



EMPLOYMENT TRIBUNALS
London Central Region

Heard by CVP on 17/12/2021

Claimant: Mrs S Redmond

Respondent: Whittle Media Ltd

Before: Employment Judge Mr J S Burns

Representation

Claimant: In person

Respondent: Mr K Sonaike (Counsel)

JUDGMENT

The claims are struck out.

REASONS

1. It was noted in paragraph 5 of a previous record of a preliminary hearing on 25/10/2021 that *“The Claimant ticked the unfair dismissal box on the claim form but confirmed at this hearing that she had understood that that claim had been struck out because she did not have two years’ continuous service. She confirmed that, in any event, her claim is only for direct race discrimination and for pregnancy discrimination contrary to section 18 of the Equality Act 2010.”*
2. It does not appear that any formal Order dismissing or striking out the unfair dismissal claim has been issued previously so for the sake of good order the unfair dismissal claim is struck out on the basis that the Claimant did not have sufficient service to bring such a claim.
3. It was noted in the same record *“She confirmed that, in any event, her claim is only for direct race discrimination and for pregnancy discrimination contrary to section 18 of the Equality Act 2010....The treatment on which she relies in respect of both heads of claim is the decision to terminate her employment which was communicated to her on 20th March 2020. There are no other allegations of less favourable or unfavourable treatment relied upon.”*
4. The purpose of the open preliminary hearing on 17/12/21 was to determine the following preliminary issues pursuant to Rule 53(1)(b) of the Tribunal’s Rules of Procedure:

Whether the claim form is defective and should be rejected because of an error in the ACAS EC certificate number used on the claim form (see, in particular, Rule 12(1)(da) and 12(2ZA)); and

Whether it is just and equitable to extend time in respect of the presentation of the claim (pursuant to section 123(1)(b) of the Equality Act 2010).

Further, pursuant to Rule 53(1)(c) and/or (d): the tribunal will consider the Respondent's application to strike out the Claimant's claim (on the basis that the substantive claims have no reasonable prospect of success) and/or for a deposit order to be made on the basis that the substantive claims have little reasonable prospect of success.

5. The documents were in a bundle of 102 pages. I heard evidence from the Claimant and then from Mr D Whittle , director of the Respondent.

Findings of fact

Basic chronology

6. In 2017 the Claimant (who identifies her race as Black) issued an ET claim against another employer and for that purpose obtained and used the ACAS EC Certificate number (R144535/17/58).
7. The Claimant had a miscarriage on 28/2/20.
8. The protected period under section 18 Equality Act 2010 ended on 13/3/20.
9. She was given one month's notice of dismissal by the Respondent on 20/3/2020.
10. Her employment came to an end on 20/4/20.
11. She fell pregnant again in May 2020 and discovered this on 10/6/20.
12. She applied to ACAS for a certificate against the Respondent on 7/6/2020. Her ACAS certificate against the Respondent R155826/20/86 was issued on 7/7/20.
13. The normal time period for presenting the claim (after adding one month for the ACAS process) expired on 19/8/2020.
14. On 6/9/20 the Claimant tried unsuccessfully to present an ET1 claim using the on-line system.
15. On 9/9/2020 the Claimant sent an email to London Central Tribunal saying that she had not been able to log in to present her claim successfully and that she "*would appreciate (the Tribunal's) assistance with this matter*". She received an automated response the same day stating that because of the pandemic normal service had been significantly disrupted and giving standardised information about how the Tribunal was operating. There was no promise or suggestion given by the automatic response or otherwise that any further specific assistance would be given to the Claimant.
16. The Claimant did nothing further until 13/11/20 and again on 20/11/21 when she telephoned the Tribunal - speaking to administrative staff about the lateness of her claim and her desire to still pursue it. An unnamed staff member suggested that she might try to present claim in the hope that it might still be accepted.
17. The Claimant presented her claim on line against the Respondent on 26/11/2020 with the wrong ACAS number R144535/17/58).
18. The Claim was not rejected or referred to a judge at that time under rules 10 or 12 at that time but was instead accepted and sent to the Respondent which served an ET3 pointing out that the wrong number had been used.

Conclusions

The ACAS certificate point

19. The Claimant inserted the wrong ACAS certificate number (R144535/17/58) on her ET1 claim form. The number she used was from a 2017 claim against another employer. She failed to insert the correct number which was R155826/20/86. This is an error as described in Rule 12(1)(da) in Schedule 1 of the Tribunal Rules 2013. Under rule 12(2ZA) the ET1 including such an error must be rejected unless the judge considers that the Claimant made the error "*and it would not be in the interest of justice to reject the claim*".
20. The Claimant did make the error but I do not think find that it would be in the interests of justice to reject the claim for that reason. If I rejected it then the Claimant would probably apply for reconsideration under Rule 13, and as the error can be easily rectified, such application would be likely to succeed. The effect of that would be that the claim would be deemed presented on the date of rectification (which in this case would be probably early January 2022 or thereabouts) thus attracting another application to strike out on time/merits grounds, and a further OPH in which the same issues and arguments as have been fully canvassed before me today, would have to be repeated, with a likely same outcome, but after further wastage of time and money.
21. It better serves the overriding objective and interests of justice not to reject the claim, so the claim can be treated as presented on its original date of presentation, namely 26/11/2020, and as susceptible to a properly constituted OPH to consider the time and merits arguments in relation to strike out or deposit, and this is what I have done today.

The time point

22. The Claimant was dismissed on 20th April 2020. The Claimant applied to ACAS on 7/6/20 and received her certificate R155826/20/86 citing the Respondent on 7/7/20. The normal time period for presenting the claim (after adding one month for the ACAS process) therefore expired on 19/8/2020. The claim was presented on 26/11/20 and is therefore over three months late.
23. Per Adeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, the burden is on the Claimant to establish that the Tribunal should exercise its discretion to extend time, which is the exception not the rule.
24. The Claimant put forward a number of reasons why her claim was so late;
25. She suggested that the normal Tribunal service had been significantly disrupted (as had been stated in the automated response dated 9/9/2020). The Claimant implied that perhaps the online system for presenting claims had been defective and this was why she had failed to present her claim on 6/9/2020. However, in cross examination she said she thought it had to do with some problem in her Yahoo email account.
26. I am personally aware, and in any event take judicial notice of the fact, that whereas some Tribunal administration was been delayed and adversely affected by pandemic-related causes in 2020, this did not affect the online system for presenting claims, and that that system was fully operational all the time or very nearly all the time during 2020. The Claimant on her own evidence tried to present her claim online only twice, namely unsuccessfully on 6/9/20 and then successfully on 26/11/20.
27. I find on a balance of probabilities that the Claimant's lack of success on 6/9/20 was caused by a mistake made by her in the process or some issue with her own email account, as she herself suggested.

28. I reject the Claimants submission that the state of the tribunal administration or the tribunal internet online system was such as to excuse or explain the Claimant's delay in presenting her claim.
29. The Claimant suggested that she was very worried and pre-occupied "*trying to keep her baby alive in her belly during the pandemic*" such that she could not reasonably take steps to issue her claim in time.
30. While of course sympathy is due to the Claimant for the miscarriage in February 2020, and it is understandable that she would have a heightened concern about her new pregnancy which she discovered on 10 June 2020, I do not find that either of these events incapacitated her from presenting her claim in time. There is no medical evidence to suggest that the Claimant was suffering any ill health.
31. During the long period between her dismissal and the date when she finally presented her claim, she was able to engage in correspondence with the Respondent, contact ACAS, liaise with the ACAS conciliation officer during the conciliation period, research her proposed claims with Google, try to submit her claim on 6/9/2020 and thereafter engage in repeated long telephone conversations with Tribunal staff.
32. The Claimant was guarded when she was asked relevant questions about her previous 2017 ET claim. I find it is likely that the Claimant had some knowledge at least since then, that time-limits apply to ET claims.
33. The Claimant agreed that she was informed expressly by an ACAS conciliation officer in June 2020 that time limits applied to any claim she may wish to make against the Respondent and she should be careful to comply with them.
34. The Claimant was plainly aware of the time limits and could and should have complied with them.
35. The Claimant adopted a leisurely approach to the matter. Although she received notice of dismissal on 20/3/20 she did not contact ACAS until 7/6/20. She did not even attempt to lodge a claim until 6/9/20 by which time the time limit had expired over two weeks previously. Knowing that her claim had not been presented on 6/9/20, she did nothing between 9/9/20 and 13/11/20 about it, and even after speaking on the phone with tribunal staff on 13/11/20 and 20/11/20, did not even then take immediate action but waited until 26/11/2020 before finally presenting her claim successfully.
36. In determining whether to extend time I have considered the balance of prejudice.
37. I find that extending time will cause prejudice to the Respondent not only because it would then have to face a stale claim but because, as per Mr Whittle's unchallenged evidence on the point, he has now disposed of or mislaid notebooks which he kept of facts and discussions which he had at the time of the Claimant's dismissal, which material he might have been able to locate had the claim been presented earlier.
38. For the reasons set out below I regard the claims as having little reasonable prospect of success in any event. That being the case, the prejudice to the Claimant caused by not extending time is low.
39. For purposes of a strike out/deposit application made by the Respondent in the alternative to the time point, I have had to consider the substantive merits of the claims. I take the Claimant's version at its highest, and in any event what she says about the main relevant facts is not disputed.

40. In relation to the claim under section 18, the Claimant agreed that she was not pregnant either when Mr Whittle gave her notice of dismissal, or when she was dismissed. Neither of these events took place during the protected period as defined in section 18. There is no evidence that Mr Whittle decided to give the Claimant notice at a time when he knew or thought that she was pregnant.
41. Insofar as the direct race discrimination claim is concerned, it is accepted that the Claimant was the only black employee of the Respondent (the others being about ten in number and all white). She was the only employee who was dismissed in April 2020, while the other employees were placed on furlough. However, it is also agreed that the Claimant was the only "back-office" employee whose roles (office manager and bookkeeping) could be easily absorbed by Mr Whittle, whereas the white employees were in client facing roles which would be important in work recovered.
42. It is also not in dispute that the Respondent was facing cancelled orders and reduced income because of the pandemic, and that two white employees were also made redundant in May 2020 and September 2020 respectively.
43. The Claimant agreed in evidence that Mr Whittle had not by word or deed before the dismissal shown or suggested that he had any concerns about the Claimant's characteristics as a woman of child-bearing age, or as a black person. The Claimant did not suggest at the time that these factors had operated, and the first time she made this suggestion was in her claim form some 7 months later.
44. In the circumstances, if the discrimination claims proceeded I am doubtful whether the Claimant would be able to adduce evidence to establish a prima facie case passing the burden of proof to the Respondent under section 136 Equality Act 2010.
45. In summary, the Claimant has not satisfied me that it is just and equitable to extend time for these discrimination claims to be brought.
46. Hence they are struck out as outside the jurisdiction of the Tribunal.

J S Burns Employment Judge
London Central
17/12/2021
For Secretary of the Tribunals
Date sent to parties:19/12/2021
