EMPLOYMENT TRIBUNALS

Claimant: D Sherwood

Respondent: Thales Uk Limited (1)
XPI Simulation Ltd (2)

Heard at: London South Employment Tribunal by CVP
On: 18 November 2021

Before: Employment Judge L Burge

Appearances
For the Claimant: In person
For the Respondents: A Smith, Counsel

OPEN PRELIMINARY HEARING JUDGMENT

It is the Judgment of the Tribunal that:

1. The name of the First Respondent is amended to Thales Uk Limited;

2. The Tribunal does not have jurisdiction to hear the Claimant's claims of unfair dismissal and automatic unfair dismissal against the First Respondent as they were brought outside of the applicable time limits and it was reasonably practicable for the Claimant to have brought them in time;

3. It is just and equitable to extend time in respect of the Claimant's claim of victimisation (dismissal and no longer being offered relocation because he had made complaints of race discrimination) against the First Respondent;

4. The Respondents' applications for strike out and/or for a deposit order to be made are not granted; and

5. The Claimant's claims of unfair dismissal, automatic unfair dismissal (whistleblowing) and victimisation (dismissal and no longer being offered relocation because he had made complaints of race discrimination) continue against the Second Respondent.

REASONS

1. Ten minutes before the 3 hour hearing was due to start the Tribunal was provided with a series of emails containing sections of a 271 page bundle, a 43 page bundle, skeleton arguments, authorities and a witness statement from Victoria Howells on behalf of the Respondent. The Tribunal had to take time to read the skeletons and witness statement. There was not enough time for the Tribunal to read the bundle in full nor for the Claimant and Ms Howells to give oral evidence to the Tribunal.

2. This case had previously been case managed by EJ Hyams-Parish on 7 June 2021. At that Hearing the parties agreed that the Claimant's claims were:
    a. Unfair dismissal (s.98 Employment Rights Act 1996);
    b. Automatic unfair dismissal – whistleblowing (s.103A Employment Rights Act 1996;
    c. Victimisation (for making complaints of race discrimination) (s.27 Equality Act 2010).

3. EJ Hyams-Parish identified the nub of the Claimant's claim - that he was selected for redundancy because he had raised a number of grievances and allegations of race discrimination. EJ Hyams-Parish asked the Claimant to provide further written particulars on whistleblowing, race discrimination and detriments, after which the Respondents were permitted to amend their Response. The Claimant had sent through what he considered to be further information in response to EJ Hyams-Parish's orders. However, the information he provided did not adhere to the request. For example, he specified "detriments" as items such as "reputational damage" and "damage to future career prospects". He is a litigant in person, these are difficult issues, there is no criticism intended.

4. The majority of the hearing was taken up with exploring whether both Respondents should remain and understanding what claims the Claimant was bringing. The Tribunal explained to the Claimant what "being subjected to a detriment" meant (the employer treating him badly in some way). We went through his claim form and the Tribunal asked him to identify each instance of being treated badly by his employer because he had blown the whistle or complained about race discrimination (other than by being dismissed, which was already defined as a claim). The following was identified - "After recently returning from paternity leave and 3 months prior to my redundancy I was told that they were no longer offering me relocation without any justification – a clear sign of victimisation." In the Claimant's response to the Respondents' rebuttal he identified that detriment as being because he had raised race discrimination complaints.

5. The Claimant also pointed to another example of detriment in his claim form - the First Respondent continuing with consultations against the advice of the occupational health assessment. However, when the Respondents pointed out that the Claimant's own documents included the occupational health

correspondence which said that he was fit to participate, the Claimant confirmed that he would not be pursuing that claim.

6. The Claimant's claims are therefore:

    a. Unfair dismissal (s.98 ERA 1996);

    b. Automatic unfair dismissal – whistleblowing (s.103A ERA 1996); and

    c. Victimisation (dismissal and no longer being offered relocation because he had made complaints of race discrimination) (s.27 EqA).

The correct Respondent and whether the time limits for bringing the claims should be extended

7. At the Preliminary hearing with EJ Hyams-Parish it appeared that the Claimant's claims were out of time. He had been dismissed on 10 July 2020 and had not contacted ACAS until 15 October 2020 (6 days late). On the claim form Thales UK was the only Respondent. EJ Hyams-Parish added XPI Simulation Limited as the Second Respondent.

8. Since that hearing there has been a change in circumstances in that the Claimant has now brought to light a second ACAS Early Conciliation Certificate with the Second Respondent which was dated 5 October 2020. This meant that time was extended by the ACAS Early Conciliation in respect of the Second Respondent and by submitting his claim on 26 November 2020 it was in time. The Tribunal therefore has jurisdiction to the hear the claims against the Second Respondent (subject to the removal of the redeployment constituting conduct extending over a period, see further below).

9. However, it was anticipated by EJ Hyams-Parish that once the Claimant had given further consideration to the contract of employment (which specifies XPI Simulation Limited as the employer) he would concede that he was not employed by Thales UK and they could be released. There was "some discussion" about it with EJ Hyams-Parish. There was considerable further discussion at this Preliminary Hearing. The Claimant was adamant that he wanted to keep Thales UK as a respondent because, while he recognised that the Second Respondent was said to be his employer in his contract of employment, he said that he worked from Thales offices, the correspondence to him was in the name of Thales, Thales was on his payslips and he was surrounded by colleagues from Thales including his manager. Mr Smith asked that the Tribunal exercised its powers under Schedule 1, Rule 34 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 to remove Thales UK as a party. The contract of employment did say that the Claimant was employed by the Second Respondent but given the Claimant's insistence that he considered himself to be employed by Thales and most of the documentation was written by Thales the Tribunal decided that it would not exercise its discretion to remove Thales under Rule 34.

10. As described above, the Claimant did not start ACAS Early Conciliation until 15 October 2020 and so it did not extend time. He was dismissed on 10 July 2020 and so he should have presented his claim on 9 October 2020. However he did not present his claim until 26 November 2020, 48 days late.

11. Section 111(2) Employment Rights Act ("ERA") 1996 states:

"…*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"

12. Section 48(3) ERA states:

"An employment tribunal shall not consider a complaint under this section unless it is presented—
(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, 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.

(4) For the purposes of subsection (3)—
(a) where an act extends over a period, the "date of the act" means the last day of that period, and
(b) a deliberate failure to act shall be treated as done when it was decided on;"

13. s.123 of the Equality Act 2010 provides that a complaint :

"(1) 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 tribunal thinks just and equitable.
…
(3) 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."

14. The question for the Tribunal in relation to his unfair dismissal claims is whether it was reasonably practicable for the Claimant to have complied with the time limit in relation to the First Respondent? It plainly was, he knew he had to enter an Early Conciliation Certificate, and did so in relation to the Second Respondent, but did not do so until after the deadline in relation to the First Respondent. The Claimant said he thought ACAS would link the forms. The Tribunal concludes

that this does not have a bearing on whether it was reasonably practically practicable for him to submit his claims on time and so time is not extended against the First Respondent in relation to his claims of unfair dismissal and automatic unfair dismissal (whistleblowing). The Tribunal therefore does not have jurisdiction to hear these claims against the First Respondent.

15. The Claimant's claim of victimisation encompasses two alleged acts, first of all dismissal and also that the Respondents were no longer offering him relocation: "After recently returning from paternity leave and 3 months prior to my redundancy I was told that they were no longer offering me relocation without any justification – a clear sign of victimisation." The Respondents say that both of these claims are out of time in respect of the First Respondent, and the second limb of this (relocation) is also out of time in respect of the Second Respondent as the Claimant had returned from paternity leave in November 2019 and so time should start to run from then. The Claimant puts the timeframe as 3 months prior to his redundancy. In her witness statement Ms Howells says:

"A few months prior to this, in November 2019, I understand that conversations took place between Dominic and HR, in which he had requested to leave the business under redundancy, as an alternative to relocation. I also understand he believed that his role may not exist beyond December 2019. Emails regarding this are at pages 269-271 of the preliminary hearing bundle. I was not involved or aware of this at the time, therefore it had no impact on my approach to the redundancy consultation exercise."

16. Page 271 shows that in November 2019 the Claimant thought that he was being "attacked and essentially pushed out" of the Respondents "since raising a grievance against Dave Faulker". On 12 November 2019 the Respondents confirmed that the Claimant was still eligible for relocation. There is no further information about whether or if relocation was withdrawn and if so when and by whom. There is not enough information on the issue to find the facts and so the Tribunal concludes that the question of whether it constitutes conduct extending over a period is to be properly determined by the Tribunal at a final merits hearing where oral evidence will be given.

17. The Tribunal concludes it is just and equitable to extend time in relation to the victimisation claims (dismissal and no longer being offered relocation because he had made complaints of race discrimination) as against the First Respondent. There is a broader discretion for the Tribunal under the "just and equitable" test. In this case the Claimant was clearly pursuing his claims against both Respondents, he was communicating with ACAS and thought they would amalgamate the two claims. It is just and equitable that time is extended and so the victimisation complaint against the First Respondent proceeds.

Strike out

18. The Respondents argue that the claims should be struck out under Schedule 1, Rule 37(1)(a) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 in that the Claimant's claims have "no reasonable prospect of success".

19. The central question is whether the claims have a realistic as opposed to a fanciful prospect of success: *Eszias v North Glamorgan NHS Trust [2007]*. Even discrimination claims can and should be struck out where the allegations are implausible and there are no facts indicative of unlawful discrimination. A case that otherwise has no reasonable prospect of success cannot be saved from being struck out on the basis that "something may turn up": *Patel v Lloyds Pharmacy Ltd* [2013] UKEAT/0418/12;

20. At first blush the Claimant had raised complaints over a number of years at his employment, some had been upheld, and he had been dismissed (the Respondents say by reason of redundancy). The claims brought by the Claimant are heavily fact sensitive. That is clearly evidenced in this case by the size of the bundle and the witness evidence needed to address the issues. There was not enough time to hear oral evidence from either the Claimant or the Respondents' witness. If they had given evidence it would have taken a lengthy period of time. In *Abertawe Bro Morgannwg University Health Board v Ferguson* 2013 ICR 1108 the EAT remarked that:

    "33. We would add this final note. Applications for strike-out may in a proper case succeed. In a proper case they may save time, expense and anxiety. But in a case which is always likely to be heavily fact sensitive, such as one involving discrimination or the closely allied ground of public interest disclosure, the circumstances in which it will be possible to strike out a claim are likely to be rare. In general it is better to proceed to determine a case on the evidence in light of all the facts. At the conclusion of the evidence gathering it is likely to be much clearer whether there is truly a point of law in issue or not…"

21. The Tribunal concludes that in this case it is better to proceed to determine the case on the evidence in light of all the facts at a final hearing and so the Respondents' application is unsuccessful.

Deposit Order

22. Under Rule 39(1) of the Rules, the Tribunal has the power to make separate deposit orders in respect of individual allegations or arguments, up to a maximum of £1,000 per allegation or argument. Rule 39(2) obliges the Tribunal to make "reasonable enquiries into the paying party's ability to pay the deposit and to have regard to any such information when deciding the amount of the deposit." The Tribunal did make enquiries of, and obtained information in relation to the Claimant's ability to pay.

23. In considering whether to make deposit orders, the Tribunal is entitled to have regard to the likelihood of a party being able to establish facts essential to their case and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward. In *Van Rensburg v The Royal Borough of Kingston Upon Thames* [2007] UKEAT/0096/07, Elias P held:

    "…the test of little prospect of success…is plainly not as rigorous as the test that the claim has no reasonable prospect of success… It follows that a tribunal has

a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response";

24. In *Hemdan v Ishmail* [2017] IRLR 228, Simler J described the purpose of a deposit order as being:

"…to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails."

25. Simler J continued:

"Where, for example as in this case, the Preliminary Hearing to consider whether deposit orders should be made was listed for three days, we question how consistent that is with the overriding objective. If there is a core factual conflict it should properly be resolved at a Full Merits Hearing where evidence is heard and tested"

26. This is also the case here. A three hour Open Preliminary Hearing did not come close to being able to hear from both sides in relation to the core factual conflict. It would have necessitated significantly more hours of hearing. It is the Tribunal's view that it is in accordance with the overriding objective for the evidence to be properly be heard and tested at a Full Merits Hearing. For these reasons the Tribunal also 6declines to make a Deposit Order.

Employment Judge L Burge

19 November 2021