EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr. D Chavda	**v**	**EE Limited**

Heard: in Leicester

On: 29 November 2023

Before: Employment Judge Ayre (sitting alone)

Representatives:

Claimant: In person
Respondent: Ms. B Mistry, solicitor

JUDGMENT AT OPEN PRELIMINARY HEARING

The claim is out of time and the Tribunal does not have jurisdiction to hear it.

REASONS

Background

1. The claimant was employed by the respondent as a Retail Business Consultant until February 2022 when he was dismissed with immediate effect.

2. The claimant began Early Conciliation on 4 May 2022 and the early Conciliation Certificate was issued the same day. The claimant presented his claim to the Tribunal on 4 May 2022.

3. In the claim form the claimant wrote both that he was employed by the respondent from 8 August 2014 until 22 February 2022 and that his

employment terminated on 3 February 2022. The respondent says that the claimant was employed from 17 September 2014 until 4 February 2022.

4. The case was originally listed for a final hearing on 13 September 2022. That hearing was postponed, and the case was subsequently listed for an Open Preliminary Hearing to consider whether the claim is in time or not.

5. It was not entirely clear from the claim form which claims the claimant was seeking to bring. In response to question 8 on the ET1 he ticked the boxes for unfair dismissal and for 'another type of claim which the Employment Tribunal can deal with'. He then went on to say that these other claims were "*Breach of GDPR, Accusations with no evidence but assumptions, unfair dismissal, discrimination, defamation of character, incorrect process applied during disciplinary process".*

6. The claimant did not provide details of any complaint of discrimination in the claim form and did not indicate what protected characteristic he was relying upon.

The Proceedings

7. There was a bundle of documents, prepared by the respondent, which ran to 73 pages. Ms. Mistry also submitted a written skeleton argument, for which I am grateful.

8. I heard evidence from the claimant and both parties made submissions.

Application to amend

9. At the start of the hearing, I asked the claimant to clarify what claims he was seeking to bring against the respondent. I explained that the Tribunal does not have jurisdiction to hear complaints of breach of GDPR or defamation claims, and that arguments that accusations were made with no evidence but assumptions, and that an incorrect process was applied during a disciplinary process are ones which could be made as part of an unfair dismissal claim, rather than freestanding claims.

10. The claimant told me that he did want to bring a discrimination claim and, when pressed, said that the protected characteristic he wanted to rely upon is race. He said that he believed Dan Taylor had discriminated against him during the investigation meeting by:

    a. Tricking him into attending an investigation meeting by telling him that it was about performance and was urgent; and
    b. Making a decision before questioning him in the correct manner.

11. After I had explained the different types of discrimination claim that can be made, the claimant said that he wanted to bring a complaint of direct race discrimination and to compare himself with two actual

comparators: 'Francesca', the manager of the Derby store; and 'Gary' who worked in Leicester High Cross store.

12. I asked both parties to make submissions in relation to the application to amend,

13. The claimant told me that he had considered ticking the discrimination box on the claim form but had decided not to because his discrimination claim was based on a 'feeling' that could not be proved. He didn't think the discrimination claim would made much of an impact on the case because he had no evidence to support it.

14. He also said that he had taken legal advice at the time he submitted his claim.

15. The respondent objected to the application to amend

16. Having considered the submissions of the parties, and the nature of the amendment sought by the claimant, I decided to refuse the application to amend for the following reasons and taking account of the factors in ***Selkent Bus Co Ltd v Moore [1996] ICR 836***:

    a. The amendment that is sought is a significant one. It involves an entirely new legal claim, the addition of new facts and a new line of factual enquiry;

    b. The application to amend is made a long time after the expiry of the relevant time limit. The meeting that the claimant seeks to complain about took place in September 2021, and he only seeks to bring a complaint of discrimination about that meeting today, more than 14 months later.

    c. The claimant considered bringing a complaint of race discrimination at the time he submitted his claim form, but chose, having had the benefit of legal advice, not to do so.

    d. The claim itself is speculative and based on a 'feeling'.

    e. The claimant has provided no good reason not to have included the race discrimination complaint in the claim form.

17. For these reasons, the balance of injustice and hardship favours not allowing the amendment, and it is refused.

18. I have therefore considered the question of time limits in relation to the complaint of unfair dismissal only.

The Issues

19. The issue for determination at today's preliminary hearing was:

    a. Was the complaint of unfair dismissal made to the Tribunal within three months (plus early conciliation extension if

appropriate) of the effective date of termination of the claimant's employment?

b. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

c. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

20. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 5 May 2022 may not have been brought in time.

Findings of Fact

21. The claimant was employed by the respondent as a Retail Business Consultant.

22. In August 2021 the respondent received a complaint about the claimant from a customer. It launched an investigation into the complaint and into the claimant's behaviour. The claimant was suspended.

23. The claimant was subsequently invited to a disciplinary hearing which took place on 7 December 2021. A further meeting took place via Microsoft Teams on 3 February 2022. At that meeting the claimant was told that he was being dismissed.

24. The respondent wrote to the claimant on 3 February 2022 to confirm the decision to dismiss. In the letter, the respondent wrote: "*Your last day of employment will be the day after the date of this letter.*"

25. On 7 February 2022 the claimant submitted a detailed appeal against the decision to dismiss him. *The appeal, which runs to 3 and a half pages, contained the following words: "I am submitting the above in support of my appeal after seeking legal advice on this case from my solicitor.*"

26. The claimant took legal advice in early February 2022 from a solicitor.

27. It took some time for the appeal hearing to be arranged, and the claimant did not receive the outcome of the appeal until 4 May 2022.

28. On 28 April 2022, within the primary time limit for presenting a claim to the Employment Tribunal, the claimant sent an email to the appeal hearer in which he wrote:

"*…I feel the business are dragging this out in the hope that I will not take this further to tribunal however I want to inform you after todays delay again I have now informed my solicitor to start proceedings as I don't feel the company are taking these allegations seriously enough to act on them.*

I feel that I given the company every chance to resolve this situation outside of legal proceedings but the company have not cooperated hence all the constant delays from EE."

29. The claimant contacted ACAS on 4 May 2022 and presented his claim to the Tribunal on the same day.

30. The claimant knew of his right to bring a claim in the Employment Tribunal from at least a month before he submitted his claim. He took legal advice three months before submitting his claim.

31. The reason the claimant did not present his claim earlier was because he put his faith in the company and believed that matters would be resolved at the appeal.

The Law

Time limits – unfair dismissal

32. The time limit for bringing a complaint of unfair dismissal is set out in section 111 of the ERA which states that:

"*(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.

(2A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection 2(a).

33. The effective date of termination of an employee's employment is defined in section 97 of the ERA as:

"(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires.
(b) In relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect…"

34. Time limits for presenting claims are a jurisdictional issue (***Rodgers v Bodfari (Transport) Ltd 1973 325 NIRC***) and if a claim is out of time, the Tribunal must not hear it. The parties cannot agree to waive a time limit, so even if a respondent does not seek to argue that a claim is out of time, the Tribunal still has no jurisdiction to hear the claim if it is in fact out of time.

35. The principle that a Tribunal cannot hear a claim that is out of time applies even where the respondent admits that the claim has merit (***Bewick v SGA Forecourts Ltd ET Case No.2501693/2014***).

36. In cases, such as this one, in which a question arises as to whether it was reasonably practicable for the claimant to present his claim on time, there are three general principles that fall to be considered –

    a. The question of reasonable practicability should be interpreted liberally in favour of the claimant;
    b. It is a question of fact as to whether it was reasonably practicable for the claimant to present her claim on time; and
    c. It is for the claimant to prove that it was not reasonably practicable for her to present hers claim on time.

37. In ***Palmer and another v Southend-on-Sea Borough Council [1984] ICR 372***, the Court of Appeal concluded that 'reasonably practicable' does not mean 'reasonable' or 'physically possible', but rather 'reasonably feasible'.

38. . The fact that an employee is pursuing an internal appeal does not necessarily mean that it is not reasonably practicable for the employee to submit a claim on time (***Bodhu v Hampshire Area Health Authority [1982] ICR 200***). In the ***Bodhu*** case, Browne-Wilkinson J commented that:

    "*There may be cases where the special facts (additional to the bare fact that there is an internal appeal pending) may persuade an [employment] tribunal, as a question of fact, that it was not reasonably practicable to complain to the … tribunal within the time limit. But we do not think that the mere fact of a pending internal appeal, by itself, is sufficient to justify a fining of fact that it was not "reasonably practicable" to present a claim…*"

Conclusions

39. In reaching the following conclusions I have carefully considered the evidence before me, the legal principles summarised above, and the submissions of both parties.

40. I find that the effective date of termination of the claimant's employment was 4 February 2022. The respondent's letter of 3 February 2022 made that clear by stating unambiguously that the last day of employment would be the following day.

41. I also find that it would have been reasonably practicable for the claimant to have submitted his claim on time, i.e. by 3 May 2022 when the primary time limit expired. As the claimant did not start early conciliation until after the expiry of the primary time limit, he does not benefit from any extension of time because of early conciliation.

42. The reason why the claimant did not submit his claim was that he put his faith in the respondent and hoped that matters would be resolved through the appeal process. Whilst this is in many ways admirable, it does not unfortunately help him in establishing that it was not reasonably practicable for him to submit his claim on time. There are no 'special facts' (as referred to in ***Bodhu***) that persuade me that, as a matter of fact, it was not possible for the claimant to present his claim on time. This is not, for example, a case in which the respondent misrepresented the position to the claimant.

43. In an email dated 28 April, the claimant told the respondent that he had instructed solicitors to issue proceedings. The claimant gave no explanation today as to why the solicitors did not do so. Had they done so on 28 April, or indeed within a few days of that date, his claim would have been presented in time.

44. The claimant took legal advice three months before the expiry of the primary time limit. He gave evidence that he knew of the right to bring a claim in the Employment Tribunal one month before the time limit expired. In circumstances where a claimant knows of the right to bring a claim and has access to legal advice, he can reasonably be expected to enquire about time limits.

45. Time limits exist for an important public policy reason and extensions of time are the exception rather than the rule. This principle applies even where, as in this case, the delay is a short one of just one day.

46. The claimant has not persuaded me that it was not reasonably practicable for him to submit his claim on time. Accordingly, his claim is out of time and the Tribunal does not have jurisdiction to hear it.

47. Although I am not required to decide the point, because of my decision not to allow the claimant's application to amend his claim to include a complaint of discrimination, if I had had to consider that point, I would also have found that it would not have been just and equitable to extend time under section 123 of the Equality Act 2010.

48. The complaint of race discrimination relates to incidents that occurred in September 2021, and the claimant only applied to include them in his claim in November 2022, some 14 months later. He took legal advice in relation to his claims and made a conscious decision not to include a complaint of race discrimination in the claim he filed on 4 May 2022. In these circumstances, it would not have been just and equitable to extend time in relation to a discrimination complaint.

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Employment Judge Ayre

29 November 2022