they well knew there was a time limit and the email from Acas of 20 April 2020 spelled out that it was their responsibility to meet the time limit. It was not inaccurate in any way. The Claimant accepts that the email is not inaccurate, but while it says that the certificate has been issued, it

does not say when, and nor was a copy attached. They had to ring Acas to get the number to go on the claim form. They say they took it that the email was telling them the EC certificate had been issued that day and they had a month to issue the claim. They say that it was an easy misunderstanding to make. Given the text of the email, and without sight of the EC certificate, this is understandable.

10. I considered that in one sense it was reasonably practicable to submit the form. The Claimant did so on 18 May 2020 without any change in the family's circumstances. On another, to do so in good time before the end of the period they had understood (with reason) to be the period makes it not reasonably practicable to do so. That second statement is the reality of the matter. I agree that it was not incumbent on the Claimant to file the claim form immediately after getting the email of 20 April 2020, when they reasonably (if erroneously) thought they had until 20 May 2020. I decide that it was not reasonably practicable to lodge the claim in time.
11. Mr Hodge submitted that if I so concluded the claim should still be struck out as it was not filed with such further period as should be considered reasonable, being 11 days late. This is chronologically accurate, but it would be contradictory to find that further period unreasonable, when it was all within a period during which I have concluded that it was not reasonably practicable to lodge it.
12. Accordingly, I extend time for the unfair dismissal and breach of contract claims to proceed, and refuse the application to dismiss them on jurisdictional grounds.
13. Next, I considered whether to strike out those claims as having no reasonable prospect of success, or to order a deposit if I consider that it has little reasonable prospect of success.

Unfair dismissal

14. The email of resignation is polite, and gives no hint of any issue, and thanks the Respondent for the opportunities when working for them. Mr Hodge submitted that any dissatisfaction arose after the resignation (on 22 November 2020). Therefore, it could not be the cause of the resignation. I note this point, but often people resign with dignity rather than setting out particulars of claim in a resignation letter. Mrs Tym submitted that he knew of others having higher pay from September 2020 as job advertisements were at higher rates of pay than he was receiving.
15. At the point of resignation that may well be the case. It may well have been that this was the reason he came to appreciate that he was being paid less than the market value of his skills. However, it is not a breach of contract to work under a contract where you are not rewarded at market levels. The employer was complying with the contract, not breaching it. That it was a contract that was a poor contract from the Claimant's point of view is not to the point. The solution is to leave to work for an employer who does recognise the market value of the skill of the employee. That is exactly what Mr Tym did – he started work on 06 January 2021 for a new employer, and at higher pay

(even than his recently increase pay level: it went from £29,000 to £35,000 a week before he resigned).

16. Accordingly, the claim has no reasonable prospect of success, and I dismiss it for that reason. (In any event there is no loss for which to compensate him, so his claim would be limited to a basic award.)

Breach of contract claim

17. This claim is about whether the non-payment of 2 weeks of the 6 weeks' notice period was a breach of contract, or was because Mr Tym had taken more holiday than he had accrued, and so had agreed it to be unpaid holiday (he did not work those 2 weeks). That is a factual dispute, to be resolved on the evidence. I did not strike it out for that reason, nor order a deposit as it is not possible to gauge whether this is a weak, or a strong, claim on the respective positions. I gave directions as to how this may be progressed, and when the Claimant has more information from the Respondent the Claimant may decide to withdraw the claim, the Respondent apply again for it to be struck out, or it settled, or decided at a hearing.

Out of time - discrimination

18. The starting point must be that if it was not reasonably practicable to present the unfair dismissal claim in the same time period it ought to be just and equitable to permit a discrimination claim to proceed. The last date for the allegations is the end of employment, so the periods are the same.
19. The reasonable practicability test relates solely to the Claimant, whereas the just and equitable test involves also the interests of the Respondent. The only prejudice to the Respondent is lengthy delay before the hearing: but of course that is only 11 days longer than if the claim was lodged on 07 May 2020.
20. Accordingly, I permit the discrimination claims to proceed. I have taken into account the case law guidance in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23.

Strike out / deposit order age discrimination

21. Mr Tym thinks that younger people were paid more than he. He was 46 at the time, which, in the context of his profession appears neither young nor old. It appears that the only thing he can point to is that there is advertisement for roles at higher pay that he was getting, and says that people recruited tended to be younger.
22. Mr Tym points to a protected characteristic, and to his pay rate, but a detriment and a protected characteristic does not mean that the former is connected with the latter, and I am unable to see any reasonable prospect of establishing one. The advertisements would be at market rate (it is not likely that anyone offer the world at large more), and unconnected with his age, or that of any applicant. There is also a point similar point to that in the unfair dismissal claim.

23. In most of the cases relating to discrimination cases it is the Claimant who appeals the striking out of his or her claim. The case law is set out fully in Malik v Birmingham City Council & Anor (Striking-out : dismissal) [2019] UKEAT 0027. Discrimination claims are particularly sensitive. Striking out a claim ends it totally, and without evidence being heard. For public policy reasons this should be done in discrimination cases in only the clearest cases. Paragraph 29 onward sets out the law, and para 31 states:

"In Mechkarov, it was said that the proper approach to be taken in a strike out application in a discrimination case is that:

- (1) only in the clearest case should a discrimination claim be struck out;*
- (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;*
- (3) the Claimant's case must ordinarily be taken at its highest;*
- (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and*
- (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."*

24. This is not an easy test to meet. I decide that it is met in the case of the age discrimination claim.

Strike out, nationality and sex discrimination

25. I considered these two claims together. The Claimant says that he is male and of Polish nationality. He says that the Respondent is a company that is female led, and that preferential terms are given to those who are female and who are native English speakers, that is (in effect largely but not exclusively) British citizens. He says that as a Polish man he is subjected to direct discrimination by reason of one or the other, or both protected characteristics by receiving lower pay.

26. While the Claimant points to adverts for new recruits this is not suspicious of itself, as anyone could respond to the adverts.

27. The Respondent puts forward explanations of the pay of the Claimant and others: these would be matters requiring evidence and findings of fact: the claim does not have no reasonable prospect of success by reason of unproven and disputed assertions from the Respondent.

28. The claims are open to the finding of objective facts which may support (or undermine) those claims. I considered that I should neither strike out nor order a deposit in respect of these claims, but make directions to enable the Claimant (and the Tribunal) to evaluate these claims by reference to the workforce, its gender and nationality and pay rates, and the income generated by each individual.

29. Once the directions have been complied with, it is open to the Respondent to make a further application to strike out if the data shows no facts from which a Tribunal could infer that the pay rate of the Claimant was the effect, even in

part, of systemic higher rates of pay for female British citizen employees with similar qualifications.

Strike out: Equal Pay claim

30. The claim is about individual pay rates, and that females and British citizens are said to be better paid than the Claimant. The claim cannot be an equal pay claim as the Claimant asserts (in part) that he was less well paid than male British citizen comparators. The reason asserted for the differential is the protected characteristics of sex and nationality. If so, the remedy lies in the discrimination claims, and the equal pay claim cannot be successful when the Claimant says that other men were also underpaid.

Conclusion

31. The sex and nationality claims, and the claim for notice pay continue, with no deposit orders. The other claims are struck out.

Employment Judge Housego

Date 18 March 2021