

JB



THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant

and

Respondent

Mr J Efeotor

London Underground Limited

Held at Croydon (By video)

On 30 November 2022

BEFORE: Employment Judge Siddall

Representation

For the Claimant: In person

For the Respondent: Mr S Liberadski

JUDGMENT ON PRELIMINARY HEARING

The decision of the tribunal is that:

1. The correct title of the Respondent is London Underground Limited.
2. The claim for unfair dismissal is struck out as the Claimant did not have two year's continuous service with the Respondent.
3. The claim for disability discrimination is out of time and it is not just and equitable to extend time.
4. The claim for unlawful deduction from wages and holiday pay is out of time and it was reasonably practicable for the Claimant to bring the claims within the time limit.

REASONS

1. The Claimant was employed by the Respondent from 14 October 2019 to 26 July 2021. He was dismissed for gross misconduct.
2. The Respondent asserts that the Claimant was dismissed because it was discovered that he had a second, full-time job without the consent of his employer. The Claimant argues that he was in fact dismissed because he had been required to shield and remain off work for lengthy periods between the start of the pandemic in March 2020 and his return in April 2021. He argues that this was disability-related discrimination. He also asserted that he was harassed by his manager when he was first told he had to shield.
3. The Claimant received his final salary payment for the period to 31 July 2021. He then received a further payslip dated 28 August 2021. This showed a recoupment of a small sum of money to reflect the fact that the Claimant had not worked for the entire month of July. He also received payment for five days accrued holiday pay. This resulted in a net payment to him in August of £262.97.
4. The Claimant contacted ACAS on 6 November 2021. An early conciliation certificate was issued on 8 November 2021 and on the same day the Claimant lodged claim number 2305426/21 in which he alleged unfair dismissal and disability discrimination.
5. On 11 November 2021 the Claimant contacted ACAS again and received a second early conciliation certificate dated 2 December 2021. He brought a second tribunal claim (2305989/21) on 24 December 2021 in which he claimed unfair dismissal, failure to pay notice pay and a claim for holiday pay.
6. It is clear that the Claimant did not have sufficient service to bring a claim for unfair dismissal and that claim cannot proceed. I have therefore struck it out.
7. The Respondent argued that the remaining claims could not proceed as they were out of time and I considered this question at the start of the hearing today.
8. The first claim of disability discrimination was out of time. The last act complained of by the Claimant was his dismissal which took place on 26 July 2021. The preliminary three-month time limit would need to have contacted ACAS for his claim to be in time. He did not contact ACAS until 6 November and his first claim was brought on 8 November.

9. As this was a claim for discrimination I considered whether it was just and equitable to extend time.
10. The Claimant had produced evidence showing that he had multiple health issues including diabetes, asthma and pancreatitis. His GP had written a letter that also confirmed he had suffered from severe depression due to family issues since September 2020. In his oral evidence to the hearing the Claimant said that he was in pain a lot of time and sometimes could not get out of bed. His depression had worsened since his dismissal.
11. The Claimant was in hospital for two or three days in July or August 2021.
12. The Claimant confirmed that he had prepared his notice of appeal (dated 6 August 2021) against his dismissal himself. The first date for the appeal hearing had to be postponed as he was unwell. He was able to attend and participate in the second hearing, which took place on 12 October 2021, with his trade union representative.
13. The Claimant confirmed that he was aware of the existence of employment tribunals and the possibility of bringing claims. He was convinced that his appeal against dismissal would be successful. When he received the outcome, he contacted a lawyer. He then started the ACAS process. His claim was lodged around fourteen days late and he argued that this was a short period and that his claim should be permitted to proceed.
14. I considered all the circumstances. I have noted the prejudice to the Claimant if his claims cannot proceed. I accept that he is in generally poor health and suffers from severe depression.
15. I have also noted that despite his health problems the Claimant was able to prepare his notice of appeal and to participate in the appeal process. It seems he was able manage his affairs and argue his case with the Respondent over the period from August to October 2021. He was also aware of the possibility of bringing an employment tribunal claim.
16. It seems plain that the Claimant decided to wait for the outcome of his appeal hearing before bringing a claim to the employment tribunal. The case of **Wells Cathedral School Ltd v Souter and Leishman** [EA-2020-000801-JOJ] states that an employee's decision to seek a resolution through an internal process before bringing a claim can be a relevant in deciding whether it is just and equitable to bring time. I have therefore considered this factor carefully. In this case however the Claimant had not argued during the disciplinary process that he believed that his dismissal would

- amount to disability discrimination. The Respondent asserts that the Claimant's health conditions were not mentioned at the dismissal hearing in this context. It was not until he brought the first claim on 8 November 2021 that this was raised and it seems to have been something of an afterthought.
17. For all these reasons I have decided that it would not be just and equitable to extend time for the claim of disability discrimination.
 18. The time limits for the claim for notice pay and holiday pay are different. I have noted that the final salary adjustment was not done until the payroll for the period to 28 August 2021. The Claimant would not have been aware of the amount of accrued holiday pay he had been paid until he received his final payslip.
 19. The initial three-month time limit for these claims would therefore not have expired until 27 November 2021. By this point the Claimant had already contacted ACAS twice – on the 6 and 11 November 2021. At that stage he had preserved his rights to bring his claims for the sums he says he is owed.
 20. The second EC certificate was issued on 2 December and the second claim was presented on 24 December.
 21. In his submission Mr Liberadski referred me to the case of **HMRC v Garau** [2017] ICR 1121. This case makes it clear that a claimant only has seek early conciliation once in relation to the matters in dispute. There is no need to apply for early conciliation again if he wishes to add to his claims. Further the case makes clear that as a second EC certificate is unnecessary, it is only the first conciliation process that is relevant to the question of time limits.
 22. In relation to the second claim, the Claimant had properly contacted ACAS within the three-month period when he obtained his first EC certificate on 8 November. The two days over which conciliation took place (6-8 November 2021) can be added to extend the limitation period which would bring it to 29 November 2021. Unfortunately the Claimant did not bring his claim until 24 December 2021. The second EC certificate, issued on 2 December 2021 did not have the effect of extending the time limit for a further month.
 23. The second claim was therefore brought out of time. In relation to these claims I must consider whether it was reasonably practicable for the claims to have been brought in time.
 24. I am satisfied that it was reasonably practicable for the Claimant to bring his second claim within the time limit as by this point he had already lodged his first claim. He was fully aware of his rights by this point and had been aware of the issues around his pay and

holiday pay since 28 August 2021. He had sought conciliation over them on 11 November 2021 and provided no explanation as to why he had waited until 24 December 2021 before bringing his second claim. I therefore find that these claims were brought out of time.

25. As this decision disposes of all the claims within the first and second claims, neither will proceed any further. The full hearing listed for 8-12 May 2023 will be cancelled.

Employment Judge Siddall
Date: 30 November 2022.

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