



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Uton Black

**Respondent:** E H Smith (Builders' Merchants Ltd)

## RECORD OF A PRELIMINARY HEARING

**Heard at:** Birmingham      **On:** 20 July 2020

**Before:** Employment Judge Hughes

### Appearances

For the claimant: In person

For the respondent: Mr D Northall - Counsel

## REASONS

### Background and issues

1 This is an Open Preliminary Hearing held by Skype in Birmingham because of the Covid 19 situation. There are three issues to be determined: whether there is jurisdiction to hear some of the claims, by reference to time limitation provisions; an application to substitute particulars of claim; and whether to allow an amendment application.

2 The history of the claims is slightly complicated. The claimant submitted Claim Form ("the first claim") on 13 September 2019 (case reference number 1307377/19). He was still employed by the respondent. He had complied with the Early Conciliation requirements. In summary, the claims were for direct race discrimination, racial harassment and victimisation. The allegations started in or around March 2017. It later came to light that the claimant had also submitted a second version of the form on-line on 22 September 2020, which contained a fuller version of the matters set out in 1307377/19. Due to an administrative error (quite possibly a belief that it was a duplicate) it was not accepted and served at the time. This was later rectified, but at a point after a further Claim Form (which I shall refer to as "the final claim") had been presented which made allegations about the claimant's dismissal (1302335/2020). This means the case reference number of the on-line form (1305596/2020) is not reflective of the date on which (or the order in which) it was presented.

3 In the final Claim Form, the dates of employment were stated to be 3 August 2016 to 28 October 2019. It is common ground that 28 October 2019 was not the

effective date of termination of employment. It was in fact the date when claimant was informed that his appeal against his dismissal was not successful.

4 There was a Case Management Preliminary Hearing before Judge Monk on the 22 February 2020 in which she identified a number of points that would have to be dealt with at today's Open Preliminary Hearing, as follows:

4.1 Whether the complaints in the final Claim Form (1302335/2020) were made in time and, if not, whether there are grounds to extend time by reference to the just and equitable test for the discrimination claims, and the reasonable practicability test in respect of the unfair dismissal claim and the claim for "other payments".

4.2 Whether to allow the claimant to substitute claim 1305596/2020 for 1307377/19.

4.3 Whether to allow the claimant to amend to attach new legal labels (public interest disclosures and detriments) to facts already pleaded.

5 I shall briefly summarise the claims. References in square brackets are to page numbers in the bundle for the Preliminary Hearing. The first claim was received by post on the 13 September. The particulars of claim were quite lengthy, covering about 7 or 8 pages and consisting of 29 paragraphs [17 onwards]. The claimant alleged that the respondent had informed him it was considering disciplinary action for alleged poor performance, and that dismissal for gross misconduct was a possible outcome. In paragraph 26 the claimant alleged that the decision to instigate disciplinary action was an act of revenge because he had brought grievances about racial harassment and direct race discrimination i.e. he made a victimisation claim. The claim was in time.

6 The second claim was submitted at around the same time on-line and, as already stated, was overlooked. It contained similar particulars of claim, but gave more detail [40 to 48]. In addition to the matters referred to above, the claimant alleged that other drivers who were more at fault than him were not disciplined. The claimant made reference to the relevant sections of the Equality Act 2010 ("EA10"), from which it was clear that he had carried out research in order to be able to draft the particulars.

7 The final Claim Form (the claim containing the unfair dismissal claim) contained a number of allegations [87 onwards]. The claimant alleged: unfair dismissal; and direct race discrimination because he was dismissed, whereas white drivers who had committed acts of misconduct were not disciplined or dismissed. The claimant alleged victimisation under section 27 EA10 "from about March 2017 to October 2019" (paragraph 10.3); and made reference to complaining about discrimination and to raising concerns about breaches of Health & Safety legislation. He also referred to not receiving an annual bonus (this was presumably the claim for "other payments"). There was no specific reference to the appeal against dismissal.

### **The substitution application**

8 Dealing first with 4.2 (the substitution point), I record that the application was not opposed and I shall allow it. Therefore, and without prejudice to the claimant, I shall dismiss 1307377/19 on withdrawal.

### **The limitation issue**

9 I shall next turn to the time limitation issue on 1302335/2020 (see 4.1 above). The effective date of termination of employment was 22 September 2019 and the complaints relating to dismissal were out of time. The claimant gave evidence about why

this was. He identified a number of factors: he was in a state of shock; he had some problems with his kidneys; he obtained a job in a new working environment which was extremely tiring; and he was unable to get legal advice or representation. The claimant also told me he had carried out research and now understands that he had misunderstood the legal position, because he mistakenly believed that the effective date of termination of his employment was the date when he was notified that his appeal was unsuccessful. The claimant confirmed that he was not paid after September 2019, but did not receive a P45 until December.

10 The respondent submitted that because the effective date of termination was the 22 September, but the claimant did not start Early Conciliation until January 13 2020, the latter did not extend time and the claim was out of time.

11 The respondent's representative argued that this meant that there was no jurisdiction to hear the allegations pertaining to dismissal. He also argued that the concept of a continuing course of discriminatory conduct could not bridge the gap between the earlier acts complained of and the dismissal.

12 The respondent's representative submitted that the claimant's evidence about why the claim was presented late, did not come close to showing that it was not reasonably practicable to claim in time, or sooner than he did. The respondent's representative said that the claims submitted on 13 and 22 September 2019 are very detailed and demonstrate that the claimant had done considerable research to be able to formulate the grounds the way he did. Mr Northall submitted that therefore the claimant should have been able to present the final claim in time, and should have known the applicable time limits.

13 After further discussion, the claimant (Mr Black) said that he was seeking to argue that the allegation which refers to victimisation under section 27 of the Equality Act 2010 during the period March 2017 to October 2019 (paragraph 10.3 of the particulars of claim) encompassed the appeal outcome, and that therefore the dismissal complaints could be in time, because the final claim was in time by reference to the appeal outcome date. Mr Northall disagreed with that proposition. He argued that because the allegation was in a section headed "My Dismissal is Unlawful" and did not mention the appeal, there was no allegation in the Claim Form relating to the appeal hearing or outcome. Mr Northall argued that the claimant was now seeking to amend to add a complaint about the appeal, but that he had made no formal application to do so.

### **Discussion and conclusions on time limits and jurisdiction**

14 As can be seen from the summary above, the claimant did provide detailed particulars of claim, and made reference to specific legal claims and the relevant sections of the EA10. It is clear that he carried out relevant research to be able to do so. It is rare to see such clear particulars of claim from an unrepresented party. For the purpose of the amendment application (which is dealt with below) it is relevant to note that the claimant did not include public interest disclosure detriments as a head of claim when he presented the claims. I infer that he has since carried out further research, and that is why he made the application to amend.

15 The allegations in the final Claim Form are out of time, subject to the question of whether a complaint about the conduct or outcome of the appeal was encompassed by paragraph 10.3 of the particulars of claim, which would have a bearing on the discrimination allegations but not on the unfair dismissal claim or the claim for "other payments". I shall first deal with those claims. The dismissal was on 22 September 2019,

and because the claimant did not commence Early Conciliation until 13 January 2020, the primary limitation period of three months minus one day was not extended, and those claims were out of time. I was not satisfied that the claimant had put forward evidence to show that it was not reasonably practicable (i.e. not reasonably feasible) to have presented those claims in time. I accepted that he had some health problems, but not to an extent that would impact on his ability to draft and present the claim. I also accepted that the claimant understandably wanted to prioritise his new job. However, and bearing in mind that the claimant had already presented two Claim Forms and was familiar with the process, I thought it was obvious that the main reason he presented the final claim when he did, was his misunderstanding as to the effective date of termination of employment. It is well established law that ignorance of time limits, or an error as to when a time limit starts to run, is not of itself, a reason to extend time.

16 Consequently I concluded there was no jurisdiction to hear the unfair dismissal claim or the claim for other payments. That finding has implications for the application to amend to argue automatically unfair dismissal for making disclosures qualifying for protection (section 103A Employment Rights Act (“ERA”)).

17 The claimant also claimed that his dismissal was an act of direct race discrimination and/or victimisation. I shall now set out my conclusions about time limitation and jurisdiction in respect of those claims. The claimant was correct to argue that if the final Claim Form contained an allegation about the appeal, that allegation would have been presented in time. It would then be open to him to argue that there was a continuing course of discriminatory conduct, up to and including the appeal. If so, the limitation question in respect of the EA10 allegations about his dismissal would need to be determined after all the evidence was heard i.e. at the substantive hearing on liability and not as a preliminary issue.

18 I am persuaded by Mr Northall’s submission that there is no allegation about the appeal contained in the particulars of claim. Therefore, the allegations of direct race discrimination and victimisation in respect of the claimant’s dismissal are out of time. Consequently, I have to decide whether they were brought within such a time period that it is just and equitable for them to be heard by reference to section 123 EA10. I conclude that it is just and equitable for them to proceed to hearing. The test is less stringent than the “not reasonably practicable” test. Whilst time limits are strict, the factors which the claimant put forward i.e. health and prioritising his new job, plus the fact that he went to Early Conciliation about three weeks after the expiry of the primary time limit, persuaded me that I should extend time. I do not think this is greatly prejudicial to the respondent, because there is already an ongoing claim and, as can be seen from the above summary of the allegations, the dismissal was a continuation of the events the Employment Tribunal will have to make findings about.

### **The application to amend**

19 The final preliminary point (see 4.3 above) was the application to amend to allege detriments and automatically unfair dismissal under the public interest disclosure provisions of the ERA. As noted above, my finding regarding jurisdiction in respect of the ordinary unfair dismissal complaint has implications for the section 103A ERA dismissal claim. Viewed one way, there is now no allegation to amend. Viewed another way, there is no jurisdiction for the same reasons as set out above in respect of the ordinary unfair dismissal complaint.

20 The application to amend to claim detrimental treatment by reason of making disclosures qualifying for protection is, in my view, a mere relabelling exercise (see for

example, the reference to reporting health and safety concerns). Therefore I shall allow it.

21 There is no application to amend to add a complaint in respect of the conduct of the appeal hearing, or its outcome. I therefore conclude that no amendment should be permitted. Consequently the Employment Tribunal does not have to determine allegations about the appeal against dismissal.

**Post Script**

22 Having given the above reasons orally, I then consolidated the claims, listed a hearing and made case management orders.

23 The judgment made at the Preliminary Hearing was not promulgated due to an administrative error. When this came to light, it was promulgated about one year later. The claimant applied for written reasons in time. Fortunately, the oral reasons were recorded, which has enabled me to produce these reasons notwithstanding the passage of time.

24 The claimant has also applied for a reconsideration of my finding in respect of the appeal against dismissal. The application was made in time. I made an Order on 20 July 2021 that within 14 days of the date when these written reasons are sent out to the parties, the respondent is to write to the claimant and to the Employment Tribunal setting out its position on the claimant's reconsideration application. The claimant has 14 days thereafter to provide a written response to the respondent and the Employment Tribunal. Once I have received these, I shall undertake a reconsideration on the papers.

**Employment Judge Hughes  
9 September 2021**