



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108010/2020
Preliminary Hearing held by Cloud Video Platform (CVP) on 26 July 2021
Employment Judge: Frances Eccles

Mr S Iroh

Claimant
In Person

Prime Secure Systems Ltd
t/a Prime Secure

Respondent
Represented by:
Ms A Buchanan,
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that it has jurisdiction to consider the claims of (i) unfair dismissal and (ii) direct race discrimination. The claims for (i) detrimental treatment for making a protected disclosure and (ii) holiday pay shall be dismissed.

REASONS

BACKGROUND

1. The case was listed for a preliminary hearing to determine the issue of whether the period for presenting some or all of the claims should be extended. At a preliminary hearing held on 11 March 2021 the following complaints were identified;

- (i) direct race discrimination under the Equality Act 2010;
- (ii) detriment for making a protected disclosure under Section 47B of the Employment Rights Act 1996;
- (iii) underpayment of holiday pay &
- (iv) constructive unfair dismissal under Section 94 of the Employment Rights Act 1996.

2. The claimant was directed to provide additional information about each head of claim. The claimant provided additional information to the Tribunal and respondent on 8 April 2021 (P10).

3. In their grounds of resistance, the respondent identified the preliminary issue of time bar. At a preliminary hearing held on 10 May 2021 the claimant accepted that his claim had been presented out of time. The claimant agreed to provide the respondent and Tribunal with a note of the circumstances that

he said supported the Tribunal extending time to enable the claim to proceed. The claimant informed the respondent in writing dated 4 June 2021 (P12) that in 2020 he *“had GERD or ulcer symptoms (still yet to be properly diagnosed) which became very severe and intense around December 2020 and January 2021”*. The claimant stated that *“at this intense period (he) was unable to perform most of (my) daily tasks and this certainly affected (my) submission timelines”*. The claimant implored the Tribunal to take this situation into consideration. The claimant also provided the Tribunal with the letter from his Nurse Practitioner dated 19 May 2021 (P13) confirming that he had been attending the GP Practice due to ongoing health issues for approximately 9 months. The letter (P13) confirmed that the symptoms were currently being investigated and that the claimant awaits further tests and investigations from secondary care. The claimant added the above letter (P13) to the Joint Bundle at the preliminary hearing.

4. In addition to time bar there is also the issue of whether any part of the additional information submitted by the claimant on 8 April 2021 (P10) constitutes an amendment. It was agreed that the issue of time bar should be considered before determining whether the additional information provided by the claimant constitutes an amendment.

5. The preliminary hearing was held by Cloud Video Platform. The claimant appeared in person. The claimant gave evidence. The respondent was represented by Ms A Buchanan, Solicitor. The respondent provided the Tribunal with a Joint Bundle to which the claimant added a letter from his Nurse Practitioner dated 19 May 2021 (P13). Ms Buchanan provided the Tribunal and claimant with a written copy of the respondent’s submissions. The claimant was allowed an opportunity to respond to the respondent’s submissions in writing. The Tribunal did not receive a written submission from the claimant.

RELEVANT FACTS

6. From the available evidence, the Tribunal found the following facts to be relevant to the issue under consideration; the claimant was employed by the respondent as a Security Guard. From shortly after the start of his employment in 2017 the claimant challenged the calculation of his holiday pay. He hoped to resolve matters with the respondent informally. This did not prove possible and he contacted ACAS in January 2019 about alleged underpayments during 2017 and 2018. The claimant was issued with an early conciliation certificate on 7 February 2019. The prospective respondent was identified as Peritus Scotland Ltd. The claimant received advice that given the passage of time since the alleged underpayments of holiday pay he should raise proceedings in the Sheriff Court. The claimant brought a simple procedure case against the respondent at Aberdeen Sheriff Court. On 7 February 2020 the Sheriff dismissed the claim against the respondent (P3). The Sheriff ruled that the Employment Tribunal had exclusive jurisdiction to consider the claim for holiday pay.

7. The claimant claims to have made protected disclosures to the respondent about poor working conditions on 12 October 2018, 11 March 2019 and 12 August 2019. He also claims to have made a protected disclosure on 23 July 2019 about another employee sleeping while on duty. The claimant claims that his shifts were reduced in July 2019 and he was subjected to disciplinary proceedings in August 2019 for making protected disclosures and/or because

he is Nigerian.

8. On 16 September 2020 the claimant raised concerns with the respondent about a new patrol path. The claimant claims that he made a protected disclosure relating to the health and safety of Security Guards allocated to the new patrol path. The claimant was particularly concerned about the level of lighting on the patrol path. The claimant was informed on 22 September 2020 that the respondent did not agree with his concerns.

9. The claimant resigned from his employment on 24 September 2020. He spoke to the CAB before and after his resignation. He contacted ACAS about early conciliation on 26 September 2020. ACAS issued the claimant with an early conciliation certificate on 29 September 2020. The prospective respondent in the early conciliation certificate was identified as Prime Secure at an address in Glasgow. The respondent traded as Prime Secure when the claimant resigned. The claimant was aware of the relevant time limits applicable to presenting a claim to the Employment Tribunal. The claimant has health issues due to gastric problems. Following his resignation, the claimant felt very stressed. This aggravated his gastric problems and impeded his ability to prepare and present a claim to the Tribunal.

10. When preparing his claim, the claimant identified his employer at Part 2.1 of the ET1 as Prime Security Services Limited (formerly known as Peritus Scotland Ltd) at an address in Aberdeen. This was after he had researched the name of the respondent using the internet and on the basis that his contract of employment (P1) identified his employer as Peritus Scotland Limited. The claimant presented a claim to the Tribunal on 24 December 2020. The claimant believed that he had presented his claim in time and did not know that the claim form was defective.

11. The claim was rejected by an Employment Judge on 30 December 2020 because the name of the claimant's employer on the claim form - Prime Security Services Limited (formerly known as Peritus Scotland Ltd) was not the same as the name of the prospective respondent on the early conciliation certificate - Prime Secure. The claim was rejected in terms of Rule 12 (1) (f) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("Rules of Procedure 2013"). The claimant was notified by letter dated 31 December 2020 that the claim had been rejected because of the above defect.

12. On 7 January 2021 the claimant applied for reconsideration of the rejection. He remained stressed and was suffering from gastric related health issues. The claimant confirmed that he had rectified the identified defect. The claimant explained that the defect was an unintentional error. The claimant explained that he had been employed by the respondent under the name Peritus Scotland Limited before switching to Prime Secure. The claimant had changed the name of the respondent on his claim form to Prime Secure. An Employment Judge decided that the original rejection was correct but that the defect had been rectified. In terms of Rule 13 (4) of the Rules of Procedure 2013 the claim was treated as presented on 7 January 2021 being the date on which the defect was rectified.

13. The respondent was sent a copy of the claim form on 14 January 2021. In their response, received by the Tribunal 11 February 2021, the respondent confirmed their name is Prime Secure Systems Limited trading as Prime

Secure. The claim was resisted.

UNFAIR DISMISSAL

14. The issue before the Tribunal in relation to the claim of unfair dismissal is whether in terms of Section 111(2)(b) of the Employment Rights Act 1996 it was not reasonably practicable for the claimant to present the claim within the applicable time limit and if it was not reasonably practicable whether it was presented within such further period as the Tribunal considers reasonable.

15. It is not in dispute that the claimant resigned without notice from the respondent's employment on 24 September 2020. He contacted ACAS on 26 September 2020 and was issued with an early conciliation certificate on 29 September 2020. Taking account of the extension under early conciliation, the date for presenting the claim was identified as 27 December 2019. The claim was treated as presented on 7 January 2021.

16. The Tribunal was satisfied that when he presented the claim to the Tribunal on 24 December 2020, the claimant believed that it was in time and contained the required information. In all the circumstances, the Tribunal was satisfied that the claimant's belief was not unreasonable. He had presented a claim before the expiry of the applicable time limit and identified his employer based on internet research and his contract of employment. Referring to the cases of *Marks and Spencer Pic v William-Ryan 2005 EWCA Civ 470* and *Wall's Meat Company v Khan 1979 ICR 52*, Ms Buchanan for the respondent submitted that the claimant's error was not reasonable. He should have been aware of the correct name and address of the respondent from the simple procedure court action that he brought against them. The extract decree contains their name and address. He had spoken to the CAB and googled their name. If uncertain about their name, the claimant should have made proper enquiries about the completion of the claim form including the requirement that the name on the form matched that on the ACAS certificate. Referring to the cases of *McFadyen & Others v PB Recovery Ltd & Other UKEAT S/0072/08* and *Solus (London) Ltd v Matthews UKEAT/0395/10*, Ms Buchanan submitted that the claimant had control over the information provided which affected the processing of his claim. It was rejected because of the information he had provided.

17. The Tribunal was not persuaded by the respondent's submission that because the claimant made an avoidable error in the ET1 form that it was unreasonable for him to believe that he had presented a properly constituted claim in time. The claimant attempted to identify the respondent's full name and while his attempts resulted in an error being made, it is reasonable to conclude that the employer's name in the ET1 form presented on 24 December 2020 would not have resulted in rejection of his claim had the early conciliation certificate contained the full name of the respondent as opposed to only the trading name. It would most likely have been treated as an error in relation to a name and it would not have been considered to be in the interests of justice to reject the claim in terms of Rule 12(2A) of the Rules of Procedure 2013.

18. It was not until 31 December 2020 that the claimant was informed by the Tribunal that his claim had been rejected. This was after the expiry of the limitation period for presenting a claim. Ms Buchanan submitted that the claimant should not have left matters until very close to the end of the time

limit to present his claim, reducing the available time to deal with any technical problems that might arise. The Tribunal accepted the claimant's evidence that he had been unwell after his resignation due to gastric problems and that this impeded his ability to deal with his claim until close to the expiry of the time limit. After the claim was presented, the claimant not unreasonably proceeded on the basis that his claim had been presented in time. He was unaware of any defect. The claimant's mistaken belief that he had correctly presented a claim form on time and did not therefore need to put in a second claim was reasonable having regard to all the circumstances, The claimant's error was genuine and unintentional. The claimant was unaware of the defect in the ET1 until he was notified of its rejection on 31 December 2020, after expiry of the limitation period. By then it was too late to present the claim in time. In all the circumstances, the Tribunal was satisfied that it was not reasonably practicable for the claimant to present the claim on or before 27 December 2019.

19. Having found that it was not reasonably practicable for the claimant to present the claim in time, the Tribunal went on to decide whether the claim was presented within such further period as the Tribunal considered reasonable. The Tribunal was satisfied that in all the circumstances a delay of 11 days was not unreasonable. The claim was presented a week after being informed about the rejection due to a defect in the ET1. The claimant was not represented. He continued to have health issues that impeded his ability to prepare and present his claim. In all the circumstances the Tribunal was satisfied that the claim was presented within a further reasonable period.

HOLIDAY PAY

20. The issue before the Tribunal in relation to the claim for recovery of holiday pay was whether, in terms of Regulation 30(2) of the Working Time Regulations 1998, it was not reasonably practicable for the claimant to present the claim within the applicable time limit and if it was not reasonably practicable whether it was presented within such further period as the Tribunal considers reasonable.

21. Subject to pre claim conciliation, the time limit for bringing a claim for recovery of holiday pay is before the end of three months from the date on which the payment should have been made. It is not in dispute that the holiday pay in respect of which the claimant alleges an underpayment dates from 2017 and 2018. He raised court proceedings in 2019 at which time he was already aware that the time limit for bringing proceedings before the Tribunal had expired. There was no evidence of the claimant having sought to bring proceedings after the court proceedings were dismissed in February 2020 until the present claim. The claimant submitted that he should not be penalised for attempting to resolve the dispute over holiday pay with the respondent informally. There was no persuasive evidence before the Tribunal of any impediment that prevented the claimant from bringing a claim for holiday pay within the applicable time limit. The claimant did not suggest, and there was no evidence to support such a position, that ill health caused any delay in bringing a claim before court proceedings were raised in 2019 or for that matter dismissed in February 2020 on the grounds that the Employment Tribunal has exclusive jurisdiction.

22. In all of the circumstances, the Tribunal was not satisfied that it was not reasonably practical for the claimant to have presented his claim for holiday

pay in time. In any event, the Tribunal would not have considered an extension in excess of two years to be a reasonable further period for bringing such a claim. The claimant by his own admission accepted that he would not have brought a claim for holiday pay but for the fact that he sought to rely on the alleged underpayment to support his claim of constructive unfair dismissal.

DETRIMENTAL TREATMENT FOR MAKING A PROTECTED DISCLOSURE

23. The issue before the Tribunal in relation to the claim of detrimental treatment for making a protected disclosure was whether, in terms of Section 48(3) of the Employment Rights Act 1996, it was not reasonably practicable for the claimant to present the claim within the applicable time limit and if it was not reasonably practicable whether it was presented within such further period as the Tribunal considers reasonable.

24. Subject to early conciliation, the applicable time limit for bringing a claim of being subjected to a detriment for making a protected disclosure is before the end of the period of three months beginning with the date of the act or failure to act to which the claim relates, or where that act or failure is part of a series of similar acts or failures, the last of them.

25. The acts about which the claimant complains for making a protected disclosure relate to disciplinary proceedings in August 2019. Apart from seeking to resolve matters informally with the respondent, the claimant has not identified any reason that would persuade the Tribunal that it was not reasonably practicable to present a claim before expiry of the applicable time limit. There was no suggestion that the claimant suffered from ill health at that time. He was aware of the existence of time limits for bringing claims to the Tribunal from his attempts to recover underpayment of holiday pay.

26. In all of the circumstances, the Tribunal was not persuaded that it was not reasonably practical for the claimant to have presented his claim for detrimental treatment for making protected disclosures in time. In any event, the Tribunal would not have considered an extension in excess of sixteen months to be a reasonable further period for bringing such a claim.

RACE DISCRIMINATION

27. The issue before the Tribunal in relation to the claim of race discrimination was whether, in terms of Section 123(1) of the Equality Act 2020, the applicable time limit for presenting the claim should be extended by such other period as is just and equitable. Subject to early conciliation, a claim of race discrimination may not be brought after the end of the period of three months starting with the date of the act of alleged race discrimination. It was not in dispute that the claim was presented out of time. The acts of alleged race discrimination identified by the claimant relate to disciplinary proceedings in August 2019 and the level of lighting on the patrol path and the respondent's dismissal of his concerns on 22 September 2020.

28. Ms Buchanan submitted that the claimant has complained about two separate acts of alleged race discrimination - the disciplinary proceedings in August 2019 and the refusal to put lighting on a patrol path in September 2020. There is no continuing course of conduct, submitted Ms Buchanan. They were different incidents, involving different individuals with entirely different

circumstances and more than a year apart. Even if there is a continuing course of conduct, submitted Ms Buchanan, the claim remains time barred. Referring to the cases of ***British Coal Corporation v Keeble 1997 IRLR 336*** and ***Adedeji v University Hospitals Birmingham NHS Foundation Trust 2001 EWCA Civ 23***, Ms Buchanan submitted that the Tribunal should have regard to the length and reasons for the delay. It must have been apparent to the claimant, submitted Ms Buchanan, that he was not going to be able to resolve matters with the respondent informally. He was aware of Tribunal time limits. The Tribunal should reject the claimant's evidence about ill health impeding his ability to submit a claim. Referring to the cases of ***Lupetti v Wrens Old House Ltd 2021 EWCA Civ 23*** and ***Rathakrishnan v Pizza Express (Restaurants) Ltd 2016 ICR 283***, Ms Buchanan submitted that the Tribunal should take account of the potential merits of the claims and the balance of prejudice to the parties. The passage of time, submitted Ms Buchanan, will adversely affect the respondent's ability to investigate the allegations made against them and to defend the claim. The respondent's Managers have left the respondent's employment. Memories will have faded. These are weak claims. The claimant has failed to specify the basis on which the alleged refusal to install lighting on a patrol path is an act of direct discrimination. The balance of prejudice favours the respondent and it would not be just and equitable to extend the time for presenting the claim of race discrimination, submitted Ms Buchanan.

29. The Tribunal was persuaded that in all the circumstances it would be just and equitable to extend the time limit for presenting the claim of race discrimination in relation to the conduct said to have occurred in September 2020. The Tribunal was not persuaded that the claim was concerned with a continuing course of conduct. The alleged acts of discrimination were concerned with separate and discrete events. They were some time apart and there was no persuasive evidence that the two alleged acts of discrimination were part of the same course of conduct. The claimant however complains of an alleged act of race discrimination on 22 September 2020 when it is claimed that the respondent rejected his concerns about lighting on a patrol path because of his race. The Tribunal accepted that when he presented his claim on 24 December 2020 the claimant made a genuine and unintentional error in the ET1 that led to its rejection. The Tribunal accepted the claimant's evidence that his poor health impeded his ability to prepare and present a claim to the Tribunal. From the available information, the Tribunal did not accept the respondent's submission that the claim is so weak that it would be unjust to extend the time limit.

30. The balance of prejudice is a material factor. The Tribunal recognises that to extend the time limit will inevitably prejudice the respondent. They will have to defend the claim incurring time and cost. The prejudice to the claimant however of refusing to extend the time limit will be significant. He will be denied the right to bring a claim of discrimination. The Tribunal was satisfied that the prejudice to the respondent of having to defend proceedings in relation to alleged acts of race discrimination do not outweigh the prejudice to the claimant of being denied the right to bring a claim of race discrimination. The Tribunal was not persuaded that the cogency of the evidence will be so compromised by the passage of time since September 2020 as to materially prejudice the respondent. The Tribunal had regard to the claimant's evidence of ill-health during the period prior to presenting the claim and to the delay caused in relation to the claim being rejected due to early conciliation defects. The Tribunal did not consider that it would be just and equitable to deny the

claimant the opportunity to proceed with a claim of race discrimination because he had unsuccessfully failed to resolve matters with the respondent in relation to earlier complaints of race discrimination. The Tribunal considered the relative prejudice to the parties of agreeing or refusing to extend the time limit. In all the circumstances, the Tribunal was persuaded that it was just and equitable to extend the time limit for presenting the claim of race discrimination to 7 January 2021 .

CONCLUSION

31. In conclusion, the Tribunal was persuaded that the period for presenting the claims of unfair dismissal and direct race discrimination (insofar as it relates to the alleged conduct in September 2020) should be extended. The Tribunal therefore has jurisdiction to consider the above claims. The Tribunal was not persuaded that the period for presenting the claims of detrimental treatment for making a protected disclosure or for payment of holiday pay should be extended. These claims shall therefore be dismissed.

Employment Judge: Frances Eccles
Date of Judgment: 07 September 2021
Entered in register: 10 September 2021
and copied to parties

This document should be treated as signed by me - Employment Judge F Eccles - in accordance with the Presidential Practice Direction of 1 May 2020.