



EMPLOYMENT TRIBUNALS

Claimant: Mr J Freeman

Respondent: Westgrove Support Services Limited

Heard at: Liverpool

On: 1 June 2021

Before: Employment Judge Aspinall

Representation

Claimant: In person

Respondent: Ms Halsall, Counsel

JUDGMENT having been sent to the parties on 28 June 2021 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:

REASONS

Background

1. By a Claim Form dated 2 December 2020 the claimant brought complaints of (i) automatically unfair dismissal for having made a public interest disclosure under section 103A Employment Rights Act 1996 (ii) detriment having made a public interest disclosure under section 47B Employment Rights Act 1996 (iii) unfair dismissal under section 94 Employment Rights Act 1996.

2. He also claimed that the respondent had failed to provide him with a written statement of particulars of his employment contrary to section 11 Employment Rights Act 1996 and he claimed an uplift on any compensation due to him for the respondent's failure to comply with ACAS guidance.

3. The claimant made an application for interim relief which was denied at a hearing before Employment Judge Dunlop on 18 January 2021. The claimant withdrew his claim for ordinary unfair dismissal as he did not have two years' service. Employment Judge Dunlop went on to case manage the claim and listed a preliminary hearing to determine whether the claimant's complaint of public interest disclosure detriment can be allowed to proceed having regard to the obligation on the claimant to engage in ACAS early conciliation prior to bringing

his claims and whether the detriment complaints should be allowed to proceed having regard to the time limit set out in paragraph 48 (3) Employment Rights Act 1996.

4. That preliminary hearing came before me on 23 April 2021. I did not have the tribunal file and did not have the benefit of having sight of Judge Dunlop's case management order. I spent the first part of the morning in private case management clarifying the schedule of disclosures and schedule of detriments.

5. Mr Freeman was sworn in and the respondent's counsel, Ms Halsall, began cross examination by seeking confirmation of the dates of the detriments relied on. It rapidly became apparent that, although we had checked our documentation at the outset, I did not have all of the documents that the parties had in their bundles. This was unfortunate given that the claimant had started giving evidence but having regard to the fact that cross examination had only advanced so far as to get dates agreed and having regard to the overriding objective to deal fairly with the case the parties agreed that the better course of action was to adjourn the hearing until all documents were available. The claimant was released from his oath.

The issues for today's hearing and the parties' submissions

6. The first issue for determination today is whether or not the Tribunal has jurisdiction to hear the detriment complaint given that the claimant did not conciliate for it. The claimant contends that he does not need to have conciliated for his detriment complaints. Ms Halsall concedes that the claimant did not need to engage in ACAS early conciliation in order to bring his section 47B detriment complaint because in his claim form the claimant brought proceedings automatically unfair dismissal for whistleblowing under section 103A of the Employment Rights Act 1996 (which falls within Part X of the ERA) and the application to institute those proceedings was accompanied by an application under section 128 of that Act for interim relief. Ms Halsall argues that under regulation 3(1)(d) of the Employment Tribunal's Early Conciliation Exemptions and Rules of Procedure Regulations 2014 the claimant did not need to enter early conciliation in relation to his section 47B complaint.

7. The second issue for determination today is whether or not the claimant brought his complaint for detriment within 3 months of the date of the last act of detriment complained of. The claimant complains of a series of detriments (from 10 March 2020 until 2 November 2020). He says they all form part of the same course of conduct extending over a period of time. He brought his tribunal claim on 2 December 2020. He says his complaint is brought in time because it is brought within 3 months of the last act in a series of detriments extending over a period of time.

8. The respondent says the acts are not a series of similar acts but are different and distinct acts, that there are arguments about ongoing consequences or impact, that furlough breaks any chain of the course of conduct extending over a period of time which may have existed. The respondent says that any detriments complained of prior to 3 September 2020 are out of time.

9. The respondent accepts that detriments complained of post 3 September

2020 (there are 3 complained of; failure pay the claimant on time on 14 October 2020, claimant given short notice of a disciplinary meeting on 30 October 2020, conduct of the disciplinary meeting by telephone on 2 November 2020) are within time.

10. The respondent says it would be prejudiced today if the “course of conduct extending over a period of time” argument were determined in the absence of its oral evidence and that the matter ought to be left for determination at final hearing following authority to which she refers me in E v X and another [2020] UK EAT 00/79/20 and Ikejiaku v British Institute of Technology Ltd [2020] UK 02/43/19.

11. The respondent submits that there would need to be a material change in circumstances for me to vary EJ Dunlop’s Order that the time point be dealt with today. The respondent submits that it would be better dealt with at final hearing. The claimant would also prefer to have it all dealt with at the final hearing in the round.

12. I confirmed the submissions with the parties and there was a full discussion of the application of the exemptions in Regulation 3 and I then adjourned to consider the exemption point. We reconvened for me to give the following judgment.

Relevant Law

13. The requirement to contact ACAS before instituting proceedings is found within section 18A of the Employment Tribunals Act 1996 and took effect from 6 April 2014. Under subsection (1) it applies to an application to institute “relevant proceedings”. Unfair dismissal complaints under Part X Employment Rights Act 1996 and detriment proceedings under Part V of the Employment Rights Act 1996 are relevant proceedings as defined in section 18(1) of the Employment Tribunals Act 1996.

14. However, section 18A gives the Secretary of State power to prescribe cases in which the requirement to undergo early conciliation does not apply. That power has been exercised in the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014, of which regulation 3 provides so far as material as follows:

- “(1) **A person (“A”) may institute relevant proceedings without complying with the requirement for early conciliation where –**
 - (a) ...
 - (b) **A institutes those relevant proceedings on the same claim form as proceedings which are not relevant proceedings;**
 - (c) ...
 - (d) **The proceedings are proceedings under Part X of the Employment Rights Act 1996 and the application to institute those proceedings is accompanied by an application under section 128 of that Act...**
 - (e)

15. Section 128 Employment Rights Act 1996 gives jurisdiction to the Employment Tribunal to grant interim relief in an unfair dismissal complaint in which it is alleged that dismissal is automatically unfair because the reason or principal reason was a protected disclosure (section 103A).

Applying the Law

16. I find myself in the somewhat unusual position of deciding the application of an exemption to the early conciliation provisions against the interpretation applied to it by both the claimant and respondent. I do so because this is a jurisdictional issue and is therefore a matter for the Tribunal which cannot be left to the consent of the parties. It is also a tricky point of interpretation and I am grateful to the claimant and the respondent's counsel for the full discussion of the point in which they engaged today.

17. The Section 47B complaint falls within Part V of the Employment Rights Act 1996. Section 18 Employment Tribunals Act 1996 provides at Section 18(1)(b) that employment tribunal proceedings brought under Part V of the Employment Rights Act 1996 are relevant proceedings.

18. There is an obligation in section 18A Employment Tribunals Act 1996 to enter early conciliation in relation to relevant proceedings, save where one of the exemptions in the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 applies.

19. The relevant exemptions are at Regulation 3 and in particular Regulation 3 (1)(b) and (d).

20. Regulation 3(1)(b) is the exemption where there are other "non relevant" proceedings on the same claim form. It does not apply to the claimant's Section 47B complaint as the other complaints brought by the claimant (unfair dismissal, both ordinary and automatically unfair at the time proceedings were commenced) are also relevant proceedings. The claimant cannot escape the obligation to conciliate under this exemption.

21. I can see how an argument might be made that the unfair dismissal complaints became or become exempt because they were or are made on the same claim form as an unfair dismissal complaint with an interim relief application attaching to it but I reject that argument because that exemption is dealt with expressly and distinctly in Regulation 3(1)(d).

22. Turning then to Regulation 3(1)(d) the requirement to undergo early conciliation is lifted only in relation to proceedings under Part X of the Employment Rights Act 1996 where *those proceedings* (my italics) are accompanied by an application for interim relief.

23. To accept that the detriment complaint is exempt under Regulation 3 would require me to read words into the Regulation at 3(1)(b) for example: in my italics:

"A institutes those relevant proceedings on the same claim form as proceedings which are not relevant proceedings *or which are relevant proceedings but otherwise exempt from early conciliation under this*

regulation at 3(1)(d) because they are accompanied by an interim relief application”.

24. The interpretation applied by the parties would require me to read 3(1)(d) into 3(1)(b) and I decline to do so.

25. It is my interpretation of Regulation 3 that it exempts the claimant from early conciliation in relation to the unfair dismissal complaints to which the interim relief application attaches at 3(1)(d). It does not exempt the claimant from early conciliation in relation to the detriment complaint under Section 47B part V.

26. Complaints under Part V are of a different nature to the complaints under Part X. This is a distinction that has been noted widely. To allow the claimant to avoid early conciliation in relation to the Part V detriment complaint would require me to misread *those proceedings (so as to have the phrase include Part V complaints when it expressly relates only to Part X complaints)* in the Regulation and or to read words into the Regulation that are not there, as above, and in both those scenarios to erode the distinction drawn between Part V and Part X complaints generally.

27. I find the claimant has not conciliated in relation to his detriment complaint. It is therefore dismissed. It is now not necessary for me to consider time points in relation to the detriments amounting to a course of conduct extending over a period of time or to consider whether or not those time points could have been deferred to final hearing in variance of EJ Dunlop’s Order.

Conclusion

28. The claimant’s claim for detriment brought under Section 47 B Employment Rights Act 1996 is dismissed. His complaint of automatically unfair dismissal proceeds to final hearing. I will now convert to private Case management hearing and list the matter for final hearing

Employment Judge Aspinall

Date: 27 July 2021

REASONS SENT TO THE PARTIES ON

5 August 2021

FOR THE TRIBUNAL OFFICE