



EMPLOYMENT TRIBUNALS

Claimant: Mr Victor Mendes, deceased

Respondents: Faccenda Foods Ltd t/a Avara Foods

RECORD OF A PRELIMINARY HEARING

Heard at: Bury St Edmunds (By CVP)

On: 11 January 2022

Before: Employment Judge Cassel (sitting alone)

Appearances

For the Claimant: Mr Vijay Mendes, Friend.

For the Respondents: Mr G Dando, EEF Solicitor.

ORDERS ON A PRELIMINARY HEARING

1. There is no order for the claims of disability discrimination to be struck out.
2. The claimant is to deposit £3, as a condition of proceeding with those claims.
3. The tribunal has no jurisdiction to hear the complaints of unpaid wages breach.
4. The tribunal has no jurisdiction to hear the complaint of breach of contract.

RESERVED REASONS

Background

1. The claimant, Mr Victor Mendes, was employed as a Twilight Intake Operative and was based at the Brackley side of the respondent. The respondent is an agricultural business that supplies poultry to supermarkets and restaurants and employs approximately 6500 people in the UK. The claimant's employment consisted of picking up recently slaughtered birds and placing them on to shackles for the cleaning/butchery process to begin. The claimant was employed from 16 July 2019 until his dismissal on 19 March 2020. The reason given by the respondent for his dismissal was his capability, ill health, to

undertake the role for which he was employed. He was paid for one week's notice in lieu.

2. On 8 November 2019 the claimant was signed off sick from work having been diagnosed with a serious skin complaint that produced ulcers on his face and tongue. He presented a doctor's note confirming he was unfit to attend work for four weeks and stated that he would return to Goa to seek treatment where he was diagnosed with Pemphigus Vulgaris ("PV"). A note from a homeopath was presented to the respondent stating that the claimant required rest and repeated follow-up consultations until 17 May 2020. The respondent engaged the services of an Occupational Health nurse who, having made enquiries with the doctor treating the claimant in Goa produced a report giving clear advice that there was a possibility that the ulcers would return and there was a danger of a serious infection whilst working with poultry due to the associated pathogens. The Occupational Health nurse also indicated that as a result of the enquiry the claimant had been advised in Goa a further six months rest was necessary which would mean a possible return to work in July. There was however no guarantee that he could return even then and that there would not be a recurrence of ulcers. An arrangement was made for the claimant to attend a meeting on 12 March 2020 to discuss with the claimant his health as well as his potential return to work. During the meeting it was confirmed that there was no return to work date and although there was some discussion of alternative roles the respondent was concerned that the claimant could not work as any type of food operative due to the health and safety of the claimant and its own obligations in food handling. A decision was made to dismiss the claimant on 19 March 2020 and he was told that his employment was terminated due to medical incapacity, that there were no suitable alternative roles nor was there any reasonable prospect of the claimant returning to carry out his substantive role.
3. The claimant appealed the decision and while in the process of dealing with this appeal and undertaking further investigation the claimant sadly died of an embolism which was unrelated to his PV.
4. The claimant's mother, as his representative and assisted by Mr Mendes, has brought claims of unpaid wages contrary to the Employment Rights Act 1996, a claim of breach of contract and the 3 claims of unlawful disability discrimination contrary to the Equality Act 2010 which comprise the claim of direct discrimination contrary to section 13, a claim of discrimination arising from disability contrary to section 15 and a claim of a failure to make adjustments contrary to its duty under section 20. The claims are resisted by the respondent and a detailed response form was submitted.
5. On 12 March 2021 a preliminary hearing took place before Employment Judge Kurrein. The representatives who appeared today also represented the parties on that occasion.
6. Various orders were made and at paragraph 15 of Employment Judge Kurrein's decision the case was listed for today for an open preliminary hearing to consider the three following specific issues:-

- 6.1 Whether to strike out a claim if it has no reasonable prospect of success;
 - 6.2 Whether to order the claimant to pay a deposit (not exceeding £1,000) as a condition of him being permitted to continue that claim if it has little reasonable prospects of success.
 - 6.3 Whether the tribunal has jurisdiction to hear any claim if it has been presented out of time.
7. Under reasons at paragraph 4 and 5 the Judge formed a preliminary view that the respondent's case that the claimant was not a disabled person at the relevant time was flawed and he expressed concern as to the merits of the claims under the Equality Act as in his initial view it appeared to him that the dismissal was potentially justifiable and that adjustments were unlikely to be reasonable if the claimant would have been put at risk.

The Hearing Today

8. Mr Dando, who appeared for the respondent, having taken further instructions accepted that the late claimant's mother could act as an appropriate party in these proceedings and that the respondent accepted that at the relevant time the claimant was a disabled person. He submitted that the tribunal had no jurisdiction to hear the complaints as they were submitted out of time. The dismissal took place on 19 March 2020, ACAS received notification of the Early Conciliation on 23 July 2020, the certificate was issued by ACAS on 5 August 2020 and the claim form was not received until 17 August 2020. In addition, he invited me to strike out the claims of unlawful disability discrimination under the powers that the Tribunal has under rule 37(1)(a) in that they had no reasonable prospect of success. That was his primary submission. In the alternative, that the tribunal should make a deposit order under rule 39 with a finding that the claim has little reasonable prospect of success and if so to make a deposit order.
9. I heard evidence from Mr Vijay Mendes who had prepared a written statement and on which he was cross-examined. I also received the affidavit of Ms Sacramento Gonsalves, who is the mother of Victor Mendes. I was also provided with a bundle of documents.

Jurisdiction

10. I first considered whether the tribunal has jurisdiction to hear the complaint under the Employment Rights Act ("ERA"). Parliament determined that there should be a time limit in which to bring proceedings and under section 111 (2) we are told that: 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.

Tribunals are reminded that the starting point must always be the statutory provision and that an extension of time is an exception. The words “shall not” were included for that purpose and I highlighted them in the preceding paragraph. The onus always remains on a claimant to show that it was not reasonably practicable for the complaint to be presented before the end of the period of three months and then acted reasonably speedily thereafter in bringing the complaint.

11. The tribunal does have power to extend that period of time if it considers it 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. Time is extended to enable Early Conciliation. There is a statutory requirement for early conciliation to take place. The date of termination of employment was 19 March 2020 and thus the last day for the notification to ACAS was 18 June 2020. It was not until 23 July 2020 that early conciliation was commenced and the certificate was issued on 5 August 2020. As pointed out in paragraph 8 above, the claim form was issued on 17 August 2020.
12. I take into account the evidence of Mr Vijay Mendes. He is a lay representative. It is quite clear however that having attended an earlier meeting, knowing that the claimant had been dismissed, assisted him in interpreting and having, he accepted, “some understanding of the issues” undertook research, assisted in the drafting of grounds of appeal and having been informed by ACAS that the claim was potentially out of time delayed in submitting the claim form. I find that the circumstances were such, the serious illness of the claimant, the institution of “lockdown” in India as a result of the coronavirus pandemic, lapses in the quality of the Internet connection it was not unreasonable to delay the notification to ACAS until 23 July 2020. However on 5 August 2020 he knew that the claim was potentially out of time. Professional legal advice was also taken and he could give no sensible explanation as to why it was not reasonably practicable to submit the claim form without further delay. It was reasonably practicable for the claim form to have been issued forthwith. The onus is on the claimant to show that the tribunal has jurisdiction and in the circumstances I find that it is not reasonable to extend the period of time in which to submit the claim form until 17 August 2020. The tribunal has no jurisdiction to hear the complaint under the ERA.
13. I am unclear as to how it is argued that the claim for life insurance is being brought and at this stage am assuming that it is argued as a breach of contract claim brought under the provisions of the Employment Tribunals Extension of Jurisdiction Order 1994. Under regulations 7 the power to extend time is in terms similar to that contained within the Employment Rights Act and on the same basis I find the tribunal has no jurisdiction to hear the complaint.

14. Section 123 of the Equality Act 2010 deals with time limits. Under that section we are told that:

(1) proceedings on a complaint within section 120 may not be brought after the end of-

the period of three months starting with the date of the act which the complaint relates, or

such other period as the employment tribunal thinks just and equitable.

15. Here the test is different. The statutory provision is for the claim form to be submitted within three months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable. I take into account the difficulty that Mr Vijay Mendes had in taking instructions from the late Mr Mendes mother. She was clearly deeply shocked at the premature death of her only son. He explained that he had believed that an up-to-date death certificate was needed before he could issue the claim, although he accepts that belief was mistaken and that being unaware as to the complexities of disability discrimination he needed to research online. He is not a professional adviser and he accepted that any delay was down to him and should not be laid at the door of Ms Gonsalves. I bear in mind the length of the delay, 14 days. There was no prejudice to the respondent, whereas in refusing to extend jurisdiction the claimant would be unable to pursue any claim in the employment tribunal. The basis of the appeal, which was still being considered at the time of the claimant's death, is reflected in the claim before the tribunal. Bearing in mind all those matters I do find that it is just and equitable to extend time so as to give the tribunal jurisdiction to hear the complaints under the Equality Act.

Strike Out

16. Under rule 37 of the Employment Tribunal Rules of Procedure 2013 the tribunal may strike out all or part of the claim or response, among other reasons, if the claim has no reasonable prospect of success. It is a high threshold and as the House of Lords made clear in **Anyanwu v South Bank University 2001 IRLR 305 HL** the power should only be used in the plainest and most obvious of cases. Looking at the evidence as presented in the bundle of exhibits and the witness statements I do not find that such a high threshold is met. It is a two-stage test. First, are the grounds made out and second should the claim be struck out? The claims are arguable and I do not find that the claims have no reasonable prospect of success and I make no order that the claims be struck out.

Deposit Order

17. Under rule 39 of the Employment Tribunals Rules of Procedure the tribunal may make an order requiring a deposit to be paid if a claim has little reasonable prospect of success. The test is less rigorous than that under rule 37.

18. There is a conflict in evidence as is to be expected in such cases as this. The respondent's position is that the claimant having been employed for a relatively

short period of time he became seriously ill as a result of an auto immune condition brought about by his contact with dead poultry. They took reasonable steps to engage the services of an occupational health specialist and following a hearing at which the claimant was accompanied, a decision was reached to dismiss him for lack of capability. On the face of it the dismissal was potentially justifiable and any adjustments were unlikely to be reasonable as it would have put the claimant at risk. The respondent bore in mind their responsibilities to maintain the health and safety of the claimant.

19. The claimant's position is that at the time the decision was taken his health was improving although his own consultant gave a less optimistic prognosis. At the dismissal meeting he had asked for more time to recover and expressed the hope of returning a few weeks later. The reasonable adjustment that is claimed is the extension of time in which to recover and be able to resume his employment. The respondent avers that consideration for alternative roles was made but as the business is essentially a poultry processing operation no such suitable alternative was available that did not bring a risk of further injury to the claimant. The claimant avers there was no genuine consideration of alternative roles although it is accepted that there was a discussion as to an alternative role which lasted "less than two minutes." The claimant also avers that the decision to dismiss was taken prior to the Indian government's decision to "lockdown" as a result of the coronavirus epidemic and had the decision been taken to allow his employment to continue the claimant could have left India to return to the United Kingdom. Frankly, that suggestion is highly questionable given the state of the claimant's health and lack of evidence to support that contention. Based on the representations from Mr Vijay Mendes the claim that is brought is essentially a claim of a failure to make adjustments. No comparator for the purposes of direct discrimination is nominated and there was nothing to suggest in the evidence presented so far that the comparator would not also have been dismissed. It is unclear, certainly at this stage, as to how it is said that a section 15 claim is being argued.
20. The claimant also avers that had his appeal been successful he would have been entitled to the benefit of life insurance. The case of **H O Fox (Father of Mr G Fox (Deceased) the British Airways plc UKEAT/0247/16/LA** is relied upon. The facts in this case are of course quite different and as was pointed out it involved the lengthy service of the member of staff in circumstances where the issues are quite distinct. It seems to me however that this claim appears to be a claim for breach of contract, although I have heard no argument as to how it should be considered. As I find above, if it is a breach of contract claim the tribunal has no jurisdiction to hear it. Subject to the following it might still be arguable to bring such a claim as one for consequent damages on a well-founded complaint under the Equality Act.
21. Having been presented with the bundle of documents to which a number have been brought to my attention and having heard the evidence and considered the affidavit I do consider that the claims under the Equality Act have little reasonable prospect of success.
22. Under rule 39 (2) I am required to make reasonable enquiries into the paying party's ability to pay the deposit. I was told that Ms Gonsalves has never left

Goa and has an income of approximately £200 per month. She is 65 years of age is a widow and is unemployed. Having heard from Mr Dando, and on his suggestion I make a deposit order of £1 for each of the three claims. The appropriate order accompanies this document.

23. I make no other orders.

Employment Judge Cassel

Date: 14 January 2022

Sent to the parties on:

4 February 2022

For the Tribunal: