



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Alele

v

Asda Stores Limited

Heard at: Watford via CVP

On: 17 May 2021

Before: Employment Judge Bartlett (sitting alone)

Appearances

For the Claimant: in person

For the Respondent: Mr Mortin

JUDGMENT

1. The tribunal has no jurisdiction to hear the claimant's claims relating to unfair dismissal and race discrimination because they are out of time.
2. All of the claimant's claims under **3306436/2020** are struck out.

REASONS

Background

1. Notice of the Preliminary Hearing was sent to the parties on 27 February 2021 setting out that this Preliminary hearing would determine whether the claims were presented out of time.
2. The hearing proceeded via CVP. There were no difficulties with communication or connection during the hearing.
3. The claimant connected from his home address and at the start of the hearing I saw a person enter the room in which the claimant was sat. I asked the claimant if there was anybody else in the room with him because he was the only individual on camera. He said he was alone. I said to the claimant that it did not matter if there was somebody in the room with him but, because I could only see him, I need to know if there was somebody else in the room. At that point he said his adult son was in the room with him to help with IT issues.

4. The background to the claimant's claim is that he suffered race discrimination relating to an incident which took place on 19 October 2019 and that he was unfairly dismissed by the respondent on 19 January 2020. The respondent's position is that it did not commit race discrimination and it had a fair reason for dismissal which was that the claimant had gone AWOL.

Application

5. During the course of the hearing the claimant referred to and showed on camera some documents which the claimant confirmed were his recorded delivery received in respect of a letter sent on 11 March 2022 the respondent and the letter itself.
6. The Respondent objected to these documents being admitted as evidence because it was the first they had heard about them and there had been orders for disclosure. Mr Mortin identified the claimant's failure to comply with tribunal orders relating to disclosure and the prejudice that arose to the respondent in relation to a contentious point which potentially could have been resolved earlier if the documents had been disclosed.
7. The claimant stated that he had referred to the receipt by its reference number in his witness statement and so the respondent should have been aware of it.
8. I decided to admit the documents as I determined that it was in the interests of the overriding objective to do so: they were relevant to the issues under consideration which were themselves important jurisdictional issues. I recognise that there was some prejudice to the respondent not being able to consider these documents and deal with them in advance of the hearing. I also recognise the claimant did not provide a reasonable explanation as to why they had not previously been disclosed. However overall I considered that their relevance required their admission.

Chronology.

9. As is set out above this preliminary hearing was to determine whether or not the claimant's claims were in time. A list of issues had not been prepared for this hearing however the claimant's claim form is clear. At the PH I asked the claimant what the last act of discrimination he complained about was. He said that it was the incident on 19 October 2019 when he was called a number of offensive names.
10. The respondent's skeleton argument set out a chronology. A significant part of the hearing was spent going through the chronology to ensure that I had an accurate record of all the relevant dates.
11. The agreed chronology is as follows (I have set out below where the dates or issues are disputed):

Date	Event
19 October 2019	Alleged offensive name-calling of the claimant
20 October 2019	The claimant raises a grievance about the offensive name-calling on 19 October 2019
22 October 2019	The respondent acknowledges receipt of the claimant's grievance
31 October to 14 November 2019	The claimant is on bereavement leave
6 November 2019	The claimant travels from United Kingdom to Uganda to attend the funeral of his father
14 November to 12 December 2019	The claimant is on annual leave
13 December 2019	The claimant is admitted to hospital with malaria
13 December 2019	The claimant telephoned the respondent
13 December to 16 December 2019	The claimant is an inpatient in hospital
16 December 2019	The claimant telephoned the respondent
17 December 2019	The claimant is arrested for driving whilst disqualified
17 December to 19 December 2019	The claimant is in custody at a police station
19 December 2019	The claimant appears before a Magistrate and is convicted. He was sentenced to 36 weeks imprisonment. The claimant accepted that he had a previous suspended sentence.
19 December	The claimant serves a prison term

2019 to 9 March 2020	
29 December 2019	An invitation to an investigatory meeting on 2 January 2020 was sent to the claimant's address and was signed for by an individual at the claimant's address.
29 December 2019	The claimant alleges that his sister telephoned the respondent and spoke to the duty manager, Oliver.
6 January 2020	The claimant was invited to a disciplinary meeting on 11 January 2020. The letter was sent by recorded delivery.
Around 18 January 2020	The disciplinary meeting was rearranged for 18 January 2020 and a further written invitation was sent to the claimant by recorded delivery.
19 January 2020	The respondent dismisses the claimant and sends a letter of dismissal to the claimant's home address by recorded delivery
21 January 2020	The latest date of deemed receipt of the letter sent by recorded delivery
22 January 2020	Effective date of termination of employment
9 March 2020	The claimant is released from prison
10 March 2020	The claimant attended the CAB and wrote a letter to the respondent appealing his dismissal and raising concerns about the grievance/discrimination.
11 March 2020	The claimant sends the above letter by recorded delivery. This is disputed by the respondent
13 March 2020	The latest date of deemed receipt of the letter sent by recorded delivery. This is disputed by the respondent
23 April 2020	The claimant was admitted to hospital suffering from Covid-19.
23 April to 1 June 2020	The claimant is treated as an inpatient in hospital with Covid-19.
1 June 2020	The claimant is discharge from hospital
29 June 2020	The claimant contacted ACAS and started the Early Conciliation procedure
8 July 2020	The claimant received the ACAS Early Conciliation Certificate and submitted his ET1.
8 December 2020	The respondent files its response to the Employment Tribunal claim.

12. The claimant accepts that the letters the respondent alleges were sent to his home address by recorded delivery were received at his home address and

signed for by somebody with his surname. At that time his sister, who is an adult, and one of his adult sons were living at his home address.

The law

13. Section 111(2) ERA sets out:

“An employment tribunal shall not consider a complaint under this section unless it is presented to the ET – (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 ET 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.”

14. section 123(1) EQA sets out:

"123 Time Limits 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 ET thinks just and equitable."

Decision relating to unfair dismissal

15. Section 111(2) ERA sets out the time limits within which such claims must be presented at the Employment Tribunal. The standard period is 3 months though this can be extended as a result of the ACAS Early Conciliation scheme which is set out in detail in section 207B ERA.

16. The letter of dismissal was sent by recorded delivery to the claimant on 19 January 2020. This letter was signed for by an individual with the claimant's name at his home address. The claimant was imprisoned during this time and therefore a close family member such as the claimant's sister or adult son signed for the document. The claimant does not dispute that he was aware of the letter of dismissal and he will have been informed around this time by a family member.

17. I have decided to take the effective date of termination as 22 January 2020. The claimant was not clear when he became aware of that dismissal letter but it would have been around 22 January 2020. The claimant accepts that the letter was signed for by a family member and that he became aware of it. I recognise that as the claimant was in prison he would have had some limits to his communication with family members however I consider that he would have been aware of the contents of the letter by 22 January 2020.

18. Therefore the claimant had 3 months from 22 January 2020 to submit his claim form in respect of the unfair dismissal claim. This takes the claimant until 21 April 2020 to submit his ET1 in respect of the unfair dismissal.

19. The claimant accepted that he was notified of the letters inviting him to a disciplinary meeting before 29 December 2020 because he asked his sister to contact the respondent which she did on that date. Therefore in late

December the claimant had notice that he may be dismissed shortly afterwards by the respondent. I accept that when the claimant was first notified of his dismissal he was in prison. In some respects this can make it harder to submit his claim to the Employment Tribunal because he is not able to access legal advice or the CAB freely and his access to computers and the Internet would have been restricted. In other respects it allows the claimant time to think matters through which he may not have had if he was busy working for example. Further his period of imprisonment covers approximately half of the three month time limit.

20. I find that the claimant had been considering his employment situation when he was in prison because he was released on 9 March 2020 and visited the CAB on the next day on 10 March 2020 and contacted ACAS on 10 March 2020. The claimant's evidence was that he was told to write to Asda and wait for their response as to whether or not they would consider his appeal. The claimant's evidence was that he told them that he had been dismissed and they told him that he had a time limit in which he could bring an Employment Tribunal claim. The claimant accepted that on 10 March he knew that he had three months in which to bring his Employment Tribunal claim. He also accepted that he told the CAB and ACAS that he was dismissed on 19 January and that they told him he needed to bring his claim by 18 April 2020. His evidence was that he took no further action because he had been told to wait for the respondent's response and that is what he was doing. Then after about one month he became ill with coronavirus.
21. It was undisputed that the claimant's letter dated 10 March 2020 gave the respondent 10 days in which to respond to him.
22. The claimant's evidence was he did not call the respondent because he did not know that he could do so because it was no longer an employee. I did not find this credible.
23. The claimant's reasons for delay also included that not only did he have Covid-19 and was ill for approximately two weeks before his admission on 23 April 2020 but that he also had two children at home who were sick with coronavirus. I asked the claimant some questions about his children and how ill they were. One of the children was an adult and suffered mild symptoms. The other child was 11 and suffered from a fever and again reasonably mild symptoms. The claimant's witness statement set out that between 10 March 2020 and 17 April 2020 he was looking for another job and that is how he counteracted Covid-19. He also stated that their symptoms started around the same time as his had. I do not find that the claimant had significant caring responsibilities in respect of his children in relation to Covid-19 all that he was caring or unduly worried about them prior to the period starting on 17 April 2020. This is because his evidence was effectively that his children's cases were mild and they started about the same time as him.
24. The claimant accepted that the text of the ET1 was cut-and-pasted from his letter dated 10 March 2020. When asked how long it took the claimant to prepare his ET1 he said that it took him one day. It was put to him that he had

a business Masters Degree and was not feasible that it took him so long. The claimant then said that it took him one hour.

25. The claimant was asked directly why he did not submit his claim between 10 March 2020 and 18 April 2020. His response was that he was waiting for Asda and then he was sick.
26. I accept that after the claimant was released from hospital on 1 June 2020 he would still be quite ill. His evidence was that he spent 11 days in ICU and anybody who has spent that period in ICU will take a considerable time to recover. I accept that he would not be in a position to submit his ET1 for two weeks after his release from hospital. However I also recognise that he lived with an adult son and his sister whom he could have given instructions to cut-and-paste from his letter and submit his ET1.
27. Therefore considering the three month initial time period I find that:
 - 27.1 The claimant was in prison for approximately the first half of this time;
 - 27.2 the claimant had at least one clear month between being released from prison and being ill with Covid-19 when he could have submitted his ET1;
 - 27.3 the claimant was ill with Covid-19 for only a maximum of the last two weeks of the 3 month time period.
28. I find that during the period between 10 March 2020 and 17 April 2020 the claimant was fit and capable. His own evidence was that he was looking for work at this time.
29. Whilst I accept that the period of imprisonment provided some obstacles to the claimant taking action in relation to an Employment Tribunal claim, I do not accept that it meant it was not reasonably practicable for him to take actions to submit an ET1 during that time. I am not satisfied that the claimant did not have such access to the Internet or his family that he could not have taken steps during that time in preparation of or actually submitting an ET1.
30. I find that the claimant could have submitted his ET1 in the period from 10 March 2022 to 10 April 2020. I recognise that the claimant was waiting for a response from Asda. But the time period of 10 days he gave to Asda to respond passed and he took no further actions to chase them. Further the claimant's own evidence was that he knew there was a three-month time which would have been fast approaching by early April and still he did not submit an ET1.
31. I recognise that it is up to an individual to leave submission of their claim until near the end of the time limit but that does carry risks that events will intervene and they may not be able to do so. This would have been evident to the claimant who had been imprisoned shortly beforehand which was a significant intervening event.

32. I also remind myself that the claimant's admission to hospital was on the last few days of which the time limit. I accept that in the week leading up to that hospital admission he would have been too ill to submit his form.
33. However in all the circumstances I consider that it was reasonably practicable for the claimant to submit the claim in time. The claimant's period of incapacitation with Covid-19 was a very short part of three-month time limit and it was open to him to submit his claim before 17 or 22 April 2020. Further, I do not find that his period of imprisonment had a significantly detrimental effect on his ability to comply with the time limit particularly as he sought legal advice immediately on his release.
34. It is also important to remember that in the ordinary course of life then people do experience significant life events such as illness, bereavement, holidays, relationship breakdowns. The time limit has been set at three months and there is no reason for me to consider that the three months only applies to uneventful periods in life.
35. Even if I were wrong in my assessment of reasonable practicability, I find that the claimant did not submit his claim in a reasonable further period. I accept that the claimant was incapacitated by Covid-19 from around 17 April 2020 to 8 June 2020. However the claimant did not contact ACAS until 29 June 2020 which is the date on which he started early conciliation. Early conciliation ended on 8 July 2020 and this is the date on which he submitted his ET1. However the claimant had known from 10 March 2020 that he had a three-month time limit which he thought had run from 19 January 2020 and that he had been told expired on 18 April 2020. Given that it did not take the claimant much time to prepare his ET1, only one hour, and he had family who could assist I do not consider that the delay from 29 June 2020 to 8 July 2020 was reasonable in all the circumstances.
36. Therefore I find that the claimant's claim of unfair dismissal is out of time and it is struck out for lack of jurisdiction.

Decision relating to race discrimination

37. The test set out by section 123 of the Equality Act 2010 is less stringent than that set out in section 111(2) ERA and I have given careful consideration to the differences between the test when coming to my decision.
38. The claimant confirmed that the last date on which a discriminatory event occurred was 19 October 2019. Three months from this date is 18 January 2020.
39. I find that on 20 October 2019 the claimant lodged a grievance with the respondent and that this was never resolved. I find that respondent did take some steps to address the grievance however it did not reach a conclusion for reasons which it was submitted relate to his eventual dismissal.
40. As can be seen from the chronology between 31 October and 14 November 2019 the claimant was on bereavement leave. Between 15 November and 13

December 2019 the claimant was on annual leave. I accept that the claimant would have been going through a difficult time following the death of his father on 31 October 2019. I accept that during the period of bereavement leave the claimant would have had other things on his mind rather than pursuing remedies in the Employment Tribunal for discrimination. I also recognise that during his annual leave the claimant was absent from the United Kingdom and most likely dealing with family matters relating to his father's passing in Uganda.

41. From 13 December to 16 December 2019 the claimant was in hospital receiving treatment for malaria.
42. From 17 December 2019 to 9 March 2020 the claimant was detained in police custody and then he was imprisoned.
43. As set out above the claimant had confirmed that by at least 29 December 2019 he was aware that the respondent was pursuing disciplinary procedures including potential dismissal relating to his non-attendance at work.
44. On release from prison on 9 March 2020 the claimant immediately sought advice from the CAB and his evidence was that he knew that he had three months from the date of termination of his employment to submit an Employment Tribunal claim. It was open to him to discuss and seek advice on the discrimination allegations.
45. On 11 March 2020 the claimant submitted a document in which he tried to appeal his dismissal and which repeated concerns about discrimination relating to the events of 19 October 2020. The focus of the letter is his dismissal.
46. I accept that there were some periods during the three-month time limit when the claimant could not be expected to be focusing on bringing an Employment Tribunal claim particularly the two weeks of his bereavement leave, his time in hospital with malaria and the first week or so of his incarceration. I recognise that a lot was happening to the claimant during this period: he was suffering from the loss of his father, he had ill health and he was imprisoned.
47. As set out above I accept that during the claimant's incarceration he would not have had free access to computers, the Internet and legal advice. However he did have some time to consider his situation and research it.
48. As I have set out above I also recognise that the claimant was incapacitated from around mid April until the end of June 2020 with Covid-19.
49. **British Coal Corporation (appellants) v. Keeble and others (respondents) - [1997] IRLR 336** identifies factors to consider when exercising my discretion.
50. One factor to consider is the length of the delay. In this case the delay is very long. The time limit expired on 18 January 2020 but the initial claim was not submitted until 8 July 2020.
51. I have summarised the reasons for the claimant's delay above.

52. Another factor to consider is the extent to which the cogency of evidence is likely to be affected by the delay. As the delay was one of approximately 10 months the respondent had little reason to take action to preserve or obtain evidence relating to the claimant's grievance. I accept that this is likely to have a negative effect on the evidence the respondent is able to provide in its defence.
53. Another factor is the extent of cooperation in relation to information. It was regrettable that the claimant had some evidence namely the recorded delivery receipt of his 11 March 2020 letter and evidence setting out the duration of his prison term which had not been disclosed to the respondent prior to this hearing.
54. The claimant's evidence was that he went to the CAB on 10 March 2020 and he was informed that he had three months to bring his Employment Tribunal claim. His evidence was that he took advice about the potential discrimination from the CAB at that time. In addition the appellant was a section leader and in his role with the respondent he had dealt with grievances. The claimant's evidence was not clear about when he considered the three-month time limit ran in respect of the discriminatory acts. However I considered that the claimant's main concern was the termination of his employment as it is evidenced by the detail of his letter and his concerns about having no money. It is not clear to me that the claimant gave much thought to the time limit relating to the discriminatory acts.
55. Another factor to consider is the steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking action. I accept that the claimant was limited in his ability to take professional advice whilst he was in prison however he took advice immediately on his release from prison. He was informed to some extent about time limits but took no action in relation to the discriminatory events. In evidence he accepted that on 10 March 2020 he had been informed about the early conciliation procedure and he did not take any steps to start that until 29 June 2020. I find that the delay in starting early conciliation cannot be justified. Finally, I find that the claimant did not submit his ET1 until four months after he first spoke to the CAB. I find that the claimant has not established that there were good reasons why he did not submit his ET1 in the period between 11 March 2020 and 17 April 2020,
56. The claimant then spoke to the CAB and ACAS on 29 June 2020 and he waited until 8 July 2020 to submit his ET1. Whilst this is not necessarily a significant delay, when it is taken in the context of all the other delays, it is a delay during a period in which the claimant already had awareness that the time limit to submit his claim for the Employment Tribunal had passed some time ago. Given that the claimant's evidence was that he cut and pasted his letter into the ET1 and therefore it did not take significant preparation time the delay is even less understandable.
57. Taking all of the circumstances of the case together I do not find that it is just and equitable to extend time in this case. Whilst the claimant has suffered a

series of unfortunate events he had periods of time when he was able to submit an ET1 and he did not do so. As I have set out above the time limits are three months and it is to be expected that some people will have some significant life events during that time that three months and still been set at the time limit. Whilst I may have accepted that it was just and equitable to extend the time period beyond 23 January 2020 and do not accept that it is just and equitable to extend it to 8 July 2020.

58. As a result of my findings above the tribunal has no jurisdiction to hear the claimant's claims of discrimination and these claims must be struck out.

Employment Judge Bartlett

Date: 25 May 2021.....

Sent to the parties on:

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For the Tribunal Office