



Case Number: 3303099/2020

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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr M Temba

and

Respondents

1 4PX Express (UK) Ltd
2 First Recruitment Limited

Held by CVP and hybrid on 25 May and 8 November 2021

Representation

Claimant:

Mr B Haamabidula, friend, on 25 May
No attendance or representation on 8
November

Respondents:

1 Mr L Grime, Consultant
2 Mr A Mohammed, Manager

Employment Judge Kurrein

Statement on behalf of the Senior President of Tribunals

This has been a hybrid hearing that has not objected to by the parties. A full face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 97 pages, the contents of which I have recorded.

REASONS FOR THE JUDGMENT

Sent to the parties on 26 November 2021

Background

1 This matter originally came before me on 25 May 2021 for an open preliminary hearing directed by EJ Vowles following a preliminary hearing on 10 March 2021. He defined the purpose of the hearing in his order in detail. It is not necessary to set it out here.

Recusal

2 On 29 October 2021 the claimant's representative wrote to the tribunal to say they would not be attending the hearing on 8 November 2021. They alleged that I was biased. The reasons given were, shortly: –

2.1 I had granted the respondent an extension of time to present a response on the ground that they had not received the original proceedings because the claimant had used the wrong postcode.

2.2 I had referred to a document in the course of that application that the claimant had not seen.

- 2.3 I had referred to the extent of the business the respondent did with China.
- 2.4 I had prevented the representative from asking questions concerning the claimant's dismissal. I did so on the basis that it was not relevant to the issue of granting an extension of time.
- 2.5 The respondent had been speculating about the outcome of that hearing before it had been given.
- 3 Having considered the guidance provided by the decision in *Ansar v Lloyds TSB Bank plc* [2006] EWCA Civ 1462 I concluded there was no basis on which an informed objective observer could reasonably conclude that I might be biased.

Non-attendance

- 4 I concluded that in all the circumstances of the case it was in the interests of justice to proceed in the absence of the claimant and his representative. They had clearly stated they had no intention to appear.

Evidence

- 5 I heard the evidence of the claimant on his own behalf and heard the evidence of Miss Bali-Khan on behalf of the first respondent. I heard the submissions of the parties and read the documents in a bundle containing almost 100 pages of detailed evidence. I make the following findings of fact

Findings of Fact

- 6 The claimant was born on 20 June 1955 and started working for the first respondent on 11 July 2019 as a warehouse operative. I find as a fact that he was not employed by the first respondent: he was a contract worker provided by the second respondent.
- 7 The first respondent is the English arm of a Chinese online E-commerce fulfilment that operates worldwide. It provides warehousing, dispatch and return facilities, and is wholly dependent on its clients engaging its services.
- 8 In early 2020 the COVID-19 pandemic hit home. China was one of the first, if not the first, country to impose restrictions on movement and other matters. As a consequence the work needed by the first respondent to process its parent company's business decreased sharply. This is no better illustrated than the decrease in the invoices from the second respondent to the first respondent. In December 2019 the invoice was in the sum of £108,000 a week, and that for the week ending 23rd February 2020 was £66,000.
- 9 The first respondent took the view, entirely reasonably in my view, that it did not need the same level of workers to carry out duties in its processing facility shortly before February 2020 and as a consequence, on 17 February 2020, the claimant employment was no longer required by the first respondent and the first respondent informed the second respondent of its changing needs.
- 10 I find as a fact that between 17 and 23 February 2020 the first respondent no longer required a total of at least 29 of its warehouse operatives, of which at least ten were under the age of 25 and at least 7 were over the age of 40.
- 11 On 9 March 2020 the claimant presented a claim to the tribunal in which he had ticked boxes alleging age discrimination, breach of contract, failure to pay holiday pay. That claim was rejected on 30 March 2020 because the claimant had not started early conciliation.

- 12 The claimant did so on 3 April 2020 and it was completed on 8 April 2020. For reasons that have been wholly unexplained, the claim was not presented until 28 June 2020 . At that date it appears to me all the claims were out of time.
- 13 In giving directions for this hearing on 10 March 2021 EJ Vowles gave specific directions for the claimant to provide further and better particulars of his claim alleging age discrimination and to provide a statement setting out an explanation for the late presentation of his claim.
- 14 The claimant provided a statement on 9 March 2021 in which he asserted that he believed he had been discriminated against because of his age as the respondent had engaged younger workers to carry out the duties he had previously carried out in baling and compacting.
- 15 That, in my view, was no more than a bare assertion. It was wholly incapable of supporting a claim of age discrimination without the claimant providing at least some evidence from which a tribunal might infer, absent an explanation from the respondent, that it could have been because of age. The claimant provided no such evidence.
- 16 The claimant also failed to provide any explanation for his failure to present his claims for breach of contract, unauthorised deductions and a failure to pay holiday pay, far less an explanation as to why it had not been reasonably practicable for him to do so.
- 17 In light of all the evidence I have heard and considered I find that all the claimant's claims are out of time. In respect of his claim for age discrimination he has failed to satisfy me on the balance of probabilities that it would in all the circumstances of be just and equitable to extend time in his favour.
- 18 In respect of his other claims, he has failed to provide any adequate evidence to show that it was not reasonably practicable for him to present his claims in time. In those circumstances I have no power to extend time in his favour.
- 19 I go on to say that even if those claims were in time I would have struck out the claim of age discrimination because it had no reasonable prospect of success. It is based on no more than an assertion, and the evidence given on behalf of the respondents is so clear and unchallenged that it had no reasonable prospect of success. For all those reasons the claimants claims are struck out

Employment Judge Kurrein

28 March 2022

Sent to the parties and

entered in the Register on : :

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For the Tribunal

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