EMPLOYMENT TRIBUNALS

Claimant: Mr N Hutchings

Respondent: Secretary of State for Justice

Heard at: Midlands East Tribunal via Cloud Video Platform

On: 28 July 2022

Before: Employment Judge M Brewer

Representation

Claimant: In person
Respondent: Ms K Loraine, Counsel

JUDGMENT

The claimant's claims for disability discrimination are struck out

REASONS

Introduction

1. This hearing was ordered by Employment Judge Phillips at a closed telephone preliminary hearing on 20 April 2022.

2. The purpose of the hearing was to consider three matters as follows:

    a. first any application to amend the claimants claim,
    b. second whether the tribunal has jurisdiction to hear the claimant's claims and if they're out of time, and
    c. third in the application by the respondent for strike out or deposit orders pursuant to rules 37 and 39 of the Employment Tribunal Rules.

3. Mr Hutchings represented himself and although he was clearly in some pain, I ensured that he was able to deal with the hearing and he confirmed that he was. I reminded him that he could ask me for a break at any point but in the event, he was happy to proceed but without breaks.

4. The respondent had prepared a bundle for this hearing which Mr Hutchings had seen this included all of the relevant documents that were available.

Issues

5. In relation to the subject matter of this judgement the issues I had to determine were:

    a. whether any of the claimant's claims we're out of time and therefore whether the tribunal had jurisdiction to hear them, and
    b. in any event whether any claim should be struck out as having no reasonable prospect of success.

Law

Time limits

6. The law in relation to time limits in discrimination claims is set out in section 123 of the Equality Act 2010 as follows:

> ***"123 Time limits***
>
> *(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—*
>
> > *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
> >
> > *(b) such other period as the employment tribunal thinks just and equitable…*
>
> ***140B Extension of time limits to facilitate conciliation before institution of proceedings***
>
> *(1) This section applies where a time limit is set by section 123(1)(a) or 1 29(3) or (4).*
>
> *(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 the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.*

(4) If the time limit set by section 123(1)(a) or 129(3) or (4) 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) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section"

7. As can be seen, the three-month time limit for bringing a discrimination claim is not absolute: employment tribunals have discretion to extend the time limit for presenting a complaint where they think it 'just and equitable' to do so — S.123(1)(b) EqA.

8. In **Robertson v Bexley Community Centre t/a Leisure Link** 2003 IRLR 434, CA, the Court of Appeal stated that when employment tribunals consider exercising the discretion under what is now S.123(1)(b) EqA,

> *'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.'*

9. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require this but simply requires that an extension of time should be just and equitable — **Pathan v South London Islamic Centre** EAT 0312/13

Strike out

10. The material parts of the Tribunal Rules are as follows:

> ***"Striking out 37.***
>
> *(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*
>
> *(a) that it is scandalous or vexatious or has no reasonable prospect of success…*
>
> ***Deposit orders39.***
>
> *(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument…"*

11. The burden of proof is set out in section 136 EqA. The leading cases on the burden of proof pre-date the Equality Act (**Igen Ltd v Wong** 2005 EWCA Civ 142 and **Madarassy v Nomura international Plc** 2007 EWCA Civ 33, [2007] IRLR 246) but in **Hewage v Grampian Health Board** 2012 the Supreme Court approved the guidance given in **Igen** and **Madarassy**.

12. By virtue of section 136, it is for a claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, absent any explanation from the respondent, that the respondent has discriminated against the claimant. If the claimant does that, the burden of proof shifts to the respondent to show it did not discriminate as alleged.

13. In **Madarassy v Nomura international Plc** 2007 EWCA Civ 33, the Court of Appeal held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. This merely gives rise to the possibility of discrimination. Something more is needed.

14. Any inference about subconscious motivation has to be based on solid evidence (**South Wales Police Authority v Johnson** 2014 EWCA Civ 73).

15. Finally, turning to the strike out provisions of the Rules, I note that claims of discrimination are rarely struck out where there is a factual dispute between the parties (**Anyanwu v South Bank Student Union** 2001 UKHL 14, and also see **Mechkraov v Citibank NA** 2006 ICR 1121). However, the test is of course whether there is no reasonable prospect of success, even if there are factual disputes.

16. Having said that, I note that I should, when considering strike out, take the claimant's pleaded case at its highest however, I do not lose sight of the fact that in many, indeed almost certainly in most claims of discrimination the Tribunal will need to draw inferences from disputed findings of fact which I am not in a position to, and indeed nor should I, do. Those inference may be critical in many cases.

17. Particular caution needs to be exercised before striking out a discrimination claim without a hearing where, even though the primary facts may not be in dispute, there is nevertheless a dispute about the inferences to be drawn from them. As Simler J explained in ***Zeb v Xerox (UK) Ltd*** UKEAT/0091/15 *(24 February 2016, unreported), 'the* question of what inferences to draw forms part of the critical core of disputed facts in any discrimination case' (para 21), as do the respondent's explanations for alleged less favourable treatment (para 23); accordingly, employment judges need to be alert to the possible inferences that might be drawn and the lines of enquiry that will need to be pursued at a hearing before striking out such claims.

Findings of fact

18. I make the following findings of fact.

19. The claimant was employed by the respondent from 13 March 2017.

20. The claimant went off on sick leave on one June 2020 and he never returned to work.

21. On 19 October 2020 the claimant raised a grievance.

22. The claimant resigned with immediate effect from his employment on 16 April 2021.

23. The claimant contacted ACAS for early conciliation on 21 June 2021 and he received his early conciliation certificate on 23 June 2021.

24. The claimant received the outcome of his grievance on 6 July 2021.

25. The claimant says that he presented his claim to the wrong employment tribunal office (Northern Ireland) on 19 July 2021. The claim was received by the tribunal in Midlands East on five August 2021. The claimant says that he was told by the tribunal office that the claim had been accepted.

26. In response to his claim, the respondent said that the claim was not sufficiently well pleaded to be able to respond to meaningfully and they requested a preliminary hearing to consider striking out the claim or the making of a deposit order as a condition of allowing the claimant to proceed.

27. A case management hearing took place on 20 April 2022 where the claim and response were discussed. There is no reference in the case management summary of the claim form having been sent to the wrong tribunal office which is surprising particularly because there is reference to the fact that the respondent provided its response to the Manchester employment tribunal instead of Midlands East but that, having been received in Midlands east on 14 October 2021, an employment judge confirmed that the response would be accepted because there had been a genuine error in the filing of the response.

28. Nevertheless, I have preceded on the basis that the claimant did present his claim in time albeit to the wrong tribunal office.

29. In preparation for the case management hearing referred to above the parties provided agendas and the claimant's agenda is at page 43 of the bundle. in section 2.2 in answer to the question whether there is an application to end the claim, the claimant says as follows

> *"yes, harassment and libellous comments made by my manager 23/04/2020 Verbally making derogatory comments about where I live and an e-mail from senior management on the 08/12/2020 with inappropriate content in regards to grievance procedure"* (sic)

30. There is then a reference to appendix 6 which is the text of the e-mail referred to by the claimant in December 2020. In brief, the claimant felt that the grievance manager was not dealing properly with his grievance, and he emailed another manager, John Phynn. It is Mr Phynn's response with which the claimant takes issue.

31. The thrust of the response is that given that Mr Phynn had been earmarked to hear an appeal, if there was one, it was not appropriate for the claimant to complain about the grievance manager to him. He goes on to say that he has confidence in the grievance manager, and he found the claimant's allegation that the grievance manager was not impartial totally unfounded. He accuses the claimant of becoming progressive, bombastic, confrontational, threatening and obstructive.

32. There was no other application to amend claim.

33. The claimant said that he felt discriminated against at the time he put his grievance in which was, as stated above common 19 October 2020.

34. At all times the claimant was a member of the PCS union and he confirmed that he had taken the advice from them about making a claim although he says time limits were not discussed. The claimant says that he decided to make a claim in June 2021.

35. The claimant confirmed that he is computer literate and is able to do research on his computer.

Discussion and conclusions

The claims

36. The starting point was to work out what claims they were for disability discrimination within the ET1 given the primacy of that document in the litigation process.

37. In **Chandhok v Tirkey** [2015] IRLR 195 iit was made clear that the ET1 is not something to *"just to set the ball rolling*, *as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so"*.

38. The restriction of having a document to start a claim was necessary to ensure that litigation is kept within sensible bounds, time limits are there for a reason and Issues should not be based on "*shifting sands*".

39. I also note the case of **Baker v Commissioner of Police of the Metropolice** UKEAT/0201/09 in which it was held that ticking a box on the ET1 is insufficient to bring a claim if no particulars of that claim are provided. In the case, although the "disability" box was ticked the ET1 was found to contain no recognisable complaint of disability discrimination as the details provided made no reference to disability.

40. Having gone through the claim form line by line the claimant agrees that in fact he was bringing two claims of disability discrimination as follows:

    a. First, a claim that the grievance manager, Mr. Smith, did not want to look at all of the grievances. The claimant confirmed that this is an allegation of direct disability discrimination,

b. Second, a claim that the grievance manager, Mr. Smith and the appeal manager, Mr Phynn, supplied witness statements to the grievance which were inaccurate and again the claimant confirmed that this was an allegation of direct discrimination.

41. In relation to the purported application to amend the claim, having discussed the claims in the ET1, and looking at the content of the agenda, the claimant agreed that in fact the e-mail he was referring to, sent to him by it Mr Phynn, Is essentially either further particulars of or background in relation to the first allegation referred to above and was not a new claim.

42. That then dealt with the first matter, whether there was an application to amend the claim. There was not.

Time limits

43. Turning to the question of time limits, the first allegation a rose in October 2020 and by the time the claimant submitted his claim, that claim was some five or six months out of time.

44. If I accept the claimant's case at its highest which is that he presented his claim form on 19 July 2021, then the second allegation was submitted in time.

45. in relation to the question of whether it was just and equitable to extend time in relation to the first allegation, the claimant says that he was in effect ignorant of time limits but in order to rely on ignorance of a time of it, that ignorance has to be reasonable, and I find in this case it was not. The claimant is clearly an intelligent man who has access to a computer and the ability to research which it clearly did because of course before seeking to make a claim he contacted a cast for early conciliation. He also had access to union advice, and he says that he took advice from him although I accept that he says time limits were not discussed.

46. For those reasons I declined to extend time in respect of the first allegation and therefore the tribunal does not have jurisdiction to hear it.

47. I turn then to the application to strike out the claims.

Strike out

48. Ms Loraine Submitted correctly that we should assume facts in the claimant's favour but as she put it, nothing in any document or indeed anything the claimant said provides any link between the conduct complained of in the two allegations set out above and disability.

49. The first complaint is really that Mr. Smith, faced with a grievance raising a significant number of issues, told the claimant that he felt that only five or so of those complaints were properly defined as grievances. He may have been right, or he may have been wrong about that but there is nothing to suggest that there was not his genuine view and further there is nothing to suggest or from which it could be inferred that the reason he did that was either because of the claimant's disability all for a reason arising from his disability. There is no

dispute of fact at this stage that Mr. Smith did do what the claimant says, and therefore no dispute of fact at all, there is merely a question of causation.

50. The second matter is essentially that witnesses giving evidence about the claimant's grievances made statements which were inaccurate. I can make no finding about whether that was the case, but that fact is not the claimant's complaint. The claimant's complaint is that he was discriminated against by Mr. Smith and Mr Phynn when they, as he put it, supplied those statements to the grievance. But as Ms Loraine pointed out how could either of these managers be responsible for what the witnesses had written even if what they had written had been entirely untrue. All the managers did was take a procedural step of providing those statements for the purpose of hearing the grievance. There is no suggestion that they were aware that the statements were untrue and even if they were they were the statements they were presented with and therefore to be used in the grievance and no doubt as part of that process could have been challenged. There is nothing in any of the documentation or indeed from anything the claimants said, and I pause to know that he said nothing in response to the respondent's submissions on the question of strike out, to suggest all from which I could infer that there was anything done by either of these managers which could possibly amount to a claim for disability discrimination in any of its various forms.

51. In my judgment neither of the claimant's allegations has any merit whatsoever and, in that sense, they have no reasonable prospect of success and for those reasons they are struck out.

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Employment Judge M Brewer

Date: 28 July 2022

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE