THE EMPLOYMENT TRIBUNALS

Claimant: Mr Colin Cooper

Respondent: Chatfields Limited (T/A Evans Halshaw)

Heard at: Newcastle upon Tyne Hearing Centre by CVP
On: Tuesday 27th July 2021

Before: Employment Judge Speker OBE DL

Representation:

Claimant: In Person
Respondent: Mr H Zovidavi (Counsel)

JUDGMENT

1. The claim of unfair dismissal is dismissed having been presented out of time, and it having been reasonably practicable for it to have been presented in time.

2. The claim of indirect discrimination on the grounds of marriage is struck-out on the grounds that it has no reasonable prospect of success.

REASONS

1. This public preliminary hearing was convened in order to determine the following preliminary issues:

    1.1 whether the complaint of unfair dismissal was presented out of time and if so whether it was reasonably practicable for the claim to have been presented in time and, if not, then presented within a reasonable time thereafter;

    1.2 whether the complaint of indirect marital discrimination should be struck out on the grounds that it has no reasonable prospect of success in that it has been presented outside the statutory time limit and time may only be extended if it is just and equitable to do so; or alternatively

1.3 whether a deposit order should be made on the basis that there is little prospect of a tribunal extending time on the grounds that it is just and equitable to do so.

2. The first of the above issues arose from a preliminary hearing before Employment Judge Martin on 20th April 2021 when she ordered that there should be a public preliminary hearing to decide whether the unfair dismissal claim was presented within the prescribed time period. She also ordered the claimant to send a witness statement setting out the grounds upon which he relied. Employment Judge Martin also ordered the claimant to provide further information about any complaint of sex discrimination, whether direct or indirect, and provided an annex setting out the text of Section 13 Equality Act 2010 – Direct discrimination and Section 19 Equality Act 2010 – Indirect discrimination. In the case summary it was noted that in discussion Mr Cooper had indicated that he was discriminated against because of his children and that he was treated "differently to a woman because of his childcare responsibilities". The claimant was urged to seek advice as to whether he was submitting claims of direct and/or indirect discrimination and that these issues could be discussed at the public preliminary hearing which was to deal with the question of whether the unfair dismissal claim was out of time.

3. At the beginning of this hearing there was discussion of the fact that when the respondent had issued an application in an e-mail dated 7th June 2021 for the discrimination complaint to be struck out as having no reasonable prospect of success, this was intended to be on the merits rather than only on the question of whether it was just and equitable to extend the time limit for such a discrimination claim. When Employment Judge Sweeney directed that the second and third of the issues referred to above should be included in this hearing, he specifically referred to the time limit points and the extension of the time limit other than to prospects of success generally. Mr Zovidavi invited me to consider that this hearing should consider the merits of the discrimination claim and not only the merits of success with regard to extending the statutory time limit. I referred to the fact that at the beginning of Rule 37 of the Employment Tribunal Rules 2013 it is stated that at any stage of the proceedings, either on its own initiative or on the application of a party, a tribunal may strike out all or part of a claim or response on any of the grounds stated in the section which includes (a) has no reasonable prospect of success. I indicated that I would give consideration to this based upon the evidence heard, the documents produced, and the submissions made by both sides. Mr Zovidavi referred to the point that if the tribunal was not prepared to consider application for strike out or deposit order at the present hearing then the respondent would inevitably submit a further application for another hearing to consider such application and the tribunal would have to consider the question of the overriding objective and the incurring of additional costs and the use of valuable judicial time.

4. Mr Cooper gave evidence on his own behalf and confirmed the two documents which he had submitted with regard to the reasons why the unfair dismissal claim was presented out of time and the basis upon which he asked the tribunal to find that it had not been reasonably practicable for him to have presented it in time. He referred to the discussions which he had had with ACAS and that they had mentioned to him a time limit of three months less one day but that he had believed that this related to the time for him to submit the claim directly to his former

employers rather than to the tribunal itself. He had not made any other enquiries or taken other advice about the time limit. He conceded that he was aware of the existence of tribunals as a place where claims can and should be made. He confirmed that he had not appealed to his employer initially against the decision that he should be dismissed having been selected for redundancy from the pool of three drivers. He confirmed the details of the various life events which had pre-occupied him from the time when he was told he was being selected and he emphasised what he regarded as the unfair procedure which applied in the selection with regard to the points given as to driving licence points, the fact that he was referred to as having a disciplinary record when there had been no disciplinary finding and the fact that he clearly had an issue with regard to how the company required drivers to work on Saturday mornings and that his contract had been altered from the beginning of April although it had not applied due to Covid and the furlough arrangements. In the course of his evidence, he referred to the telephone conversations and meetings which he had had with the employers and emphasised what he regarded as the unfairness applied to him in relation to the redundancy selection process. He was informed in August that he was being made redundant and would receive a redundancy payment of £2,677.57. He was nor required to work his notice but was placed on garden leave which was to end on 8th October 2020. In fact, before that time, he was able to secure alternative employment from 17th September 2020 although at the time he was still working out his notice with the respondent. He stated that the respondent was aware that he was starting his new job. He claimed that he was bringing his case against the respondent because he felt he had been lied to by the respondent and that the marking in the selection process was unfair. The discriminatory aspect was the involvement of Saturday working which was difficult for him because of his parental responsibilities and that the other two drivers did not have such responsibilities.

5. Mr Zovidavi referred to the fact that the claimant suggested that he did not file his claim within the time limit because of ignorance. However, ignorance is not an excuse. The tribunal needed to look at whether the ignorance was reasonable but here there was nothing to show that it was reasonable. Mr Cooper had had three discussions with ACAS and more importantly he had not conducted any other investigation or research as to the time limit or how to bring an employment tribunal claim. Mr Cooper accepted that like most people he was aware of the right to bring a claim to the tribunal. There was no evidence to the effect that he was misadvised. As to ACAS it seemed clear that they had informed Mr Cooper of the time limit of three months less a day and it must be assumed that they were telling Mr Cooper about his right to bring a claim to the tribunal. It was inherently unlikely that they would have been telling him that this was a time limit in relation to the lodging of an appeal with the employer bearing in mind that ACAS deal with these matters of employees wishing to consider tribunal claims on a daily basis. This was not a case of negligent bad advice but of Mr Cooper saying that he misunderstood.

6. If the claimant had undertaken the most basic of enquiries he would have known that three months less a day related to the time for presenting a claim to an employment tribunal. From this it was clearly reasonably practicable by 17th August and thereafter for the claim to have been issued and it would have been in time. Mr Cooper knew all of the information necessary to present his claim.

7. As to the merits Mr Zovidavi suggested that the discrimination claim was bound to fail. The basis of the claim had fluctuated between direct and indirect discrimination and it appeared that what Mr Cooper was arguing was in fact direct discrimination in that he was marked down because he had raised childcare responsibilities. He had not produced any material on the basis of which he could argue that there was a PCP which placed persons who were married or in a civil partnership at a disadvantage compared with people who are not married or in such a partnership. Although it had not been put forward expressly by Mr Cooper, it had to be recognised that in modern society very many people who are married do not have children whilst very many people who are not married or in a civil partnership do have children. The claim put forward could not have any prospects of success and he argued it should be struck out. Mr Cooper had initially argued that the claim was based upon being a man rather than a woman but there was no substance in such an application and it was argued that such a claim would fail. Alternatively, Mr Zovidavi argued that the tribunal should find that there was little prospect of success and therefore that a deposit order should be made.

8. Mr Cooper submitted to the tribunal that he disagreed with having been selected for redundancy and that he had been treated worse because of the fact that he had childcare responsibilities and that other aspects of the redundancy selection were unfair. As to the lateness of his application he stressed that he had been working anti-social hours and nightshifts. If Mr Ward at his employer had replied to the letter of appeal in good time then Mr Cooper would have realised that he needed to put his application in to the tribunal and he would have been within the time limit. He wanted the tribunal to take into account the various respects in which he felt the dismissal was unfair referring to the points awarded in th marking system.

9. Dealing firstly with the question of the presentation of the unfair dismissal claim, Mr Cooper himself conceded that it was indeed out of time. The statutory test is set out in Section 111 (2) of the Employment Rights Act 1996 as follows:

   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.

10. It is argued on behalf of the respondent that it was reasonably practicable for the claim to have be presented in time bearing in mind that the claimant was aware that there was a time limit and had spoken to ACAS and the discussions could only reasonably be interpreted as referring to the claim which could be brought to a tribunal rather than letter of appeal addressed the employer. Mr Cooper is askIng the tribunal to take into account that he was pre-occupied with various life events from the time of termination of the employment and that he was effectively prejudiced by the employer delaying by some days in responding to what amounted to a late letter of appeal.

11. The concept of reasonable practicability is well-established and has been the test connected with the submission of unfair dismissal claims to employment tribunals, specifically since the Employment Rights Act 1996 and before that.

12. In the case of Palmer & Saunders v Southend on Sea Borough Council [1984] IRLR119CA the Court of Appeal stated that the meaning of the words "reasonably practicable" in Section 111 (2) lies somewhere between reasonable on the one hand and reasonably physically capable of being done on the other. The best approach is to read "practicable" as the equivalent of "feasible" and to ask "was it reasonably feasible to present the complaint to the employment tribunal within the relevant three months?"

    In Biggs v Somerset County Council [1996] IRLR203CA it was held that the words "reasonably practicable" are directed to a temporary impediment or hindrance faced by an individual claimant, such as illness rather than a mistake of law. In London Underground Limited v Noel [1999] IRLR 621CA it was held that the essential matter or matters about which the claimant is mistaken or ignorant must relate to the right to bring a claim.

13. In this case the claimant had spoken to ACAS and they had mentioned the time limit of three months less a day. The claimant maintains that he misinterpreted this as referring to the submission of a letter of appeal directly to his employer which he did in January. I do not find that there is reasonable basis upon which the claimant could have believed that the time limit related to this rather than to the time for bringing a claim to the employment tribunal. Employment tribunal claims have been part of English law since 1971, a period of fifty years. It is common knowledge, which was also possessed by Mr Cooper, that if employees wish to complain about their dismissal, then they can bring cases not to the normal courts but to the employment tribunals (or the industrial tribunals as they were formerly known).

14. On all of the evidence presented I find that it was reasonably practicable for Mr Cooper to have presented his claim within the statutory time limit of three months. Therefore I find that the tribunal has no jurisdiction to hear Mr Cooper's complaint of unfair dismissal and accordingly it is dismissed. The time limit imposed by parliament must be properly applied subject only to the limited discretion available in Section 111 (2) which I found does not apply to this case.

15. Turning to the discrimination claim, the time limit set out for such claims is in Section 123 of the Equality Act 2010 namely a period of three months from the date of the act referred to or such other period as the tribunal finds just and equitable.

16. The concept of reasonable practicability and just and equitable are different. Tribunals will normally find that it is open to them to allow discrimination claims to proceed by applying the concept of whether it is just and equitable to allow more time rather than looking at whether it was reasonably practicable to present the tribunal the discrimination claim within the strict time limit. Mr Cooper was invited to explain any other bases upon which he would argue it was just and equitable to extend the time limit for any discrimination claim. He relied upon the same material with regard to the events which were happening in his life at the time which meant

that he did not concentrate on bringing his claim rather than the changes in his life and dealing with his family responsibilities. I found no basis upon which to exercise discretion on the basis that it would be just and equitable to do so. Essentially the claimant was aggrieved at being made redundant and the essence was that he felt the marking was unfair and this is what he wanted the tribunal to redress. It is clear that in cases of unfair selection for redundancy, the tribunal dies not embark upon re-marking or re-scoring, but rather considers whether the employer had in place a reasonable process for selection.

17. It is appropriate to consider the question of the merits of the discrimination claim and whether there are prospects of success and if so to what extent. The difficulty with this discrimination claim is that clearly Mr Cooper did not initially have in mind instituting such a claim. In his claim form he ticked only the box for unfair dismissal and none of the options of discrimination which are set out underneath that line in the claim form, including discrimination on the grounds of sex or marriage. Failure to tick the boxes is of course not fatal in any way to the bringing of a discrimination claim if it is essentially included within the text of what is provided within the form itself. Certainly, it was considered at the time of the preliminary hearing before Judge Martin that there was a potential for a discrimination claim. No formal application was made to amend the case at the time of the preliminary hearing before Employment Judge Martin but she did direct that the claimant must provide further information with regard to his discrimination claim and whether it was direct or indirect discrimination. The claimant was also urged to consider obtaining further professional advice about this.

18. In the document which he filed with the tribunal the discrimination was dealt with under the heading “claim of indirect discrimination” and in that document Mr Cooper referred to the protected characteristic of marriage and a policy with regard to Saturday working which he claimed adversely affected him as a married father with childcare responsibilities. Employment Judge Martin had attached to her orders an index explaining to Mr Cooper the types of discrimination which he appeared to wish to argue as alternatives namely direct discrimination under Section 13 of the Equality Act 2010 and indirect discrimination in Section 19 Equality Act 2010. It was of significance that the detailed document filed referred only to indirect discrimination.

19. I have considered the merits of this. Mr Cooper was arguing that if the employers took into account in the selection process the ability to work on Saturday mornings then they were discriminating against him as a person who was married or in a civil partnership as such persons were more likely to have parental responsibilities. No explanation was given as to how this would be argued and Mr Zovidavi had submitted that in modern society persons who are married or in a civil partnership cannot be said to be more likely to have children because very many people who are not in a marriage or civil partnership do indeed have children. I do not find that there are any reasonable prospects of success in Mr Cooper’s claim as set out in his document or as explained to me today. There was no persuasive argument to the effect that this discrimination case could succeed. whilst this is not a criticism of Mr Cooper as an unrepresented party, the claim as put forward by him was unclear and without merit.

20. Accordingly I find that the discrimination claim has no reasonable prospects of success and therefore under Rule 37 of Schedule 1 of the Employment Tribunals Rules 2013 I strike out the discrimination claim as having no reasonable prospects of success.

21. I take into account the overriding objective in Rule 2 of the Employment Tribunals Rules 2013 in making the determination on all of the issues.

EMPLOYMENT JUDGE SPEKER OBE DL

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 3 AUGUST 2021