



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
MR D CHASE

Respondent
FRESH COLLECTION DRY CLEANERS

Open PRELIMINARY HEARING

HELD AT: London Central (CVP) ON: 9 November 2021

BEFORE: Employment Judge Russell (sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Ms. B Samuels , Peninsula

Judgment

- The Claimant's claim of unfair dismissal is dismissed .
- The Claimants claim of direct race discrimination shall continue to the listed full hearing on 22 and 23 February 2022 in accordance with case management orders made.

Reasons

Background

1. This hearing of 9 November was principally to determine the Respondent's Application for a Strike Out of the Claimant's claims Under Rule 37 (1) (a) primarily on the grounds of jurisdiction .
2. The Claimant's employment terminated on 25th November 2020. The Claimant commenced Early Conciliation on 22nd February 2021 which concluded on 18th March 2021. The Claimant then submitted his ET1 on 21st April 2021 and therefore 4 days out of time.
3. The Respondents also sought to have the Claims struck out due to the Claimant's noncompliance with case management orders. Specifically, the Claimant was required to provide and has not provided the following:
 - Schedule of loss by 16th August 2021
 - Identify his race and / or ethnic origin in connect with his race discrimination allegation

The Law

s111 ERA 1996

- (1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.
- (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.

s123 Equality Act 2010

- (3) [Subject to section 140A] 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
 - (c) such other period as the employment tribunal thinks just and equitable.
- (4) For the purposes of this section—
 - (a) conduct extending over a period is to be treated as done at the end of the period;
 - (b) failure to do something is to be treated as occurring when the person in question decided on it.
- (5) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
 - (a) when P does an act inconsistent with doing it, or
 - (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Rule 37 ET Rules

I have put the relevant provision for this case in bold.

- (1) 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 following grounds—
 - (a) that it is scandalous or vexatious or has no reasonable prospect of success;
 - (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
 - (c) for non-compliance with any of these Rules or with an order of the Tribunal;**
 - (d) that it has not been actively pursued;
 - (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
- (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
- (3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

Findings and applying the law

1. Having heard from the parties it is clear that the Claimant , although acting in good faith and without legal advice, could have filed his claims in time. And even though he only knew (he says) as to what he felt was discriminatory treatment as to his dismissal (his unfair selection set against the treatment of Asian co-workers) when the ACAS early conciliation ended on 18 March 2021 his claims were not filed until 21 April. He had had health issues and I find that he acted in good faith in that he did not mean to miss the deadline and tried to get advice , but also that he had no justifiable reasons for not lodging his claims in time.
2. The burden of proof in showing the tribunal should extend time is placed squarely on to the Claimant: Robertson v Bexley Community College [2003] IRLR 434 .
3. However in respect of his discrimination claim, primarily discriminatory dismissal, the Tribunal has a wide discretion under s 123(1)(b)Eq Act 2010 to do what it thinks is just and equitable in the circumstances. The authority of Southwark London Borough Council v Afolabi [2003] IRLR 220, CA makes it clear the tribunal is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action. Given the delay was only 4 days and the reasons for it and the lack of prejudice to the Respondent , in allowing the claim as to a discriminatory dismissal to proceed, it is clear to me that an extension should be allowed. In so far as it relates to a complaint under the Equality Act.
4. The Claimant's position in respect of the unfair dismissal case itself, under the Employment Rights Act, is much weaker. Reasonable practicability means, reasonably feasible. Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119. The Claimant was aware he had the right to present a claim to the Employment Tribunal and he knew there was a 3 month period to do so once he had contacted ACAS but still waited nearly a month to do so . He had no advisor at any time and had not got advice to clarify the position but he ought to have known of the urgency. Applying Porter v Bandbridge [1978] ICR 943 in this respect it is clear to me that it was reasonably practicable/feasible for him to have filed his unfair dismissal claim in time. And so the unfair dismissal claim is struck out on jurisdiction grounds but the discrimination claim shall continue.
5. As far as the Respondent's application for a strike out based on the noncompliance of orders under rule 37(1) (c) is concerned however , I find this without substance. The Claimant legitimately felt that he could not file his schedule of loss until requested payslips had been sent to him (now recently received) and was confused as to how to set this out . He had also been ill. He has now indicated his race/ethnic origin is White British which will come as no surprise to the Respondents and although his race claim remains slightly unclear as to the detail the basis of his claim as to unfavourable

treatment , particularly as to his dismissal , compared to 2 Asian co-workers, has been clear throughout . The Respondent's application for a strike out under Rule 37 fails.

6. So the standard unfair dismissal claim is struck out on jurisdiction grounds but the discrimination claim (principally as to a discriminatory dismissal) should continue. Subject to the case management orders made.

EMPLOYMENT JUDGE- Russell

9 November 2021
Order sent to the parties on

09/11/2021.

for Office of the Tribunals