EMPLOYMENT TRIBUNALS

Claimant
Mr A Ofoegbu

Respondent
Srixon Sports Europe Ltd

Heard at: **Southampton (by CVP)** **On: 30 April 2021**

Before: **Employment Judge Dawson**

Appearances
For the claimant: Representing himself
For the respondents: Mr Reeds, solicitor

REASONS

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided

The Issues

1. By a claim form presented to the employment tribunal on 4 September 2020 the claimant presented claims of unfair dismissal and discrimination on the grounds of race.

2. Upon the claim being accepted the tribunal wrote to the claimant (on 16 September 2020) stating

   From the information contained in the claim, it appears that all or some of the specific complaints which it contains may have been presented outside the statutory time limits. The Tribunal must consider that matter, either at a preliminary hearing or at the main hearing, even if no valid response to the claim is received. You will receive further directions about this in due course.

3. On 27 November 2020, following receipt of the response, the tribunal wrote to the parties stating:

   The case file has been referred to Employment Judge Rayner, who directs that this case will be now listed for a two-hour Preliminary Hearing in Person. The parties are informed that the Preliminary Hearing in Person will consider whether or not the Employment Tribunal has jurisdiction to hear the Claimants claims of unfair dismissal and race discrimination which appear significantly out of time, or

whether there are grounds to extend time. If the Employment Tribunal has jurisdiction then a case management hearing will follow.

4. In *E v XLZ* UKEAT/0079/20/RN (V), Ellenbogen J stated, at para 50

With the qualification to which I have referred at paragraph 47 above, from the above authorities the following principles may be derived:

1) In order to identify the substance of the acts of which complaint is made, it is necessary to look at the claim form: **Sougrin;**

2) It is appropriate to consider the way in which a claimant puts his or her case and, in particular, whether there is said to be a link between the acts of which complaint is made. The fact that the alleged acts in question may be framed as different species of discrimination (and harassment) is immaterial: **Robinson**;

3) Nonetheless, it is not essential that a positive assertion that the claimant is complaining of a continuing discriminatory state of affairs be explicitly stated, either in the claim form, or in the list of issues. Such a contention may become apparent from evidence or submissions made, once a time point is taken against the claimant: **Sridhar**;

4) It is important that the issues for determination by the tribunal at a preliminary hearing have been identified with clarity. That will include identification of whether the tribunal is being asked: (1) to consider whether a particular allegation or complaint should be struck out, because no prima facie case can be demonstrated, or (2) substantively to determine the limitation issue: **Caterham**;

…

12) Definitive determination of an issue which is factually disputed requires preparation and presentation of evidence to be considered at the preliminary hearing, findings of fact and, as necessary, the application of the law to those facts, so as to reach a definitive outcome on the point, which cannot then be revisited at the full merits hearing: **Caterham**;

13) If it can be done properly, it may be sensible, and, potentially, beneficial, for a tribunal to consider a time point at a preliminary hearing, either on the basis of a strike-out application, or, in an appropriate case, substantively,, so that time and resource is not taken up preparing, and considering at a full merits hearing, complaints which may properly be found to be truly stale such that they ought not to be so considered. However, caution should be exercised, having regard to the difficulty of disentangling time points relating to individual complaints from other complaints and issues in the case; the fact that there may make no appreciable saving of preparation or hearing time, in any event, if episodes that could be potentially severed as out of time are, in any case, relied upon as background more recent complaints; the acute fact-sensitivity of discrimination claims and the high strike-out threshold; and the need for evidence to be prepared, and facts found (unless agreed), in order to make a definitive determination of such an issue: **Caterham**.

5. Having considered the order of Employment Judge Rayner, I conclude that the matter which has been listed before me today is not a question of whether the

claim should be struck out as having no reasonable prospect of success but is, rather, the substantive determination of the limitation question by way of trial of a preliminary issue.

6. Thus the issues for me to determine are:

    a. In respect of the discrimination claims were they brought after the end of—
        (a) the period of 3 months starting with the date of the act to which the complaint relates, or
        (b) such other period as the employment tribunal thinks just and equitable;
    b. in the case of the unfair dismissal claim,
        i. was it brought before the end of the period of three months beginning with the effective date of termination, or
        ii. 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 be presented before the end of that period of three months.

Matters in Respect of the Hearing

7. I heard evidence from the claimant on oath and was also provided with a bundle of documents by him running to 21 pages. In addition I was provided with a 49 page bundle and a chronology.

8. The claimant indicated that he had other documents which he wanted to refer to, including two videos but which he had not disclosed to the respondent.

9. I explored with the claimant whether they were relevant to the question of whether the claim had been presented within the relevant time limit or only to the merits of the case. I explained that if they were relevant to the question of time they would need to be disclosed to the respondent which may mean that an adjournment was necessary. The claimant took the view that it was not necessary to refer to them in respect of the question of whether his claims were in time or not.

10. Before the claimant gave any evidence I explored with him in some detail what the allegations of race discrimination were. The last act which he complains of was an event in July 2019 which was a delayed Christmas party at which racist comments were made about him in public. He also told me about two earlier incidents, in one of which personal remarks were made about his body and in the other rubbish was thrown out of a window and he was told to pick it up.

Findings of Fact

11. The Early Conciliation Certificate in this case shows that the matter was notified to Acas on 10 July 2020 and the certificate was issued on 10 August 2020.

12. The claimant accepted in cross examination that his contract of employment terminated on 16th December 2019 and thereafter he was a self-employed subcontractor through a company called Caludof Services Ltd (the company).

13. The services of the company were terminated on the 10th February 2020 following the alleged unauthorised destruction of company property and data. The claimant took strenuous issue with whether that termination was fair or not and whether he had done anything wrong but those are not issues which are for me to determine today. He did not suggest that the decision was tainted by questions of race discrimination.

14. The allegations of race discrimination are not yet proved but if they are true then one can understand a significant level of distress on the part of the claimant. It appears from a document at page 48 of the respondent's bundle that an internal investigation found " the matter relating to the racist comment made by the director in July 2019 was dealt with informally. At the time TO informed SSE that he had accepted the apology therefore the matter did not progress further ... Only following the termination of TO's contract for services did TO raise that he was unhappy with the outcome and that he expected the business would make a statement condemning the behaviour."

15. The claimant had moved his workplace to Canada in July 2019 and he tells me, and I accept, that he had a newborn baby in June 2019. His baby needed neurological tests and he was going backwards and forwards to the hospital.

16. The claimant also told me, and I accept, that things became difficult in the early part of 2020 when coronavirus struck and he had a family of five at home; he was trying to put food on the table in circumstances where his contract with the respondent had been terminated and he had an ill child. I accept all of those things.

17. The claimant told me that in February 2020 he started working on a voluntary basis for different organisations doing data transfers and he got alternative paid employment in July 2020.

18. The respondent was, during 2020, carrying out an investigation out into the allegations of racism which had been made by the claimant as is apparent from a document at page 46 of the respondent's bundle. That document is dated 30th November 2020 and a letter dated the 18th December 2020 sets out conclusions from the investigation. The claimant was aware of the investigation. However it is also apparent that the claimant did not wait until the outcome of that process before either approaching ACAS or bringing proceedings.

19. The claimant explained that he was able to present his claim to Acas in July 2020 because by then the stress he was under was reducing, Quebec had started to re-open following coronavirus restrictions and his children were going back to school and life came back to the house.

20. The claimant told me, and I accept, that while he was working for the respondent he did not want to rock the boat by making strenuous allegations of racism or by bringing proceedings. I also accept what the claimant says, that he did not want to bring proceedings against the respondent and he still has people within the respondent who he would describe as close. I accept that he has seen the bringing of proceedings as being a matter of last resort.

Law

21. In respect of a claim for unfair dismissal, section 111 provides

(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) 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 be presented before the end of that period of three months.

22. The leading authority is the decision of the Court of Appeal in *Palmer and Saunders v Southend-on-Sea Borough Council [1984] 1 All ER 945*, *[1984] IRLR 119*, *[1984] ICR 372, CA*. In that case, May LJ stated

"[W]e think that one can say that to construe the words “reasonably practicable” as the equivalent of “reasonable” is to take a view that is too favourable to the employee. On the other hand, “reasonably practicable” means more than merely what is reasonably capable physically of being done—different, for instance, from its construction in the context of the legislation relating to factories: compare *Marshall v Gotham Co Ltd [1954] AC 360, HL*. In the context in which the words are used in the 1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word “practicable” as the equivalent of “feasible” as Sir John Brightman did in [*Singh v Post Office [1973] ICR 437, NIRC*] and to ask colloquially and untrammelled by too much legal logic—“was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?”—is the best approach to the correct application of the relevant subsection."

23. Even if a claimant satisfies a tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his or her favour. The tribunal must then go on to decide whether the claim was presented ‘within such further period as the tribunal considers reasonable’.

24. Lady Smith in *Asda Stores Ltd v Kauser* EAT0165/07 stated: ‘the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done’.

25. In *Lowri Beck Services Ltd v Patrick Brophy* [2019] EWCA Civ 2490 the Court of Appeal held:

12. There has been a good deal of case law about the correct approach to the test of reasonable practicability. The essential points for our purposes can be summarised as follows:

(1) The test should be given “a liberal interpretation in favour of the employee (*Marks and Spencer plc v Williams-Ryan [2005] EWCA Civ 470, [2005] ICR 1293* , which reaffirms the older case law going back to *Dedman v British Building & Engineering Appliances Ltd [1974] ICR 53*).

(2) The statutory language is not to be taken as referring only to physical impracticability and for that reason might be paraphrased as whether it was “reasonably feasible” for the claimant to present his or her claim in time: see *Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119* . (I

am bound to say that the reference to "feasibility" does not seem to me to be a particularly apt way of making the point that the test is not concerned only with physical impracticability, but I mention it because the Employment Judge uses it in a passage of her Reasons to which I will be coming.)

(3) If an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will have been reasonably practicable for them to bring the claim in time (see *Wall's Meat Co Ltd v Khan [1979] ICR 52*);but it is important to note that in assessing whether ignorance or mistake are reasonable it is necessary to take into account any enquiries which the claimant or their adviser should have made.

(4) If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee (*Dedman*). I make that point not because there is any suggestion in this case that the Claimant's brother was a skilled adviser but, again, because the point is referred to by the Employment Judge.

(5) The test of reasonable practicability is one of fact and not of law (*Palmer*).

26. In *University Hospitals Bristol NHS Foundation Trust v Williams* 0291/12 the EAT emphasised that this limb of S.111(2)(b) does not require the tribunal to be satisfied that the claimant presented the claim as soon as reasonably practicable after the expiry of the time limit in order to allow the claim to proceed. Rather, it requires the tribunal to apply the less stringent test of asking whether the claim was presented within a reasonable time after the time limit expired.

27. In respect of the Equality Act 2010 section 123 provides

> (1) Subject to sections 140A and 140B, proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable

28. In *Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13*, the EAT stated

"Though there is no principle of law which dictates how sparingly or generously the power to enlarge time is to be exercised (see *Chief Constable of Lincolnshire Police v Caston* [2009] EWCA Civ 1298 at para 25, [2010] IRLR 327, per Sedley LJ) a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to do so, and the exercise of discretion is therefore the exception rather than the rule (per Auld LJ in *Robertson v Bexley Community Centre* [2003] EWCA Civ 576, [2003] IRLR 434 (CA)). A litigant can hardly hope to satisfy this burden unless he provides an answer to two questions, as part of the entirety of the circumstances which the tribunal must consider. The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is reason why after the expiry of the primary time limit the claim was not brought sooner than it was." (para 52).

29. In *Olufunso Adedeji v University Hospitals Birmingham Nhs Foundation Trust [2021] EWCA Civ 23* , Underhill LJ stated

> "It will be seen, therefore, that *Keeble* did no more than suggest that a comparison with the requirements of section 33 might help "illuminate" the task of the tribunal by setting out a checklist of potentially relevant factors. It certainly did not say that that list should be used as a framework for any decision. However, that is how it has too often been read, and "the Keeble factors" and "the Keeble principles" still regularly feature as the starting-point for tribunals' approach to decisions under section 123 (1) (b). I do not regard this as healthy. Of course the two discretions are, in Holland J's phrase, "not dissimilar", so it is unsurprising that most of the factors mentioned in section 33 may be relevant also, though to varying degrees, in the context of a discrimination claim; and I do not doubt that many tribunals over the years have found Keeble helpful. But rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language (as occurred in the present case – see para. 31 above). The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."

Conclusions

30. I will deal, first, with the claim of unfair dismissal.

31. The effective date of termination was the 16th December 2019 and, therefore, limitation expired on 15th March 2020.

32. I am not satisfied that it was not reasonably practicable for the claim to be presented by 15th March 2020. Even taking account of all of the matters which the claimant has told me, it is clear that he was able to do voluntary work in February 2020 which required data transfers and if he was able to do that work, I can see no reason why he could not have presented a claim form to the tribunal by 15th March 2020. It seems to me that he was delaying because he did not want to risk his good relationship with former colleagues who still worked for the respondent and his priorities lay in a direction other than bringing a claim. That may have been understandable but it does not mean that it was not reasonably practicable to present a claim within the 3 month period. I have heard no evidence that persuades me that it was not reasonably practicable to present the claim in time.

33. However even if I had decided that point in favour of the claimant and decided that it was not reasonably practicable for him to present the claim at that stage, it clearly was reasonably practicable for him to present it by July when he notified ACAS of his claim. Instead of presenting his claim then he did not present it until 4th September 2020. He did not present the claim within a reasonable time after the limitation period.

34. The test is different in relation to the claim of discrimination and, in particular, I must look to the length of the delay and the reasons for the delay.

35. The delay is much more significant in relation to the claim of discrimination. The claim was presented over 12 months after the last date of the discrimination complained of.

36. Although I accept the matters which the claimant has told me, I do not find that they present a good reason why the claimant did not present the claim within three months of the act complained of.

37. It would not normally be considered a good reason for failing to present a claim that somebody continues to work for the employer, but of course each case must be determined on its merits and I take into account the additional pressures which the claimant would undoubtedly have felt given the position with his daughter and the move to Canada.

38. However, even taking those matters into account, the claimant was, as I have already said, able to do voluntary work in February 2020 and take alternative paid employment in July 2020. He was able to notify his claim to Acas in July 2020 and, in those circumstances, it seems to me that there is no satisfactory reason for the claimant delaying until September to present his claim form.

39. Parliament has deliberately given a short limitation period for the presentation of discrimination claims and although it has not been suggested to me that there has been any prejudice in terms of loss of evidence caused by the delay, that of itself, is not conclusive. In this case having regard to the long delay and the lack of good reason for failing to present the claim form within the 3 month time limit, I regret that I do not find that the claim form was presented within such period as is just and equitable.

40. In those circumstances the tribunal does not have jurisdiction to determine the claimant's claims and they must be dismissed.

Employment Judge Dawson
Date: 21 May 2021

Reasons sent to the Parties: 24 May 2021

FOR THE TRIBUNAL OFFICE