



EMPLOYMENT TRIBUNALS

At a Preliminary Hearing

Claimant: Mr T Thomas

Respondent: Woods Coaches Limited

Heard at: Leicester Employment Tribunal

On: 5 May 2022

Before: Employment Judge R Broughton (sitting alone)

Representation

Claimant: No Attendance

Respondent: Ms Lucy Stephenson – solicitor

JUDGMENT AT AN OPEN PRELIMINARY HEARING

The judgment of the Employment Tribunal is that;

- The Tribunal does not have jurisdiction to deal with the claim of ordinary unfair dismissal brought pursuant to section 94 and 98 Employment Rights Act 1996 and the claim is therefore struck out.
- The claim of automatic unfair dismissal brought pursuant to section 103A Employment Rights Act 1996 was not brought within the relevant time limit pursuant to section 111 (2) ERA and is therefore struck out.

REASONS

The Background

1. The claimant was employed by the respondent as a Coach Driver. He issued a claim in the Employment Tribunal on the 22 June 2021 following a period of Acas early conciliation from 22 February to 22 March 2021.
2. There was a closed preliminary hearing before Employment Judge Ahmed on the 29 October 2021 which the claimant and respondent attended, albeit the claimant lost reception part way through the hearing.

3. Employment Judge Ahmed recorded that the Claimant makes the following complaints;
 - *Ordinary unfair dismissal*
 - *Automatic Unfair Dismissal for making a protected disclosure (whistleblowing)*
 - *Sex discrimination/harassment*
4. The summary of that hearing recorded that the claimant accepted that he was employed from 1 February 2019 and that he was dismissed on 11 January 2021. Within his claim form he had given the date of dismissal as 24 January 2021 because that was the date he asserts, the appeal was concluded.
5. The written record of the hearing informed the parties that they must inform the Tribunal and each other in writing within 14 days of the date the record of the hearing was sent to them, if anything in the document is inaccurate. The claimant did not write to dispute the accuracy of the record.
6. It was pointed out to the claimant in the hearing that the claimant did not seem to have the necessary qualifying service to bring a claim of ordinary unfair dismissal and further, that although he did not require 2 years' service to bring a claim of automatic unfair dismissal pursuant to section 103A ERA (dismissal for whistleblowing), he had a problem in that his claim did not appear to have been lodged within the relevant 3 month time limit.
7. With respect to the claim of sex discrimination/ harassment, Employment Judge Ahmed noted that further and better particulars of the claim were likely to be sought and after receipt of those, the respondent may apply for the preliminary hearing to include consideration of whether the sex discrimination/harassment complaint should be struck out or be made the subject to a deposit order (it did not however state that this application would necessarily be granted).

The Hearing

8. The hearing was listed today by Employment Judge Ahmed, to determine the following issues;
 - *Whether the claimant has the qualifying service of 2 years to bring a complaint of ordinary unfair dismissal*
 - *Whether the complaints of ordinary unfair dismissal and automatic unfair dismissal for making a protected disclosure (whistleblowing) have been presented out of time .If out of time whether time should be extended if it was not reasonably practicable to bring the claim in time.*
 - *To identify the issues and make such case management orders as are necessary for the future conduct of the case.*

Evidence

9. I was assisted today by a bundle of 54 pages prepared by the respondent and the respondent's detailed written submissions.
10. The claimant did not attend the hearing which was listed to commence at 10am.

Steps taken to contact the claimant

11. The Tribunal Clerk checked with Nottingham Employment Tribunal who confirmed that they had not received any communication from the claimant about not being able to attend today's hearing. The ET3 form included only an email address for the claimant as his contact details. I checked and confirmed that the same email address in the ET3 was used to send notification of the hearing. The Tribunal Clerk sent an email to that address to enquire about the claimant's whereabouts. The respondent assisted by obtaining from its client a contact number they had retained from the period of his employment by them however, they were uncertain whether this was his own number or his partner's, nevertheless the Tribunal Clerk attempted unsuccessfully to make contact with the claimant on that mobile telephone number and a voicemail message was left.
12. After waiting until 11am to give the claimant an opportunity to respond to the voicemail message and/or the email, I considered that any enquiries that may be practicable had been made in the circumstances to contact the claimant to enquire as to why he had failed to attend this hearing .
13. Rule 47 provides that;

47. Non-attendance

If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence.

14. I decided to proceed in the claimant's absence and determine the issues as set out by Employment Judge Ahmed however, I did not consider that it was in accordance with the overriding objective under Rule 2, to proceed to hear the respondent's application to strike out the claims of discrimination/harassment. Although the claimant had been put on notice of that application and been invited to comment on it by the Tribunal in a letter dated 26 April 2022 (to which he had not responded), the claimant had not been notified that the application *would* be dealt with today by the Tribunal. The respondent was content to proceed on this basis.
15. There was an Order made by Employment Judge Ahmed for mutual exchange of witness statements 24 days before this preliminary hearing and for lodging of those with the Tribunal 4 days before the hearing. The respondent had not

produced any witness statements. No witness statement had been sent to the respondent or received by the Tribunal from the claimant.

16. I read the documents in the bundle and the respondent's written submissions. The respondent made some brief oral submissions which were essentially a summary of what was contained in the written submissions.

Issue 1: Qualifying service : ordinary unfair dismissal

Findings of fact

17. All findings of fact are based on a balance of probabilities and reference to page numbers are to pages in the bundle produced today by the respondent.
18. The claimant was employed from 1 February 2019. He had accepted at the closed preliminary hearing that the correct date when his employment terminated summarily is as set out in the respondent's response, namely the 11 January 2021.
19. There was no evidence produced by the claimant about why in law, the termination date should be treated as extended to 24 January 2021 because of the appeal process.

Legal Principles

20. **Section 108** of the Employment Rights Act 1996 sets out the required qualifying period of employment.

*(1)Section 94 does not apply to the dismissal of an employee unless he has been continuously employed **for a period of not less than two years ending with the effective date of termination.***

*(3)Subsection (1) does not apply if—
(ff)section **103A** applies.*

21. I considered (although this was not dealt with in the respondent's submissions) the effect of the statutory provisions for extending the EDT if the employer has dismissed an employee with no notice or with less than the minimum statutory notice stipulated pursuant to section 86 ERA, as set out in section 97 ;

Section 97 ERA - Effective date of termination.

(1)Subject to the following provisions of this section, in this Part "the effective date of termination"—

...

(b)in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and

(2)Where—

(a) the contract of employment is terminated by the employer, and

(b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)), for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.

(3) In subsection (2)(b) “the material date” means—

(a) the date when notice of termination was given by the employer, or

(b) where no notice was given, the date when the contract of employment was terminated by the employer.

22. However, even extending the EDT by one week (which would have been the applicable minimum statutory period of notice) to 18 January 2021, the claimant had still not been employed for 2 years as at the date of termination.

23. No evidence was provided by the claimant to rebut these findings of facts.

Submissions

24. The respondent's submissions were in brief, that the claimant did not have the necessary qualifying service and should be struck out under Rule 37.

Conclusions

25. The claimant did not have the required qualifying service required pursuant to section 108 (1) ERA as at the termination date to bring a claim of ordinary unfair dismissal and therefore the Tribunal has no jurisdiction to deal with this claim. The claim for ordinary unfair dismissal is therefore struck out under Rule 37 as having no reasonable prospect of success.

Issue 2 : *Whether the complaint of automatic unfair dismissal for making a protected disclosure (whistleblowing) has been presented out of time .If out of time whether time should be extended if it was not reasonably practicable to bring the claim in time.*

26. As the claim of ordinary unfair dismissal is struck out, it is not necessary to determine the issue of time limits in respect of that claim.

Findings of fact

27. The claimant had appealed the decision to dismiss and although he asserted at the preliminary hearing this was concluded on the 24 January 2021, the respondent's position is that it was actually later, on the 16 February 2021.

28. The termination date of the 11 January 2021 taking into consideration the rules on automatic extension of time for early conciliation, means that the claim should have been presented on 11 May 2021 according to the respondent. I find however that the correct time limit as extended, expired on **8 May 2021**, (i.e. by adding the 28 days of conciliation on to the 10 April 2021, the correct date is 8 May 2021 pursuant to section 207(B) ERA).

Legal Principles

29. The time limit to bring a claim of unfair dismissal, including a claim that an employee has been dismissed for making a protected disclosure, is set out in section 111 Employment Rights Act 1996 which provides as follows;

(2) [Subject to the following provisions of this section], 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.*

30. Section 207B Employment Rights Act 1996 deals with the extension of time limits to facilitate conciliation before institution of proceedings and provides that;

(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a “relevant provision”).

(2) In this section—

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section

31. It is a question of fact for the tribunal to determine whether it was *reasonably practicable* to file the claim in time.
32. ***In Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA***, the Court of Appeal held that the existence of an internal appeal cannot by itself justify extending the time limit. However, the existence of an internal appeal may be one of a number of factors a tribunal takes into account in determining whether it was *reasonably practicable* for an employee to submit his or her claim within the three-month time limit.
33. ***In John Lewis Partnership v Charman EAT 0079/11***, the EAT upheld an employment judge's decision that it was not *reasonably practicable* for a claimant to present his unfair dismissal claim because he was awaiting the outcome of an internal appeal in circumstances in which he was *reasonably ignorant* of the existence of a time limit.

Respondent's submissions

34. I set out in brief the key elements of the submissions but took into account the submissions in full;
35. The respondent referred to the case of **Department of Constitutional Affairs v Jones [2007] EWCA Civ 894** : there is no presumption on the extension of time – the exercise of discretion should be the exception and not the rule.
36. The respondent also referred to : **Robinson v The Post Office [2000] UKEAR 1209/99/1207** : the continuance of any internal process is not a good reason to delay submission of claim.
37. The respondent also referred to **O'Brien v Holmes & Hills Solicitors LPL ET/3219992/20**.
38. The respondent submits that the claimant has failed to put forward any witness statement or other documents despite being out on notice of the jurisdictional issues and has not provided any basis upon which the Tribunal could conclude that it was not *reasonably practicable* to bring the claim in time.

Conclusion

39. The claimant had failed to put forward any evidence or indeed even attend this hearing to make submissions on why it was not reasonably practicable for him to present the claim in time. There is no mention of any reason at the closed preliminary hearing. Even if he mistakenly believed that the limitation period started from the date when the appeal concluded , taking that date as the 16 February 2021 (rather than the earlier date the claimant asserted the appeal was concluded of the 24 January 2021), the limitation period would have expired on the 12 June 2021 and the claim would still have been presented out of time.
40. The claimant was able to present an appeal and I note on 23 December 2021 [p.50] provided quite detailed further particulars of his claim of discrimination/harassment.
41. There is nothing within the papers before me which provides any explanation or grounds to find that it was not reasonably practicable for the claim to be presented within the period of 3 months from the effective date of termination extended by the Acas early conciliation period and therefore the tribunal conclude that **it was** reasonably practicable to bring the claim within time pursuant to section 111(2)(a) ERA and the Tribunal accordingly has no jurisdiction to hear this claim. The claim is struck out under Rule 37.
42. This judgment and the reasons were delivered orally at the hearing.
43. The respondent reserves its position as to costs.
44. Separate Orders are made with respect to the remaining claims of discrimination/harassment in light of the claimant's failure to attend this hearing..

Employment Judge R Broughton

Date: 7 May 2022

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