



EMPLOYMENT TRIBUNALS

Claimant Mr A Nowrouz

Respondent Lodge Service UK Limited

Heard at: Exeter
(remotely by video hearing)

On: 15 March 2022

Before:
Employment Judge Goraj

Representation

The claimant: Mr J Lazar solicitor for part of the hearing and Ms K Adekoya
Trainee solicitor for the remainder of the hearing

The respondent: Mrs J Barnett consultant

Interpreter: Mrs A Melville (Farsi Interpreter)

RESERVED JUDGMENT AT A PRELIMINARY HEARING

THE JUDGMENT OF THE TRIBUNAL IS that: -

1. The claimant's complaint of unfair dismissal pursuant to section 98 of the Employment Rights Act 1996 is, by consent, dismissed upon withdrawal by the claimant.
2. The Tribunal does not have jurisdiction to entertain the claimant's complaints of:- (a) unauthorised deductions pursuant to section 23 of the Employment Rights Act 1996 ("the 1996" Act") and/or (b) detriment and/or unfair dismissal for making protected public interest disclosures pursuant to sections 48, 103A and 111 of the 1996 Act, as they were not presented within the relevant statutory time limits and it was

reasonably practicable for them to have been presented within such time limits.

3. The Tribunal does not have jurisdiction to entertain the claimant's complaints of unlawful discrimination because of race and/or religion pursuant to sections 9, 10, 13 26, 39 and 123 of the Equality Act 2010 as they were not presented within the relevant statutory time limit and it is not just and equitable to extend time to allow them to proceed.

REASONS

Conduct of the hearing

1. The hearing was conducted as a remote hearing to which the parties consented. The form of remote hearing was a video conference hearing. A face-to-face hearing was not held because of the Covid pandemic and because it is in the interests of justice and in accordance with the overriding objective to minimise expenditure on time and costs. The claimant experienced technical issues connecting to the hearing which delayed the start of the hearing. The claimant used his smartphone to connect to the hearing. The claimant continued to have connection issues from time to time however the hearing was able to proceed. The claimant was initially represented at the hearing by Mr J Lazar who was replaced during the course of the hearing by Ms Adekoya. The Tribunal was informed that Mr Lazar had left the hearing because of a medical emergency and that Ms Adekoya, who had been working with him on the case, would be taking over conduct of the hearing on behalf of the claimant. The claimant was assisted during the hearing by a Farsi interpreter on the agreed basis that he had a working knowledge of English, and that the interpreter would assist him as and when required. Overall, the claimant exhibited a good understanding and use of English during the hearing. This Judgment was reserved as there was insufficient time for the Tribunal to consider and prepare its judgment at the conclusion of the hearing.

Introduction

2. By a claim form which was presented to the Tribunals on 8 December 2020 (pages 1- 12 of the bundle) the claimant, who states on his claim form that he was employed by the respondent as a security officer between 13 January 2019 and 19 June 2020 brought claims of :- (a) unlawful deductions from pay (b) constructive unfair dismissal (c) detriment/ constructive unfair dismissal for making a protected public interest disclosure (d) discrimination because of race and /or religion or belief (direct discrimination and/or harassment). The claimant describes himself as an Iranian who is of Muslim faith.
3. The claimant's ACAS Early Conciliation Certificate, which is at page 13 of the bundle, records that the claimant's Early Conciliation Notification

was received by ACAS on 9 October 2020 and that the Early Conciliation Certificate was issued, by email, on 9 November 2020.

4. The claimant's claims are disputed by the respondent (the response form and grounds of resistance at pages 14 – 26 of the bundle) including on the grounds that the Tribunal does not have jurisdiction to hear the claims as the claimant does not have sufficient qualifying service to bring a complaint of unfair dismissal and that all claims were, in any event, presented outside the relevant statutory time limits.
5. During the course of the hearing, the claimant consented to the dismissal upon withdrawal of his unfair dismissal claim brought pursuant to section 98 of the Employment Rights Act 1996 ("the 1996 Act") as it was acknowledged that he did not have the necessary 2-year qualifying service to bring such a claim

Witnesses

6. The Tribunal received a witness statement (unsigned) and heard oral evidence on affirmation from the claimant (as no Holy Book was available). The Tribunal also received a witness statement on the claimant's behalf from Mr Tammar Jannat. This statement however relates to the substantive allegations of discrimination because of race / religion or belief and does not address the preliminary issue of time limits.

The Tribunal's letter dated 22 March 2021 and the clarification of the Issues

7. By a letter dated 22 March 2021 (pages 27 – 29 of the bundle), the Tribunal directed that the matter be listed for a Preliminary Hearing to determine whether the claimant's claims had been brought within the relevant statutory time limits and if not whether they should, in any event, be allowed to proceed on the grounds that it was not reasonably practicable for the claimant to have brought the detriment/ unfair dismissal or unlawful deductions within such period / it was just and equitable to allow him to pursue his discrimination claims.
8. The claimant was directed at paragraph 2 of the directions for the hearing (page 28 of the bundle) to provide (together with any supporting documents) a witness statement in relation to the preliminary issue of time limits addressing the issues identified in that paragraph namely :- (1) why he presented his claims when he did (2) when he was first aware of his rights to bring a claim (3) whether anything was stopping him from bringing a claim within the time limit of 3 months (4) whether he received any legal advice and (5) in relation to the discrimination claims why it would be just and equitable to extend time. The claimant, who has been legally represented throughout these proceedings, has therefore had nearly a year to prepare his evidence for this case.

9. The claimant was also directed by the Tribunal's letter dated 22 March 2021, to provide further details of his discrimination and protected public interest disclosure claims. The claimant provided further information relating to such claims by his email dated 4 April 2021.
10. The claimant's representative confirmed at the commencement of the hearing that: - (a) all alleged acts of discrimination / detriment/ unlawful deductions occurred on or before 19 June 2020 and (b) the claimant says that his employment came to an end (by constructive unfair dismissal pursuant to section 103 A of the 1996 Act and /or unlawful discrimination because of race or religion) on 19 June 2020 as stated in his claim form.

Documents

11. The Tribunal was provided with an agreed bundle of documents ("the bundle") relating to the preliminary issues. The Tribunal was also provided with written submissions on behalf of the respondent.

THE FACTS

12. The claimant is Iranian and of the Muslim faith. The claimant's wife is English and works as a Healthcare assistant. The claimant has, at all relevant times, had a smartphone.
13. The claimant was employed by the respondent from 13 January 2019 as a security guard working on customer sites. On or around 29 July 2019 the claimant reported to the respondent, and also subsequently to the police, concerns relating to alleged unauthorised access to and viewing of CCTV footage in changing rooms on site. It is agreed between the parties that the claimant's last day on site/ for which he worked for the respondent was 19 June 2020.
14. On 5 August 2020 the claimant submitted a lengthy grievance (pages 38 – 49 of the bundle) in which he made multiple allegations of race / religious discrimination, detrimental treatment because of concerns which he had raised regarding alleged unauthorised viewing of CCTV footage and general unfair treatment. The claimant referred in his email dated 5 August 2020 to the events of 19 June 2020 and his dismissal. The claimant also referred at the conclusion of his email to mental health problems which he said had been created by the respondent including that he was very depressed and was taking medicine.
15. The respondent undertook a grievance/ appeal process. As part of that process the claimant submitted a lengthy grievance appeal by email dated 30 September 2020 which is at pages 50 – 57 of the bundle. The claimant referred in the email to "inviting" the respondent to the Tribunal and to the "royal high court of justice".

16. The claimant made his EC notification to ACAS on 9 October 2020 and his ACAS EC certificate was issued by email on 9 November 2020 (paragraph 3 above).
17. On 13 November 2020, the respondent sent to the claimant by email and recorded delivery a grievance appeal outcome letter (following a stated grievance appeal hearing on 28 October 2020) (at pages 58 – 60 of the bundle) dismissing all of the claimant's complaints. The respondent advised the claimant that the letter concluded the respondent's grievance and appeals procedure.
18. On 8 December 2021 the claimant presented his claim form to the Tribunals in which he stated that his employment with the respondent had terminated on 19 June 2020 (paragraph 2 above). The claimant further stated in his claim form that he had been unfairly treated and consequentially forced to leave his job because of the actions of his employer and the failure to deal with his complaints which he contended had affected his mental health and caused him depression (page 7 of the bundle).

The reasons for the delay in bringing his claims

19. In his witness statement which is at pages 30 – 34 of the bundle the claimant has given a number of reasons for the delay in pursuing his claims and why he says that the Tribunal should extend time to allow his claims to proceed. In summary the claimant relies in his statement on four principal reasons namely :- (a) although the last day upon which he worked for the respondent was 19 June 2020 he did not think that his employment had ended and which prevented him from bringing a complaint of unfair dismissal (b) the delay in receiving the outcome of the respondent's response to his complaint (c) he did not receive any legal advice until December 2020 when a relative suggested that he should get legal advice as the wait had been going on for far too long and (d) he was struggling financially and the matter was causing him mental health issues.
20. In his oral evidence the claimant contended that :- (a) he had first contacted ACAS in June or July 2020 by telephone and that his wife had also spoken to them around that time including that he understood at that time that he needed to pursue a grievance with the respondent in order to obtain an ACAS certificate (b) he first contacted a solicitor sometime between July and September 2020 and (c) he had some physical health problems during this period which had required surgery. The claimant did not provide any further information regarding any contact with solicitors in December 2020.
21. The Tribunal has considered the factual basis for such reasons as addressed below.

22. Having given careful consideration to all the available evidence the Tribunal is satisfied, on the balance of probabilities that:- (a) the claimant and his wife first contacted ACAS regarding the matter in matter in June /July 2020 at which time he understood that he needed to pursue a grievance with the respondent in order to obtain an ACAS Certificate (b) the claimant however also contacted a solicitor regarding the matter between July and September 2020 (c) the claimant was, in any event, aware of his right to pursue his claims to the Tribunal by 30 September 2020 (paragraph 15 above) as he advised the respondent of such right in his appeal grievance letter of that date and (d) the claimant contacted his current solicitors in or around December 2020. When reaching the above conclusions, the Tribunal has taken into account the claimant's oral evidence as the claimant has not provided any documentary evidence regarding such matters (notwithstanding the directions contained at paragraph 2 of the Tribunal's letter dated 22 March 2020).
23. Further, the Tribunal is not satisfied, on the balance of probabilities, that the claimant was prevented from bringing his claims at any earlier time because of any health issues (physical or mental) or by reason of any conduct by the respondent for the following reasons: - (a) the claimant has not provided any details and/or any medical evidence of any relevant medical conditions including regarding the effect of any such conditions on the claimant's ability to pursue his claims. Further it is clear that the claimant was able to prepare and send to the respondent in August 2020 and September 2020 detailed accounts of his complaints and further to participate in such process (b) the claimant was advised of the outcome of his original grievance in September 2020, filed an appeal on 30 September 2020 and was advised of the appeal grievance outcome on 13 November 2020 (by which time the claimant had already lodged his EC notification with ACAS on 9 October 2020 and his EC Certificate had been issued on 9 November 2020 – paragraph 3 above).

24. THE LAW

25. The Tribunal has had regard in particular to the following statutory provisions and legal authorities: -
Section 23 of the 1996 Act (unlawful deductions)
Section 48 of the 1996 Act (unlawful detriments for making protected public interest disclosures).
Sections 95 (1) (c), 97,103 A and 111 of the 1996 Act (dismissal/constructive dismissal for making a protected public interest disclosure).
Section 270 (B) of the 1996 Act (extension of time limits to facilitate conciliation before institution of Tribunal proceedings)
Sections, 9 ,10, 13, 26,39 and 123 and 140 B of the 2010 Act,

Porter v Bandridge Limited [1978] ICR 943 CA.

Wall's Meat Company Limited v Khan [1979] ICR 52

Palmer and another v Southend- on Sea Borough Council 1984 ICR 372 CA.

**Apelogun- Gabriels v Lambeth London Borough Council and anor
2022 ICR, 713, CA
Robertson v Bexley Community Centre [2003] IRLR 434 CA
Adedeji v University Hospitals Birmingham NHS Foundation Trust
[2021] EWCA Civ 23. CA.**

CLOSING SUBMISSIONS

26. The Tribunal has had regard to the submissions of the parties (including to the written submissions and legal authorities relied upon by the respondent as referred to above).

THE CONCLUSIONS OF THE TRIBUNAL

Does the Tribunal have jurisdiction to entertain the claimant's claims pursuant to the 1996 Act?

27. The Tribunal has considered first whether it has jurisdiction to entertain the claimant's complaints of detriment/ constructive dismissal pursuant to sections 48 and /or 103 A and 111 of the 1996 Act.
28. In both cases the relevant statutory provisions require the claimant's claim form to have been presented with 3 months of the effective date of termination (unfair dismissal) / the last of the alleged acts of detriment (the PIDA claim) - sections 48, 97 and 111 of the 1996 Act).
29. As stated previously above, the claimant's representative accepted at the commencement of the hearing (and notwithstanding the contentions contained in the claimant's witness statement to the contrary) that the claimant's employment with the respondent terminated on 19 June 2020. This is also acknowledged by the claimant in his grievance letter dated 5 August 2020 (paragraph 14 above) and the claimant's claim form (paragraph 2 above). Further, the claimant complains about alleged acts of discrimination/ detriment occurring during his employment with the respondent and does not, in any event, rely on any alleged acts after 19 June 2020 (the claimant's further information dated 4 April 2021).
30. The claimant's claim form was presented on 8 December 2020 and was therefore not presented within the primary 3-month time limit provided for in sections 48 and 111 of the 1996 Act which expired on 18 September 2020. The claimant is not assisted in this case by sections 207B of the 1996 Act (extension of time for ACAS Early Conciliation) as the claimant's Early Conciliation notification was not received by ACAS until 9 October 2020 ie after the primary limitation period had expired. The Tribunal therefore has to consider whether it was reasonably practicable for the claimant to have presented his claim form within the 3-month time limit and if not, whether it was presented within a reasonable period thereafter. The Tribunal has

proceeded on the basis that for such purposes “reasonably practicable” means reasonably feasible.

31. The claimant has put forward a number of reasons why he says that it was not reasonably practicable for him to have presented his claim prior to 18 June 2020 and that he presented it within a reasonable period thereafter including:- (a) lack of clarity regarding the date of the termination of his employment (b) that he pursued first a grievance with the respondent, as advised by ACAS, and was awaiting the outcome of his grievance which was delayed by the respondent until December 2020 (and following which he took legal advice and presented his claim form promptly thereafter) and (c) that his ability to pursue his claim was impeded by his ill health (severe depression and a physical illness) and limited use of English.
32. In summary, the respondent says that it was reasonably practicable for the claimant to have presented such claims within the relevant statutory time limit i.e. by 18 September 2020/ that he did not, in any event, present it within a reasonable period thereafter. The respondent says in particular that :- (a) the claimant has not provided a satisfactory explanation for the delay in commencing ACAS EC or Tribunal proceedings (b) the claimant clearly acknowledged that his employment had come to an end on 19 June 2020 in his letter of grievance dated 5 August 2020 and, in any event, all relevant matters occurred on or before 19 June 2020 (c) the claimant stated in his grievance appeal letter dated 30 September 2020 (page 57) that he invited the respondent to the Tribunal and should therefore have proceeded with his claim more quickly and (d) the claimant has not provided any evidence that depression or any other medical condition impeded his ability to pursue matters.
33. Having given the matter careful consideration the Tribunal is not satisfied that it was not reasonably practicable for the claimant to have presented his claims of PIDA detriment / dismissal by 18 September 2020 for the following reasons: -
 - (1) All of the matters about which the claimant complains occurred on or before 19 June 2020. Further, it is clear from the claimant’s letter of grievance dated 5 August 2020 that as far as he was concerned his employment with the respondent had come to an end on 19 June 2020 (paragraph 14 above).
 - (2) The claimant stated in his oral evidence which was accepted by the Tribunal that :- (a) he, and also separately his wife, had spoken to ACAS about the matter in June – July 2020 and (b) that he had also consulted a solicitor about the matter in July-September 2020. The Tribunal is therefore satisfied, on the balance of probabilities, that the claimant would have been made aware of the time limits for bringing a claim to the Tribunal at such times by reason of such contacts.

- (3) Although the claimant's first language is not English, it was apparent from his conduct of the hearing that he has a good working knowledge of the English language and further his wife (who also spoke to ACAS) is a native English speaker who was able to assist him with this case.
 - (4) There was no evidence before the Tribunal (and notwithstanding that the claimant has had the benefit of legal advice and nearly a year to prepare his case) to indicate that he was unable to pursue his claims prior to 18 September 2020 because of any medical conditions. Further, it is apparent from the claimant's lengthy letter of grievance dated 5 August 2020 that he was able at that time to articulate his claims (paragraph 14 above).
34. The Tribunal has however, gone on to consider whether, even if it had not been reasonably practicable for the claimant to have presented his claims by 18 September 2020, including by reason of his pursuit of a grievance, his complaints of PIDA detriment/ unfair dismissal were, in any event, brought within a reasonable period of time thereafter.
35. Having given the matter careful consideration the Tribunal is not satisfied that the claimant's claims were, in any event, presented within a reasonable period of time thereafter for the following reasons: -
- (1) By September 2020 the claimant was clearly aware of his right to pursue the matter to a Tribunal (as stated in his grievance appeal letter dated 30 September 2020 (paragraph 15 above). Moreover, and notwithstanding that his grievance appeal was still ongoing at that time, the claimant contacted ACAS again on 9 October 2020 to initiate the formal Early Conciliation process and an ACAS certificate was subsequently issued on 9 November 2020 (paragraph 3 above).
 - (2) By an email/ letter dated 13 November 2020 (paragraph 17 above) the claimant was informed by the respondent that his grievance appeal had been dismissed and that there was no further right of appeal. The claimant was therefore aware that this was the end of the process.
 - (3) Notwithstanding the above the claimant (whose claim form was prepared and lodged by solicitors on his behalf) was not presented to the Tribunal until 8 December 2020 ie more than 3 weeks later. The claimant has not however given any proper explanation for such delay including what steps he took following receipt of the respondent's email dated 13 November 2020 (not December 2020 as stated in the claimant's witness statement) to pursue his claims. Further, there is no medical evidence to suggest that there was any medical reason for the delay in pursuing his claims at that time.

36. In all the circumstances the Tribunal does not therefore have jurisdiction to entertain the claimant's complaints of PIDA detriment/unfair dismissal.

The claimant's claim for unlawful deductions

37. The claimant contended in his claim form (paragraph 8.2 at page 7 of the bundle) that it was agreed when he started work in January 2019 that he would be paid an additional 4 hours per day to cover travel costs from home which payment was stopped in April 2019 contrary to the terms of the agreement. The Tribunal directed in its letter dated 22 March 2021 that the Tribunal should consider at this hearing the preliminary issue of time limits in respect of the claimant's unauthorised deductions claim.
38. The claimant contended in his claim form that the payment terminated in April 2019. Any claim should therefore have been presented (subject to any extension for ACAS Early Conciliation) to the Tribunals by 30 June 2019. The claimant has not given any explanation (over and above the explanation given in respect of the above claims) for the inordinate delay of nearly 18 months in bringing this claim. Having had regard to all of the matters previously identified above together with the claimant's failure to provide any proper explanation for not pursuing this matter in 2019, the Tribunal is not satisfied that it was not reasonably practicable for the claimant to have brought his claim within the relevant three-month time period and/or that it was, in any event, brought within a reasonable period of time thereafter. The Tribunal therefore does not have jurisdiction to entertain the claimant's complaint of unlawful deductions.

The claimant's complaints of unlawful discrimination because of race and/or religion or belief

39. Finally, the Tribunal has considered the claimant's complaints of discrimination because of race and /or religion or belief.
40. When considering such matter, the Tribunal has had regard to the law and submissions of the parties referred to above.
41. As stated previously above, it is accepted that all relevant acts of discrimination occurred on or before 19 June 2020. Accepting, strictly for the purposes of this preliminary hearing, that there has been an alleged series of acts extending over a period ending on 19 June 2020, and (in the absence of the benefit of any ACAS EC extension pursuant to section 140B of the 2010 Act), the primary time limit of 3 months for the purposes of section 123 (1) (a) of the 2010 Act, therefore expired on 18 September 2020.

42. The Tribunal has therefore gone on to consideration whether the discrimination claims were however presented within such further period as the Tribunal thinks just and equitable for the purposes of section 123 (1) (b) of the 2010 Act. The Tribunal has reminded itself that this is a different test to that of “reasonable practicability”. In cases involving discrimination the Tribunal has to have regard in particular to the length of the delay, the reasons for the delay and the question of prejudice.
43. As far as the length of the delay is concerned the claim is approximately 2 ½ months out of time (18 September 2020 – 8 December 2020).
44. When considering the questions of delay and prejudice, the Tribunal has taken into account the reasons given by the claimant as referred to previously above including that claimant’s first language is not English, that he understood from ACAS that he was required to pursue first a grievance (which he did so) and that he had health issues which impeded his ability to pursue his claims. The Tribunal has also taken into account that the respondent undertook an investigation into the matter during August – November 2020 (albeit that none of the claimant’s allegations were upheld).
45. The Tribunal has however balanced against such matters the factors identified at paragraphs 33 (2) -(4) and 35 above including that :- (a) all relevant acts had crystallised at the latest by 19 June 2019 (b) the claimant contacted ACAS and thereafter a solicitor between June/ July and September 2020 and as a result of such contacts he would, on the balance of probabilities, have been made aware of the relevant time limits and (d) further, notwithstanding that the claimant obtained his ACAS EC Certificate on 9 November 2020 and his grievance appeal was concluded on 13 November 2020, he still did not present his complaints to the Tribunal until over 3 weeks later and for which delay he has not given any adequate explanation.
46. The Tribunal has also considered the prejudice which would be suffered by the parties of extending or refusing to extend time. The Tribunal appreciates that if it refuses to extend time the claimant would not be allowed to pursue his complaints of discrimination further. The Tribunal has also taken into account however, that if the Tribunal extended the time limit the respondent would be required to defend allegations which occurred at the latest nearly two years ago (and in some cases go back to July 2019) which were not pursued by the claimant at the relevant time. The Tribunal has further taken into account that the allegations are likely largely to centre on a conflict of oral evidence (involving in respect of some allegations third parties on site), which would be unlikely to be considered at a Tribunal hearing for at least another 12 months and would therefore be difficult properly to

determine in the light of the lengthy passage of time since the events in question.

47. Having weighed all of the above, the Tribunal is not satisfied, in all the circumstances, that it is just and equitable to allow the claimant to proceed with his complaints of discrimination because of race or religion.

Employment Judge Goraj
Date: 6 April 2022

Judgment sent to parties: 19 April 2022

FOR THE TRIBUNAL OFFICE

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